



EMPLOYMENT TRIBUNALS

Claimant: Mr E Eden

Respondent: Skills and Work Solutions Limited

HELD AT: Manchester

ON: 23 and 24 October 2017

BEFORE: Employment Judge Aspden

REPRESENTATION:

Claimant: Mr Mensah. Counsel

Respondent: Mr Lewinski, Counsel

Judgment having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013 the following reasons are provided:

REASONS

Claims and Issues

1. The Claimant brings a reference to determine his entitlement to a statutory redundancy payment under the Employment Rights Act 1996 (ERA) and makes a claim for damages for breach of contract.
2. So far as the breach of contract claim is concerned, the Claimant contends that the Respondent failed to pay him a redundancy payment to which he was entitled under the terms of his contract of employment.
3. At the beginning of the hearing the parties agreed that the issues were considerably narrower than had previously been discussed at the case management hearing. The parties now agreed that:
 - a. the Claimant was dismissed by the Respondent

- b. the reason for his dismissal was redundancy as defined in the Employment Rights Act 1996
 - c. the Claimant's employment terminated on 30 November 2016
 - d. the Respondent made an offer to the Claimant to renew his contract or re-engage him before his employment terminated
 - e. the Claimant did not accept the offer that had been made.
4. The only outstanding issues for me to determine, therefore, were:
- a. whether the Claimant lost the right to a statutory redundancy payment by operation of ERA s141; and
 - b. if not, the amount of the statutory redundancy payment due to the Claimant under ERA.
5. It was agreed by the parties that the Claimant's contractual claim on its merits stood or fell with the claim for a statutory redundancy payment. In other words if the claim for a statutory redundancy payment succeeded so would the contractual redundancy pay claim, and vice versa - if the statutory claim failed so would the contractual claim.
6. It was agreed that, if the right to a contractual redundancy payment had arisen, the amount of the payment far exceeded to statutory maximum amount I can award of £25,000. As identified in the case management order, there was an issue, however, as to whether there should be further offsetting of the amount of the statutory redundancy payment so as to reduce the award further.

The Facts

7. I heard evidence from the Claimant and, for the Respondent, from Mr McDonald, an operations manager with the company. I was also referred to a number of documents.
8. The Claimant worked for the Respondent company until his dismissal took effect on 30 November 2016.
9. At the time of his dismissal he was employed in the role of Mentor/Employment Training Consultant (Offender Services). He had been doing that job since April 2009. He performed that role from two different geographical bases. Four days a week he worked at Vektor House and one day a week from a base in Wigan.
10. I was referred to the Claimant's job description (pages 52-53 of the bundle). It referred to the job title I have already given. It mentioned his reporting line. He reported to a Service Manager (Offender Services). He worked in the department known as Offender Services. His job level was 9. The job purpose was described as follows: 'Through the delivery of a range of guidance and training services for

unemployed offenders; contribute to individuals' progression into employment training, education and a life free from crime.' That document went on to identify key responsibilities in bullet points. The first bullet said that a key responsibility was: 'To case manage offenders on intensive community orders and provide advocacy, mentoring, advice and guidance and training interventions that meet the needs of individual offenders and support the achievement of skills and progression towards sustained employment.' Over the page there was another section headed 'Dimensions' referring to the customers that the Claimant was to work with. It referred to them as 'including young offenders and 18-24 year old male offenders referred by various agencies and bodies'. There were then details of knowledge skills and experience needed to do the job. Again various bullet points were listed. There is no suggestion that the Claimant did not have the skills and experience to do the job that he was doing, I find as a fact that he did.

11. The Claimant had not always done this job when he worked for the Respondent. He had had at least one previous job as evidenced by document 41 which purports to be a contract of employment dated March 1998 and said the Claimant's job at the time was a Development and Account Manager. I was not referred to any contractual documents dating back to when the Claimant moved to the role he was in when his employment ended, but it is clear to me, and I find, that the contract that I was referred to did not accurately reflect all of the terms of the Claimant's employment at the date of his dismissal in light of that change of role.

12. Returning to the role that the Claimant was in at the time of his employment ending, he had been in that role since 2009. Mr Donald said the Claimant had been one of the 'original mentors' – he used the word 'mentors' in his evidence to describe the Claimant. I find the document at pages 52-53 accurately represents what the Claimant did in this role.

13. In evidence there was a disagreement as to the function of the Claimant's role. The Respondent's case was that the Claimant's job was really all about getting offenders into employment training and education. The Claimant's case, on the other hand, was that his job was not just about getting offenders into employment, training and education but was also about preventing re-offending. In support of the Claimant's case I was referred to page 52, which specifically refers to a 'life free from crime.' For the Respondent I was referred to the evidence of KPIs for the role showing that what was being measured was the number of customers that were got into employment training and education. I accept that was measured and the Claimant knew that was being measured, but notwithstanding that I find that the Claimant perceived his role as being somewhat broader than simply being involved in achieving that aim. I find he genuinely believed that his job involved more than simply getting offenders into employment training and education.

14. The contract document dating back from March 1998 stated: 'The employee's normal place of employment is initially at Manchester TEC, Great Bridgewater Street Manchester, or such other place of business as the TEC may from time to time direct.'

15. At the time of dismissal the Claimant was no longer working at Lee House. He was working four days in an office at Vektor House in Manchester and one day a

week in Wigan. Mr McDonald's evidence for the Respondent was that the Claimant had worked at Vektor house for 7-8 years. I asked Mr McDonald about the reference in the contract to Great Bridgewater Street and Mr McDonald that the Claimant's first job had been based there but that he had since moved to other roles and he moved to Vektor House with a change of role. There was no evidence before me that the Claimant had been moved to that role by his employer unilaterally and I infer that the move to Vektor House was by agreement, as was the move into a different role, and the two happened at the same time. As for the work based in Wigan, that started later; Mr McDonald could not say exactly when but suggested it might have been a couple of years ago. It was clearly a settled state of affairs that the Claimant would work one day a week at Wigan.

16. The Respondent's staff handbook contained provisions regarding redundancy, including the right to severance pay. Those provisions were incorporated into the Claimant's contract of employment.

17. On 18 August a letter was sent or given to the Claimant. It was a letter from the Respondent giving notice of termination by reason of redundancy. That notice was due to expire on 30 November 2016. In that letter the employer said that if the Claimant was not redeployed he would be entitled to a redundancy payment of £59,014.44. The Claimant was subsequently told that the correct figure was £59,605.20.

18. On 15 November, 15 days before that notice was due to expire, the Claimant received an email attaching a letter dated 4 November that he had not previously seen. That letter purported to withdraw the Claimant's notice of termination (page 101 of the bundle). The letter said:

'I am delighted to confirm that a vacancy of Employment & Training Consultant (substance misuse) within Substance Misuse Team was become available. This role is the same salary and terms and conditions as your home role. Despite the difference in role title the duties are substantially similar (i.e. 95%) to that of your home role. This means you are now matched and we will therefore rescind your notice of redundancy.'

19. The letter went on to say, 'This letter confirms you in post as Employment & Training Consultant within The Work Company from 1 December 2016'. The letter also said there would be no trial period and said this was due to the significant degree of similarity between the roles.

20. Attached to that letter was a copy of a role profile which appears at pages 54-55 of the bundle. That role profile was in the same format as the one for the Claimant's existing role at pages 52-53. The job was described as 'Employment & Training Consultant (substance misuse)'. There was no mention in the job title of 'mentoring'. The document said that all incumbent in the role reported to a Service Manager (substance misuse) in the Substance Misuse Department. The job level was 9 as per the Claimant's existing role. The job description was set out as follows: 'through the delivery of a range of guidance and training services for customers in treatment contribute to individuals' progression into employment training and education'.

21. Key responsibilities were set out as per the previous role profile document in bullet point form, and those responsibilities were very similar to those set out in the Claimant's existing job description. There were also, however, some differences. In particular I refer to the first bullet point which refers to 'delivering advice, guidance and training interventions that meet the needs of customers'. Although that also appears in the profile for the Claimant's existing role on page 52, there is no mention on page 54 (the proposed alternative role) of advocacy or mentoring as there was on page 52 of the Claimant's existing role profile.

22. It was clear from the job purpose and over the page in the section on 'Dimensions' the Claimant would, in this new role, have be working with a different client base, or cohort as Mr Lewinski described them. In respect of the proposed alternative role these were described as people in treatment services for alcohol or drug dependency, substance misuse treatment providers and a range of other bodies. This is different from the client base that the Claimant worked with under his existing role. The Claimant agreed, however, and I find, that there was a considerable overlap between the two client bases, or cohorts, with some individuals coming within both groups. A significant number of those dealt with as young offenders, or aged 18-20, had substance misuse issues and the Claimant would have dealt with them and addressed those issues with them as part of his existing role.

23. This brings me onto the knowledge, skills and experience set out in the proposed alternative role profile. These were very similar indeed to those that were set out in the Claimant's existing role profile. One way in which they differed was that the new role referred, under 'experience', to working with customers in the treatment for substance misuse and/or disaffected and marginalised from mainstream services, etc. This did not appear in the job description for the Claimant's current role, understandably, because it was a different client base, but as I have said I accept there was an overlap between the cohorts and I find as a fact that in his existing role the Claimant had gained experience of working with customers in the treatment for substance misuse and who were disaffected and marginalised from mainstream services.

24. On 16 November, after receipt of those documents, the Claimant emailed Mr David Vaughan saying he wanted to discuss whether the 'implied match is suitable'. There then followed a meeting on 17 November between the Claimant, Mr McDonald and another manager, Mr Vaughan. Mr Vaughan explained some more about the proposed role.

25. There was a dispute in the evidence as to what was said in that meeting about where the work involved in that role might be performed. The Claimant's evidence in chief was that Mr Vaughan had said the role might involve operating from various locations in the North West. Mr McDonald was adamant that that was not said and that it simply was not the case that the role might involve operating from various locations in the North West. The Claimant did, as I understand it except on cross examination he might have misunderstood. I accept Mr McDonald's evidence that neither he nor Mr Vaughan said that the job would be carried out across the North West. Mr McDonald's evidence was that they told the Claimant that the new role would be based at Phoenix Mill, and I accept that is what the Claimant was told.

However, I also find that the Claimant was under a genuine misapprehension as to where he would be working if he accepted this new role. The Claimant referred in documents that he prepared, in the context of what was described at one point as an appeal, a long note setting out what he believed appeared to him to be the differences between the two roles, and he referred there to the new role involving work around the North West. I find that that reflected a genuine understanding, albeit a misunderstanding, on the part of the Claimant, as to what that job would involve.

26. There followed an email from the Claimant of 21 November which records that the Claimant questioned in that meeting of 17 November whether the role that was being proposed for him was really a match for the role he was currently doing; in other words whether it was really substantially the same as was being suggested. That email also records that the Claimant had said in that meeting that he felt he should be offered a trial period for that job. I find that the Claimant did make these points in the meeting.

27. Mr McDonald responded to that email of 22 November saying the new role was essentially the same as the old role and that therefore there would be no trial period. The Claimant replied by email of 22 November referring again to having reservations about the new role, repeating his suggestion that he should be offered a trial period in the new role. He also said he continued to regard himself as within his redundancy period, the notice period ending on 30 November. Mr McDonald replied on 23 November by email, repeating his position that the roles were essentially the same. He said that if the Claimant did not agree he would need to appeal and he stated that if the Claimant left it would be treated as a resignation and not redundancy.

28. On 25 November the Claimant followed that up with an email to a Mr Gerry Stokes. He raised again his expectation that he would have a trial period. He referred again to the reservations he had about whether the roles were as similar as was being claimed, and repeated again that he considered he was being dismissed because of redundancy. Mr Stokes replied the same day, suggesting that it would be best to hear the Claimant's concerns about the role in a face to face meeting and asking the Claimant to outline before the meeting why he did not think the jobs were a match. That was followed by an emailed letter inviting the Claimant to what was described as an appeal meeting. There was then some correspondence about whether this really was an appeal meeting, what the purpose of the meeting was and an acknowledgement from the Respondent that they understood the Claimant was not appealing against the redundancy, it was relating to the redeployment issues.

29. There was an appeal meeting which took place on 1 December. On that day the Claimant had emailed Mr Stokes ahead of the meeting with documents that set out in more detail his view of why he thought the jobs were different. He referred again in his email to his objection to not being offered a trial period. The notes he attached set out what he saw as differences between the old role and the new proposed role. Those differences were set out under headings which included context, client base and outcomes. It was then followed by a table purporting to compare the two jobs side by side. Amongst the differences that were suggested to exist, the Claimant:

- a. made the point in the document that in his existing role he was employed primarily as a mentor and that the employment training and education element was secondary; whereas in the new role the employment and training consultancy was the sole purpose
- b. highlighted again the different client base
- c. referred to a difference in locations, suggesting that the new role could be in various locations around the North West as opposed to on one site
- d. referred to a wider range of targets and outcomes being applied to the existing role; and
- e. referred to a different IT system being in operation and a different knowledge base, as he described it.

30. Towards the start of that meeting the Claimant said again that he was not appealing the theory of redeployment, as he put it. He said: 'All I'm asking is that I am afforded a minimum one month trial'. The HR Business Partner said the redundancy had been 'rescinded'. That was repeated again. The Claimant repeated his view that there should be a trial period. He said he felt that failing to offer him a trial period was outside legislation and outside company policy. He also said that if a trial period could not be offered 'there is nothing further to discuss'. The Respondent's position was repeated again, that as it was a match there was no trial period. There was then a discussion based on the documents the Claimant had prepared setting out what he felt were the differences between the jobs. The issue was raised as to the primary role and whether that was as a mentor in the current employment. The Claimant repeated that this was his primary role. He also said that the purpose of that role was to prevent reoffending. Mr Stokes clearly did not agree with that and suggested that everything the company did was employment led. The Claimant highlighted again the different client base and explained that his existing work was with a group who typically were young male offenders who were immature, volatile, violent, aggressive and at risk of going into custody again.

31. The meeting ended without any movement from the company on the trial period. Looking at the evidence before me in the round, I find that the Claimant did genuinely believe that there were differences in substance between the role that he had been doing and the role that was being offered to him. The Claimant was not willing to take up the alternative role without a trial period and so his employment came to an end.

Law

32. ERA s141 provides as follows:

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.

(4) The employee is not entitled to a redundancy payment if—

(a) his contract of employment is renewed, or he is re-engaged under a new contract of employment, in pursuance of the offer,

(b) the provisions of the contract as renewed or new contract as to the capacity or place in which he is employed or the other terms and conditions of his employment differ (wholly or in part) from the corresponding provisions of the previous contract,

(c) the employment is suitable in relation to him, and

(d) during the trial period he unreasonably terminates the contract, or unreasonably gives notice to terminate it and it is in consequence terminated.

33. In comparing the provisions of an existing contract with those of the new proposed role, terms cannot be regarded as the same unless they are identical, unless 'differences are so trivial that one can fairly dismiss them under the doctrine of de minimis' : *Rose v Henry Trickett & Son Ltd (No 2) (1971) 6 ITR 211, Div Ct.*

34. On the question of whether an employee acts reasonably in turning down an offer of suitable employment, the question is whether the employee had sound and justifiable reasons for turning down the offer: *Bird v Stoke-on-Trent PCT UKEAT/0074/11 (21 July 2011, unreported)*. As was said by the EAT in *Everest's Executors v Cox* [1980] ICR 415, 'The employee's behaviour and conduct must be judged, looking at it from her point of view, on the basis of the facts as they appeared, or ought reasonably to have appeared, to [him] at the time the decision had to be made'.

35. Linked with section 141 is section 138, which provides that an employee whose contract of employment is renewed or who is reengaged pursuant to an offer made before the end of his existing employment is still entitled to a statutory redundancy payment if he or she terminates that employment within the 'trial period' and certain other conditions are met. Those conditions would be satisfied if it was reasonable for the employee to terminate their new employment and the terms of that employment differed from the original role as to location or capacity.

Conclusions

36. ERA Section 141 provides that, where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.

37. I must, therefore, consider first of all whether the provisions of the contract as renewed, or the new contract, would differ from the corresponding provisions of the Claimant's previous contract as to the capacity in which the employee would be employed or the place in which the employee would be employed, or as to any other terms and conditions of employment.

38. If the answer to that question is that there was no difference then I would go straight on to consider whether the Claimant unreasonably refused the offer. If, on the other hand, there was a difference, the next question is whether it was an offer of suitable employment in relation to the employee. If the answer to that is no, then the claim succeeds. If the answer is yes then again I need to go on to consider whether the Claimant unreasonably refused the offer.

39. To reach conclusions on the first of these issues I need to consider what is meant by 'capacity'. Mr Lewinski submitted that the concept of 'capacity' it is not necessarily just confined to a job description. I accept that submission. 'Capacity' can include matters such as the role, function, seniority and responsibilities; it can include matters such as a job description and which department somebody works in. Having said that, what I am concerned with here is not what a job involves in practice but what the contract provides as to those matters.

40. On the facts of this case, the 1998 written contract clearly did not reflect the provisions of the contract as to capacity that existed when the Claimant was dismissed.

41. At the time of his dismissal, I find that the terms of the Claimant's employment as to capacity must have included his job title as Mentor/Employment & Training Consultant (offender services) in the Offender Services Department. As far as the new role was concerned I am not referred to any contractual documents but what I do have is the letter that was sent to the Claimant purporting to rescind his notice of termination and which contained the first indication of the new role, and the job title there is given as Employment & Training Consultant (substance misuse) within the Substance Misuse Team. Those provisions do differ. I have considered whether that is a difference in substance, or is de minimis. I find that there do appear to be real differences of substance. I am assisted in that conclusion by looking at the job role documents and in particular the first bullet point under 'key responsibilities' that my attention was drawn to in respect of both roles. I have already highlighted that the

existing role the Claimant was in specifically referred to advocacy, mentoring, advice and guidance and training interventions etc. The new role is worded similarly but excluded the words 'advocacy and mentoring'.

42. Mr McDonald suggested in evidence that the word 'mentoring' was simply included in the Claimant's job description to satisfy a requirement of those providing funding. The implication of his evidence was that it was a word that added nothing of substance. I do not accept that implication reflects reality. It does appear from the documents that the word 'mentor' was not superfluous - it was a term that was meant to mean something in addition to giving advice, guidance and training interventions. Indeed Mr McDonald himself described the Claimant as a 'mentor'. Certainly I do not feel able to find that there was no difference in the terms as to capacity in the existing contract as opposed to the contract that was being offered.

43. I turn now to the contractual provisions as to the place where the Claimant was employed as compared to the contractual provisions as to place of employment for the proposed alternative role offered. As far as the new role is concerned the letter telling the Claimant about the new role contained no mention of any change to the place of work; in fact it said terms and conditions would remain the same. However, the Claimant was told by Mr McDonald in the meeting of 17 November that he would be based at different premises to those he was presently working at. I infer from that that it was a contractual requirement that the Claimant would work at these new premises.

44. As far as the old role is concerned, it was suggested by Mr Lewinski that the only contract term regarding place of work in relation to that old work was the one set out at page 41 which reads: 'The employee's normal place of employment is initially Manchester TEC, Great Bridgewater Street, or such other place of business as the company may direct.'

45. I reject the contention that that was the only provision of the Claimant's contract as at the date his employment ended as to place of work. That clause referred to the place of work 'initially' being at Great Bridgewater Street. It also referred to the possibility of the Claimant working elsewhere because he was 'directed' to do so. Mr Lewinski suggested the Claimant had been 'directed' to work elsewhere but I have found that the change of the Claimant's place of work came about with a change of role which I infer the Claimant agreed to, and I infer that there was an agreed change of place of work and a variation to the contract. As at the time of termination the provisions in the Claimant's contract as to work included that he work at Vektor House.

46. The terms of the new contract offered to the Claimant did not provide for the Claimant to work at Vektor House. Nor, for that matter, did they provide for employee's normal place of employment to be 'initially at Manchester TEC, Great Bridgewater Street.' The terms of the role offered to the Claimant would have required him to work at a different office in Manchester altogether. This was not a de minimis difference.

47. Other than the difference in contract terms as to capacity and location, I find there were no differences between the terms and conditions of employment that the

Claimant was employed under in his existing role and those that were being offered to the Claimant in the alternative role.

48. Because I have found the terms and conditions were not the same in relation to capacity and place I need to consider now whether the offer constituted an offer of suitable alternative employment in relation to the Claimant.

49. As far as location was concerned the alternative role would have involved the Claimant working not far from where he had previously been working at least four days a week. I have found that the Claimant was wrong to think that it was going to involve potentially working all around the North West. The job would not involve more travel and his hours would be the same. Furthermore, he would, under the new contract, have been doing very similar work to the work which he had previously done. The client base would have been different but I have found there would be a substantial overlap between the two and the Claimant could use the skills gained in the job he had been working in for several years in the alternative job, because he had been working with people with substance misuse problems. On his own evidence that Claimant said he felt he could probably have done the job and it would not have taken him long to pick it up even if he may not have been able to hit the ground running on day one. The Claimant referred to differences in the IT system; I find those would have been minor, however, and did not affect the suitability of the role. There was going to be no less pay, and no greater expenditure for the Claimant to do the job. There was no suggestion that there would be a lowering of status, at least from other people's perspectives. In all the circumstances I find there job offered to the Claimant was an offer of suitable employment in relation to him.

50. The next question I must consider then is whether the Claimant unreasonably refused the offer.

51. As I have said, I have found the Claimant genuinely believed there were differences between the role he was doing and the role he was being asked to do. He pressed the Respondent a number of times for a trial period and whilst the Respondent has suggested that the Claimant really was only interested in a redundancy payment I do not accept that was the case. I do not accept that the request for a trial period was some sort of ruse dreamt up subsequently by the Claimant to attempt to justify his failure to accept the job. It clearly was not. It was a point that he made throughout the process leading up to the termination of his employment, and gave reasons as to why he should have a trial period, producing a lengthy document highlighting what he thought were the differences between the two jobs.

52. I have considered whether the Claimant's perception that there were differences between the jobs was reasonable. In this regard I bear in mind that whilst the Claimant was extremely familiar with the job he had been doing he would not have had the same level of knowledge as Mr McDonald would about the new role. I accept Mr McDonald was in a much better position than the Claimant to judge the similarities between the two roles. His evidence was that there is very little difference between the two roles. I accept that in practice that may well be the case but it is necessary to consider the question about the reasonableness of the refusal from the

Claimant's perspective and consider what was his understanding of the differences between the roles and were those beliefs reasonable.

53. I am left with the clear impression that the Claimant believed there were or at least might be real differences in what the roles entailed based on the job description he had been given. I note that those job descriptions contained a lot of similarities, but there were some differences, especially in relation to the omission of any reference to mentoring and advocacy. The Claimant also, I accept, believed that his role was not just about getting clients into employment training and education but steering young men away from offending in a wider sense; I accept that he genuinely believed that to be a part of his role that was reflected to some extent in the job description. As far as the alternative role was concerned, the Claimant was at a disadvantage compared to Mr McDonald because he did not have the knowledge that Mr McDonald did about the new role and what it would entail.

54. If the Claimant had taken the job he was offered he would have had an opportunity to discover for himself whether the alternative role suited him without losing his right to a redundancy payment. Provided he resigned within the trial period provided for by ERA s138 and provided his decision to leave was reasonable, he would have retained his right to a redundancy payment. The purpose of that trial period is to cover precisely the kind of situation in which the Claimant found himself, where employees are offered an alternative role that they do not have first-hand experience of themselves – it provides the employee with an opportunity to find out for themselves whether it suits them.

55. The Respondent's approach effectively deprived the Claimant of the benefit of a trial period to assess the suitability of the job. Instead of offering the job with a trial period, managers dug their heels in and purported to withdraw the notice of termination, something it could not do under the terms of the Claimant's contract. It is true that, in practice the Claimant could have taken the job and if he had left within the trial period and that decision was reasonable he would not have lost his redundancy payment, because of course, as a matter of law, the employer is unable to deprive an employee of statutory rights. Nevertheless that is what the employer purported to do notwithstanding the Claimant's repeated requests for a trial period.

56. Mr Lewinski speculated that even if the Claimant had been offered a trial period it may not have made any difference. He suggested it was 'moot' whether the Claimant would have accepted it. I reject that submission on the facts – the Claimant repeatedly pressed for a trial period and I infer that, if offered one, he would have accepted the role. That does not mean he would not have terminated his employment during the trial period – he may well have done so; we simply cannot say. What we do know, however, is that if the Claimant had had an opportunity to discover for himself that the jobs were, as the Respondent said, virtually identical, it would then have been very difficult for him to subsequently claim that the resignation was reasonable and that he would be entitled to a redundancy payment. But the fact remains that the Claimant did not get the chance to find out for himself whether that was the case.

57. It is suggested that the real reason the Claimant rejected the role is that he wanted a redundancy payment. There was clearly a large amount of money at stake

here, and I accept that that may have been in the Claimant's mind. The Claimant did take up a defensive position, repeating that he still considered he was being made redundant in a number of emails. However, I find that it was perfectly understandable in the circumstances because the Respondent was purporting to do something it could not do as a matter of law, which was to rescind the dismissal notice and prevent the Claimant accessing a redundancy payment. In the circumstances I do not accept the submission that that the chance of obtaining a redundancy payment was in reality the reason why the Claimant did not accept the job.

58. The Claimant declined the new role because he genuinely and reasonably believed that there were real differences between his existing role and the new role he was being offered and he was not afforded the opportunity of a trial period to find out for himself whether the role was suitable. In all the circumstances I find that it was reasonable for the Claimant to refuse the offer that was made to him.

59. That being the case I conclude that the Claimant is entitled to a statutory redundancy payment under section 135 of the Employment Rights Act 1996.

60. It also follows, based on the submissions I have heard and the concessions that have been made, that I must find that the Respondent breached the Claimant's contract of employment in failing to pay him a contractual redundancy payment and the claim of breach of contract succeeds.

Remedy

61. As far as the remedy is concerned I cannot see any basis on which to reduce the entitlement to a statutory redundancy payment. It has not been paid.

62. Mr Lewinski calculated the amount of the Claimant's statutory entitlement as being £12,933.00 based on the Claimant's age at the effective date of termination (65), 18 years' continuous service, and a week's pay of £479 (taking into account the statutory cap). Mr Mensah suggested the correct figure was £14370 but could not explain how that higher figure had been reached and nor could he identify any error in the Respondent's calculation. Accordingly I find that the Claimant is entitled to a statutory redundancy payment of £12,933.00 and the Respondent is required to pay that amount under section 135 of the Employment Rights Act 1996.

63. As far as breach of contract is concerned, the Claimant's case was that under the terms of his contract he was entitled to a contractual redundancy payment of either £59,605.20 or £59,014.44, depending on which of two figures he had been given by the Respondent is correct (and there was no suggestion by the Respondent that neither of the figures was correct).

64. It is not disputed that, pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the amount I can award by way of damages for breach of contract is limited to £25,000 even if the Claimant's losses exceed that figure.

65. The Respondent submits that the amount of the statutory redundancy payment should be offset against the capped amount of £25,000 to bring the breach of contract award down to just £12,067. The suggestion appears to be that the

Claimant was not entitled to recover £25000 for breach of contract as well as a statutory redundancy payment because the contract provided for the statutory payment to be offset against the contractual payment.

66. I reject the Respondent's submission on this issue.

67. The purpose of damages for breach of contract is to put the Claimant in the position he would have been in if the contract had been properly performed. Properly construed, the terms of the Claimant's contract do not entitle him to the full amount of £59,605.20 or £59,014.44 in addition to statutory redundancy pay. The contract provides that, whatever the statutory redundancy entitlement is, it is offset against the sum that would be calculated applying the provisions of the contract. I must take that into account in assessing the Claimant's loss. The award of a statutory redundancy payment reduces the Claimant's loss for these purposes by £12,933.00, taking that loss down to just over £46,000.

68. Paragraph 10 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides as follows: 'An [employment tribunal] shall not in proceedings in respect of a contract claim, or in respect of a number of contract claims relating to the same contract, order the payment of an amount exceeding £25,000.'

69. It is clear that this provision imposes a cap on the amount that can be awarded by a Tribunal. That is a cap that is imposed after the loss is assessed. It does not, as appeared to be suggested on the part of the Respondent, provide that in calculating the Claimant's loss, £25,000 is the starting point and the amount awarded to the Claimant must be further reduced. There is nothing in the provision that supports the submission made on behalf of the Respondent.

70. Had the contract been properly performed, the Claimant would have received just over £46,000 as well as his statutory £12,933.00 redundancy payment. Therefore the Respondent is ordered to pay to the Claimant the sum of £25,000.00 as damages for breach of contract. This is in addition to the amount it is required to pay under section 135.

Employment Judge Aspden

Date 23 February 2018

REASONS SENT TO THE PARTIES ON
12 March 2018

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.