



## THE EMPLOYMENT TRIBUNALS

**Between**

**Claimant: Mr G Finella**

**Respondent: The Kent, Surrey and Sussex Community  
Rehabilitation Company Limited**

**Hearing at London South on 2 November 2017 before Employment Judge  
Baron**

**Appearances**

**For Claimant: The Claimant was present in person**

**For Respondent: Daniel Cotton - Solicitor**

### JUDGMENT

It is the judgment of the Tribunal that the claims are dismissed.

### REASONS

- 1 The claims in summary are as follows. The Claimant was made redundant by the Respondent with effect from 3 March 2017. He received payment in lieu of notice and also redundancy pay based upon the statutory formula, but without the application of the statutory cap on the amount of a week's wages. The first claim made by the Claimant is that he was entitled to a larger redundancy payment under terms of a collective agreement. The second claim is that the Respondent did not comply with its obligations in that agreement relating to notification to the recognised unions of the proposal to make redundancies.
- 2 The Claimant sought to introduce into evidence concerning the performance of the Respondent and an extract from its accounts to 31 March 2016. I did not allow that material to be introduced on the basis that it was simply not relevant to the issues I had to determine.
- 3 I was referred to a significant amount of documentation to which reference is made below. I have included some provisions upon which neither party placed particular reliance, but I consider to be material so that the context of the provisions in the document may be better understood. The documents are set out in chronological order save for the letter of 22 April 2015 which I have added at the end.

- 4 The Claimant was employed by the Sussex Probation Board from 6 May 2008 as a Performance Analyst. Clause 2.1 of his contract of employment provides as follows:

**2 Terms and conditions of employment**

2.1 Save as otherwise provided for in this statement, your terms and conditions of employment with the Sussex Probation Board are those established by the National Negotiating Council ('NNC') for the Probation Service as set out in that body's Code of Conditions of Service, subject to:

(a) Any decisions of the Sussex Probation Board ('the Board') regarding the adoption and implementation by the Board, with or without modification of the NNC Code of Conditions (including any changes to the same agreed at national level from time to time) and/or

(b) Any local collective agreement reached by the Board with the trade unions that it recognises.

2.2 Your terms and conditions of employment as referred to in paragraph 2.1 above can be varied from time to time by collective agreements or variations to existing local agreements agreed (a) at national level by the NNC which have been adopted by the Board and/or (b) at local level between the Board and its recognised trade unions.

- 5 The Surrey and Sussex Probation Trust approved a policy on 14 May 2012, entitled 'Redundancy and Related Redeployment Policy and Procedure'. It is stated to be a policy, and there is nothing in the text in the bundle to indicate that it formed part of any collective agreement.

- 6 The Respondent was incorporated on behalf of the Secretary of State for Justice on 4 December 2013 and initially the Secretary of State was the sole shareholder. As part of the privatisation of at least part of the probation service the Claimant's employment was transferred to the Respondent. It is agreed that the Claimant continued to be on the same terms. New shares were issued, and from February 2015 the Respondent became a wholly owned subsidiary of a company referred to as 'Seetec', apart from the 'golden share' retained by the Secretary of State.

- 7 The Claimant's contract of employment refers to a collective agreement. I will refer to it as the 'NNC Agreement'. Some aspects of the collective agreement are material. Only relevant parts were in the bundle. It is stated to be the 'Legacy version as at 31 May 2014' and both parties accepted that it is the relevant document.<sup>1</sup> The cover sheet states it to be the 'National Negotiating Council for the Probation Service – National Agreement on Pay and Conditions of Service'. The first section is headed 'Introduction'. Paragraphs numbered 1 and 2 are as follows:

1. This handbook sets out the terms and conditions negotiated at national level for employees covered by the National Negotiating Council for the Probation Service (the NNC). The handbook, the contents of which will be regularly updated, sets out the national terms and conditions which are applicable from 1 April 2006 and comprises four sections:

Section A – Terms and Conditions

Section B – Model Policies/Procedures, agreed Schemes

Section C – Guidance

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<sup>1</sup> It appears that it was probably dated 29 January 2014 – see clause 30.3(d) of the Commercial Agreement mentioned below.

Section D – Relevant supporting nationally agreed documents

2. The parties to this Agreement are the Probation Association, the Ministry of Justice/National Offender Management Service and the recognised Trade Unions, Napo and Unison.
- 8 Paragraph 6 states that ‘Section A of the Handbook sets out the terms and conditions of employment which the NNC expects every probation trust to honour’. I was not provided with Section A, but the index to it was in the bundle.<sup>2</sup> That index set out the headings to seventeen sets of provisions, and covers matters which one would expect to see in a contract of employment, such as ‘Pay and Grading Provision’, ‘Hours of Work’, ‘Leave’ and so on.
- 9 The ‘index’ page to Section D is headed ‘Section D – NNC Agreements’. The document in Section D3 is headed ‘Rehabilitation Programme – National Agreement on Staff Transfer and Protections’. The context is helpfully set out in paragraphs numbered 1 and 2:

**Introduction**

Under the Ministry of Justice’s Rehabilitation Programme, Probation Trusts will cease to provide probation services on 31 May 2014 and existing staff transferred as appropriate to one of the newly created 21 Community Rehabilitation Companies (CRCs) or the newly established National Probation Service (NPS).

The transfer of Probation Trust employees to the Community Rehabilitation Companies and the National Probation Service on 1 June 2014 will be a key component to achieving a secure and fair transition to the new service delivery arrangements. It is then intended that the services transferred to the CRCs will be contracted out around October 2014, with contracts to be let via a share sale. This agreement therefore covers the following:

- 1 The point of transfer to NPS or CRCs on 1 June 2014.
- 2 The period between 1 June 2014 and CRC share sale.
- 3 The position post share sale.

- 10 Paragraph 11 is as follows:

**Voluntary redundancies arising as a direct consequence of the rehabilitation programme**

This Agreement includes an enhanced national voluntary redundancy scheme to apply during the transition period. The period covered by the agreement, attached as Appendix B, is up to and including 31 March 2016, decisions including agreement on applications for voluntary redundancy to have been made and agreed by 31 March 2015.
- 11 Paragraph 12 is headed ‘Post Transfer Staffing Arrangements including Post Share Sale’. There are ten unnumbered bullet points, the second, third and fourth are set out below:

**Post transfer staffing arrangements including post share sale**

- 12 The following guarantees will be put in place:
  - No compulsory redundancy in either the NPS or the CRCs for a period of seven months post share sale.
  - Protection of continuity of employment for any member of staff transferring between NPS/CRC or vice versa up to the point of share sale

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<sup>2</sup> [37]

- Additional protection of continuity of employment for staff employed on the 31 May 2014 who transfer between CRCs or from the NPS to a CRC for a period of seven years post share sale, this to be specified in the commercial contract.

12 There are further provisions as follows:

**CRC and NPS Terms and Conditions**

13 The CRCs and NPS will adopt the NNC and SCCGOG National Agreements and Pay and Conditions of Service for all staff

16 In addition, the commercial contracts will specify that, other than where more beneficial terms exist, where voluntary redundancy is offered, the enhanced terms set out at Appendix B should apply to any member of staff in a CRC employed by a Probation Trust on 31 May 2014.

13 The relevant provisions of Appendix B to Section D3 are as follows:

**Rehabilitation programme: enhanced voluntary redundancy scheme**

1 This Appendix sets out the voluntary redundancy scheme which will apply to employees in a category where there is a potential oversupply post transfer. This is likely to apply initially primarily to Senior Management and Corporate Support staff posts. The provisions apply in all cases of voluntary redundancy arising as a direct consequence of the TR Programme and will remain in operation until 31 March 2015, last day of service agreed to be no later than 31 March 2016.

2 Additionally, the commercial contract will specify that, other than where more beneficial terms exist, where voluntary redundancy is offered, these enhanced term should apply to any member of staff employed by a Probation Trust on 31 May 2014.

3 The decision in respect of individual applications on whether to award voluntary redundancy is at the employer's absolute discretion and will include consideration of, amongst other things, the exigencies of the service, organisational issues and business needs. Whilst the decision as to which applications for voluntary redundancy should be agreed and at what date this will take effect will rest with the employing body, it is expected that, in reaching a decision, the employer (Trusts in the period up to 31 May 2014) will reach agreement with MoJ/NOMS in terms of future service delivery arrangements.

**Voluntary Redundancy for those aged under 55<sup>3</sup>**

Redundancy compensation will be paid, subject to a maximum of 67.5 weeks' pay and reckonable service of 15 complete years, as follows

Four and a half weeks pay for each year completed service

14 Section D4 is headed 'Management of Change Protocol'. The material provisions are set out below.

**1 Introduction**

- 1.1. This NNC protocol expresses the determination of the probation employers and trade unions to work together to maintain the security of employment of probation staff in a positive industrial relations climate.
- 1.2. The protocol provides an agreed framework within which trusts and trade unions should manage situations that potentially require a reduction in the number of employees. It should be applied in conjunction with legislative requirements and an association with local trust policies and procedures.
- 1.3. It sets out best practice principles and procedure to help probation employers and trade unions to deal with the impact of financial settlements and restructuring arising

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<sup>3</sup> The Claimant is aged under 55

from organisational change and the need to continue to deliver high quality services. It is recognised that many trusts will already have in place policies and procedures consistent with the best practice set out in this document.

## 2 Aim

2.1 The aim of the NNC Management of Change Protocol is to ensure that every effort is made to minimise compulsory redundancies by using the following means:

- Timely forward planning
- Consultation between employer and trade unions at the earliest possible opportunity
- A period of reflection to allow all parties to take stock at local, regional and national level
- Clarity over the options available to trusts to offer voluntary severance and/or voluntary early retirement
- Advice on vacancy management and redeployment.

## 5. The period of reflection

5.1. The period of reflection takes place when trusts reach a critical stage in their workforce planning and realise that they may need to issue compulsory redundancy notices.

5.2. The period of reflection enables:

- all parties to take stock/review action taken to date to avoid compulsory redundancies and
- an opportunity to look at any further action that could be taken to alleviate the situation (including addressing any barriers).

5.3 Trusts should notify the NNC Joint Secretaries by email at least six weeks before they are planning to issue compulsory redundancy notices to enable the period of reflection to commence. The Director of Probation and Contracted Services should also be made aware of the intention to issue notices of compulsory redundancy. The period of reflection can run concurrently with statutory periods of consultation and does not replace the requirements to consult with trade unions locally.

5.4 The period of reflection may take the form of meetings between the following stakeholders

- Trust
- Recognised trade unions
- NNC Joint Secretaries
- NOMS Director of Probation and Contracted Services

## 7. Voluntary Redundancy/Voluntary Early Retirement Schemes

7.1 The decision whether to award voluntary redundancy or early retirement is at the employer's absolute discretion and will include consideration of, amongst other things, financial and organisational issues. Where at all possible, decisions on voluntary measures should be made prior to the contemplation of compulsory redundancy.

15 The next document is what has been referred to as 'the Commercial Agreement'. This is an 'in-house' Agreement entered into between the Secretary of State for Justice and the Respondent at a time when the sole share in the Respondent was vested in the Secretary of State and before the Respondent became involved. The material provisions are in clause 30.3 headed 'Employee Protection' and are as follows:

(d) The Contractor acknowledges that since the Employee Transfer Date the voluntary redundancy terms (the **Voluntary Redundancy Terms**) set out in Appendix B to the National Agreement on Staff Transfer and Protections dated 29 January 2014 (the **National Agreement**)

a copy of which is contained in Part 2 of Schedule 25 to this Agreement have been applied in all cases of voluntary redundancy of Employees (save when more beneficial terms exist).

(e) The contractor shall be entitled to effect voluntary redundancies of Employees from the Employee Transfer Date in accordance with applicable law. Other than where more beneficial terms exist, in all cases of voluntary redundancy of Employees the Contractor shall give effect to the Voluntary Redundancy Terms, unless agreed otherwise between the contractor and employee.

#### **42.4 Third party rights**

(a) Subject to Clauses 42.4(b) and 42.4(c), no term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement. This Clause 42.4 does not apply to the Crown and does not affect any right or remedy of any person that exists or is available otherwise than pursuant to that Act.

Clauses 42.4(b) and (c) are not relevant to the Claimant.

- 16 On 27 June 2016 an Employee Consultation Pack was issued concerning a proposed restructuring of the part of the business in which the Claimant was employed. As I understand it, the proposals did not involve a reduction in the number of employees overall, but there were to be some significant changes in function, and some employees were to become employed by Seetec rather than the Respondent. It is accepted that the Claimant's role was redundant as defined in section 139 of the Employment Rights Act 1996. The material section in the Pack is as follows:

#### **Voluntary redundancy (VR)**

Given that a potential redundancy situation exists for the posts specified in this pack, the Company may agree for individuals to express interest in VR. The expressions of interest in VR are not binding on employees or the service. The expression of interest process will close by a specific date – 26 August 2016.

The Company will review all formal applications for VR and will communicate their decisions by week commencing 12<sup>th</sup> September. Subject to the proposals becoming plans, those who are permitted to take VR should be aware that their leaving dates will be agreed by the Director and will be subject to the operational requirements of the department.

- 17 The date of 26 August for expressions of interest was then repeated, and the week commencing 12 September 2016 was stated to be the week during which decisions on any applications were communicated. Some aspects of the timescale set out in the pack were subsequently extended so that the new structure was to commence on 21 November 2016 rather than 1 November 2016 as originally planned. The date for the issuing of redundancy notices was varied to the week commencing 17 October 2016.
- 18 The Claimant worked in the vicinity of Tracey Young, the Senior HR Consultant of the Respondent. Discussions took place between them, and there is therefore not a complete email trail. At some stage the Claimant expressed an interest to her and he was provided with a calculation of the redundancy pay which would be paid if he took voluntary redundancy. The amount was £14,532. That was calculated on the basis of 21 weeks' pay. The Claimant queried the amount and Ms Young sent an email to him on 5 August 2016 as follows:

The voluntary redundancy scheme available to staff back in 2014 was directly connected to Transformation Rehabilitation (TR). At that time SSPT was provided with money from the MoJ which was to ensure that the service provided to service users was maintained. At that time SSPT chose to use this money to offer an enhanced VR scheme to staff.

The review that is currently taking place is not linked to TR in any way and as such the same VR terms are no longer available to staff.

- 19 The Claimant did not subsequently pursue the possibility of voluntary redundancy. On 18 October 2016 the Chief Executive wrote to the Claimant stating that his position was redundant, and offering him the alternative role as a BI Reporting Analyst for a trial period of three months. That trial period did not prove to be successful and on 2 March 2017<sup>4</sup> a letter was written to the Claimant terminating the Claimant's employment by reason of redundancy with effect from 3 March 2017. Payment in lieu of notice was to be paid, and the letter stated that the Claimant would receive a redundancy payment of £14,878.
- 20 Finally I record part of the contents of a letter dated 22 April 2015 from the then Chief Executive of the National Offender Management Service to senior officers in each of UNISON, NAPO, and GMB/SCOOP. The context of the letter was not provided, but it is headed 'Proposals for staff redundancies in Sodexo owned CRCs'. The relevant section is as follows:

**3) Confirmation of Unison's understanding of the entitlement of Unison members to the National Negotiating Council (NNC) Enhanced Voluntary Redundancy (EVR) Scheme**

As confirmed by representatives of the Rehabilitation Programme to you and Neil Richardson, as representatives of UNISON, at the Transforming Rehabilitation Consultative Forum on 22 January 2015, the enhanced voluntary redundancy terms set out in the National Agreement remain unchanged and are duly repeated in the Amended and Restated Services Agreement (ARSA); specifically referred to at clause 30.3(e) which you have noted within your letter and a copy of the National Agreement is repeated in Part 2 of Schedule 25.

Paragraph 11 of the National Agreement sets out the Enhanced Voluntary Redundancy Scheme to apply to voluntary redundancies arising as a direct consequence of the Rehabilitation Programme, during the period up to and including 31 March 2016, with decisions including agreement on applications to have been made and agreed by 31 March 2015.

Paragraph 16 of the National Agreement then goes on to state that, in addition, the Enhanced Voluntary Redundancy Terms as applicable through the scheme outlined in Para 11, should apply to any member of staff in a CRC who was employed by a Probation Trust on 31 May 2014. This is an indefinite obligation (subject to the right to amend the Enhanced Voluntary Redundancy terms in accordance with applicable employment law). As such, clause 30.3(e) of the ARSA provides that the contractor (i.e. Sodexo) will give effect to these Enhanced Voluntary Redundancy Terms on the same basis.

We therefore confirm that your understanding (that the EVR terms set out in National Agreement should apply to any voluntary redundancies offered by Sodexo CRCs to employees employed by a Probation Trust as at 31 May 2014 for the lifetime of the Sodexo contracts) accords with the MoJ's intention and understanding of the relevant terms of the National Agreement and the ARSA, subject to any amendments to such terms be negotiated with the relevant employee representatives and in accordance with applicable employment law.

*The law, discussion and conclusions*

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<sup>4</sup> The date of the letter is not absolutely certain.

- 21 At the outset I emphasise that the claims are a matter of law. It is not the function of the Tribunal to consider, or indeed comment on, the decisions of the Respondent save as material to the legal issues to be decided. It is even less the function of the Tribunal to consider the wisdom of the reorganisation of the Probation Service or the effects of the reorganisation. Insofar as the Claimant wishes to raise those issues then he must do so in another forum.
- 22 The Claimant set out his case in a document referred to as his 'position statement'. There were five principal points set out at the beginning as follows:
1. Deliberate failure to contact NNC Joint Secretaries and Unions in a timely manner as set out in the NNC agreement, therefore invalidating the redundancy process.
  2. Failure to agree a redundancy process with the unions.
  3. Deliberate failure to offer Enhanced Voluntary Redundancy (EVR) at the appropriate rate, (see .Appendix 1 for NNC agreement on pay and conditions.)
  4. As part of this agreement there are particular procedure that need to be followed by unions, staff and the organisations.
  5. This claim demonstrates that [the Respondent] behaviour ignored this agreement stated above and decided to follow its own approach.
- 23 The Claimant then said that the Respondent had failed to follow the procedure in paragraph 5 of Section D4 in the NNC Agreement as to 'The Period of Reflection' because the Respondent had 'failed to notify the NNC joint secretaries or the unions in a timely manner.'<sup>5</sup> The Claimant made various other criticisms of the manner in which the Respondent had conducted the redundancy exercise. As far as the claim for further redundancy pay is concerned, the Claimant referred to the letter concerning Sodexo of 22 April 2015.
- 24 It is the Respondent's case that the Management of Change Protocol in the NNC Agreement is not binding on the Respondent, that the Claimant is not in a position to enforce it, and that in any event the Claimant has suffered no loss. As far as the enhanced voluntary redundancy payment is concerned the following points were made. Firstly, the Claimant was not a party to the Commercial Agreement. Secondly, it was specifically provided that third parties could not benefit from its provisions. Thirdly, the Claimant was made redundant compulsorily, and he did not volunteer for redundancy.
- 25 The two claims by the Claimant depend upon him being able to enforce provisions of an agreement to which he is not himself a party. I will deal with the NNC Agreement, and the procedural point first. Collective agreements between an employer and a trade union are generally not enforceable between those bodies. However terms of a collective agreement may be incorporated into the contract of employment of an individual employee, or groups of employees. In this case clause 2.1 of the Claimant's individual contract of employment is quite clear, and the provisions of the NNC Agreement therefore apply to it, but subject to the next point.

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<sup>5</sup> Paragraph 6 of the document.



26 In such circumstances, it is only those provisions of the collective agreement which are appropriate or apt to be included in an individual's contract of employment that are so included. Mr Cotton referred me to *Department of Transport v. Sparks* [2016] ICR 695 CA. McCombe LJ reviewed various authorities, and then said this:

18 The question to be asked is whether the provision in question is apt for incorporation into the contract between employer and employee. The starting point, of course, is the language of the employment documents as a whole (I avoid the term employment contract at this stage.) As Hobhouse J said in *Alexander v Standard Telephones & Cables Ltd (No 2)* [1991] IRLR 286, as approved in this court in *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193, contractual intention when expressed in a written document must be ascertained in accordance with ordinary principles of contractual construction, but where a document is incorporated by general words it is necessary to ask whether any particular part of the document is apt to be a term of the contract. Each set of employment documents will differ and each has to be analysed in accordance with its own terms, not over-rigidly controlled by what another court may have thought of a different set of documents, dealing perhaps with a similar subject matter to the one in question.

27 Mr Cotton pointed out that Section A of the NNC Agreement contained provisions which, at least in general terms, covered matters appropriate for a contract of employment. On the other hand, Section D4 was specifically referred to as a 'protocol'. In the Introduction there was reference to a 'framework' for managing redundancies, and also reference to 'best practice principles'. Mr Cotton further submitted that on the facts there had been compliance with the provision as to six weeks' notification.

28 I agree with the first submission made by Mr Cotton and conclude that the provisions of Section D4 of the NNC Agreement were not incorporated into the Claimant's contract of employment. Those provisions were declarations of intent by the parties to the Agreement, not binding on them, and not suitable for incorporation into the contract of any individual employee. I do not need to consider Mr Cotton's alternative submission. The claim for damages for breach of contract relating to the redundancy procedure therefore fails.

29 The other claim made by the Claimant is for the enhanced redundancy payment. In his position statement the Claimant relied only upon the letter of 22 April 2015 of which an extract is set out above. That letter does refer to the NNC Agreement and also the Commercial Agreement. I will deal with each in turn.

30 My conclusion is that the Claimant cannot become entitled to any further payment under the NNC Agreement. I am assuming for these purposes (but without so finding) that Section D4, and thus Appendix B, have contractual effect. Two linked aspects defeat the Claimant's possible claim. The first is that any decision as to whether to offer voluntary redundancy is at the employer's absolute discretion. An employee has no right to voluntary redundancy. Secondly, as a matter of fact the Claimant was made redundant compulsorily, and did not volunteer for redundancy.

31 The second document is the Commercial Agreement. That is an agreement between the Secretary of State and the Respondent. It does

provide in clause 30.3(e) that the Respondent will offer the enhanced voluntary redundancy terms set out in the NNC Agreement. I conclude that the Claimant cannot succeed under the terms of the Commercial Agreement either. It is an agreement to which he is not a party, and any potential right which he may have had to seek to benefit from it is excluded by clause 42.4(a). The further point is the same as for the NNC Agreement, being that the Claimant was not in fact redundant on a voluntary basis.

- 32 The final matter is the letter of 22 April 2015, being the document principally relied upon by the Claimant. I do not know the background to that letter but it is apparent that the paragraph in question relates to Sodexo CRCs. In my view, all that that letter does is to set out an admirable summary of the material provisions of the NNC Agreement and also no doubt a document in similar or identical terms to the Commercial Agreement to which the Respondent is a party in this case. However that letter cannot by itself create any rights enforceable by the Claimant against the Respondent.

**Employment Judge Baron**

**Dated 10 November 2017**