



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104531/2018

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Held in Glasgow on 14 August 2018

Employment Judge: Frances Eccles

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Mr J McCann

**Claimant
In Person**

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The Phoenix Car Company Limited

**Respondent
Represented by:
**Mr D Southall -
Consultant****

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that (i) the claimant was not unfairly
25 dismissed by the respondent; (ii) the contract claim is well-founded & (iii) the
respondent shall pay to the claimant notice pay in the sum of **£4,980** (four thousand
nine hundred and eighty pounds) (12 weeks x £415).

WRITTEN REASONS

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BACKGROUND

1. The claim was presented on 4 May 2018. The claimant claimed unfair
dismissal and breach of contract (notice pay). The claim was resisted. In
their response, accepted on 8 June 2018, the respondent denied dismissal.
35 The respondent claimed that the claimant had left their employment of his
own volition without notice and having unreasonably refused suitable
alternative employment during a redundancy consultation.

E.T. Z4 (WR)

2. For the respondent the Tribunal heard evidence from Stephen DaSilva, former Dealer Principal; John Fyfe, Group After Sales Manager & Peter Mustard, Group Operations Manager. The claimant gave evidence. The Tribunal was provided with a Bundle of Productions.
3. The claimant appeared in person. The respondent was represented by Mr D Southall, Consultant. The Tribunal announced its decision at the end of the hearing and gave its reasons orally. The respondent requested written reasons.

FINDINGS IN FACT

4. From the evidence before it the Tribunal found the following material facts to be admitted or proved; the claimant was employed by the respondent as a Sales Executive from 1 October 2003 to 31 March 2018. He was based at the respondent's branch in Dumbarton Road, Glasgow ("the Glasgow branch") where the respondent operated a Honda dealership. Most of the cars sold by the claimant, both new and used, were Hondas. In March 2018 the claimant was aged 63. His pay was £1,800 per month; £415 per week. In terms of his contract of employment (P22 -29) the claimant was entitled to receive from the respondent one week's notice for each completed year of service up to a maximum of 12 weeks.
5. On or around 1 March 2018 the respondent decided to close their Glasgow branch. The claimant received a letter from the respondent dated 1 March 2018 (P32) advising him of the closure and that as a result the role of Sales Executive at the Glasgow branch would no longer be required. The respondent invited the claimant to consult with them about the possibility of redundancy over a 30-day consultation period. In their letter (P32) the respondent informed the claimant that they hoped to confirm the position no later than 31 March 2018 and that if, after a suitable selection and consultation process, there was no suitable alternative employment that it

would give the claimant formal written notice of the termination of his employment.

- 5 6. The claimant is a very experienced Sales Executive. Like many of its employees, the claimant had long service with the respondent. The respondent wanted to retain the claimant as an employee. The claimant met with Stephen DaSilva, Dealer Principal on or about 8 March 2018. The claimant confirmed that he would be happy to move to the respondent's branch in Paisley. He did not rule out the possibility, subject to location, of
10 transferring to work with Arnold Clark but expressed a clear preference to remain in the respondent's employment.
- 15 7. The claimant met with Stephen DaSilva and another Manager, John Fyfe on 15 March 2018 to be advised about the scoring criteria to be used by the respondent to select Sales Executives for the Paisley branch. The claimant did not express any concerns about the selection criteria. From the four Sales Executives based at the Glasgow branch, two were selected for transfer to the Paisley branch. The claimant was not one of them. The claimant was informed about the outcome of the scoring criteria at a
20 meeting on 17 March 2018. He was unhappy about the outcome but did not challenge the score he had received.
- 25 8. Based on their meetings with him, the claimant's Managers proceeded on the basis that he was willing to accept a transfer to an Arnold Clark branch to avoid redundancy. The claimant met with Stephen DaSilva, John Fyfe and Geraldine Bjonness from Arnold Clark on 21 March 2018. The claimant explained that he did not want to transfer to an Arnold Clark branch. This took the claimant's Managers by surprise. The claimant enquired about what he would be entitled to receive if made redundant. John Fyfe informed
30 the claimant that there had been some staff changes and that he would confirm what was on offer.
9. Stephen DaSilva informed the claimant by e mail on 22 March 2018 (P38) about the possibility of additional Sales Executive roles in the Paisley

branch. The claimant had by then decided that he wanted to leave the respondent's employment with a redundancy payment.

5 10. The claimant met with John Fyfe on 24 March 2018. John Fyfe informed the claimant about a Sales Executive role with the respondent at the Paisley branch. Other than location and the type of vehicle that the claimant would be required to sell – Mitsubishi as opposed to Honda - his terms and conditions in Paisley would be the same as those under which he was employed at the Glasgow branch. The claimant informed John Fyfe that he
10 felt it was too late for him to consider the offer of an alternative role as he had promised to accept employment with a friend who he did not want to let down.

15 11. John Fyfe wrote to the claimant on 27 March 2018 (P41) referring to the "*very suitable offer*" of relocation to the Paisley branch. He reminded the claimant that he had not received notice of redundancy and that if he was to leave in these circumstances he would not receive a redundancy payment. The claimant replied in writing the following day (P41) to confirm that he felt the respondent had left it too late to offer him a position. John Fyfe replied
20 later that day to confirm that the offer had been made during the 30-day consultation period and in response to the claimant saying that he wanted a position in Paisley. John Fyfe advised the claimant that he "*will really need to accept*" the post and that he was expecting the claimant to attend work in Paisley the following week.

25 12. P45s were issued to employees based at the Glasgow branch, including the claimant, on 26 March 2018 confirming termination of their employment as at 31 March 2018. The claimant was working with Peter Mustard on 31 March 2018. Peter Mustard was the Manager of the Honda branch in
30 Paisley. He offered the claimant a post as Sales Executive in Paisley. The claimant declined the offer confirming that he had another job to go to.

13. The claimant did not receive notice from the respondent of the termination of his contract of employment. The claimant did not receive a redundancy

5 payment. The claimant did not attend work after 31 March 2018 on the basis that his employment with the respondent had ended. The respondent issued the claimant with a further P45 at the end of April 2018 recording his date of leaving their employment as 6 April 2018. The claimant was paid to 31 March 2018.

ISSUES

10 14. The issues before the Tribunal were (i) whether the claimant was dismissed by the respondent; (ii) if the claimant was dismissed, whether his dismissal was fair or unfair; (iii) if the claimant was dismissed, whether the respondent give him notice of his dismissal & (iv) if the claimant was unfairly dismissed and/or the respondent failed to give the claimant notice of his dismissal, what if any compensation including a redundancy payment should be awarded to the claimant.

15 DISCUSSION & DELIBERATIONS

15 15. In terms of Section 95(1) of the Employment Rights Act 1996 ("ERA"), an employee is dismissed by his employer if (a) the contract under which he is employed is terminated by the employer (whether with or without notice); (b) 20 the limited-term contract under which the employee is employed expires by virtue of the limiting event or (c) the employee terminates the contract (with or without notice) in circumstances in which he is entitled to resign without notice by reason of the employer's conduct. It was the respondent's position that the claimant was not dismissed either expressly in terms of Section 25 95(1) (a) of ERA or constructively in terms of Section 95(1) (c) of ERA. (There was no suggestion that the claimant was employed under a limited-term contract). The claimant, submitted the respondent, left their employment of his own volition to take up alternative employment elsewhere. The claimant submitted that on receipt of his P45 he was 30 entitled to assume that he had been dismissed and that any offer of alternative employment was an attempt by the respondent to avoid liability for his redundancy payment.

16. The Tribunal was satisfied that the contract under which the claimant was employed was terminated by the respondent. It was not in dispute that the claimant was employed to work as a Sales Executive at the Glasgow branch. The Glasgow branch closed at the end of March 2018. The claimant received a P45 confirming termination of his employment as at 31 March 2018. There was no satisfactory explanation provided as to why a further P45 was issued to the claimant after his employment ended on 31 March 2018. The claimant did not accept the offer of alternative work at Paisley. The Tribunal did not agree with the respondent that they were entitled to treat this as the claimant having resigned from his employment. The claimant's employment with the respondent's ended on 31 March 2018 when the Glasgow branch closed. In all the circumstances, the Tribunal was satisfied that the claimant was dismissed by the respondent in terms of Section 95(1) (a) of ERA.

17. Section 139(1) (a) of ERA provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed in the place where the employee was so employed. In other words, if the employer closes the workplace where the employee was employed, the employee will be redundant. As referred to above, it was not in dispute that the claimant was employed to work as a Sales Executive at the Glasgow branch. It was not in dispute that the respondent ceased trading at the Glasgow branch on 31 March 2018. From that date the claimant did not have a job with the respondent as a Sales Executive in the Glasgow branch. He was issued with a P45 confirming his leaving date as at 31 March 2018. He did not accept a move to the respondent's workplace in Paisley. The Tribunal was satisfied that in all the circumstances the claimant's dismissal was by reason of redundancy.

18. The claimant submitted that his dismissal was unfair. Redundancy is a potentially fair reason for dismissal in terms of Section 98 (2) (c) of ERA. There being a potentially fair reason for dismissal, the Tribunal went on to

consider whether the claimant's dismissal was fair or unfair having regard to the claimant being redundant. In terms of Section 98(4)(a) of ERA, this depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking), the respondent acted reasonably or unreasonably in treating the claimant's redundancy as a sufficient reason for dismissing him. This must be determined in accordance with equity and the substantial merits of the case in terms of Section 98(4)(b) of ERA. The Tribunal was satisfied that in all the circumstances the respondent acted reasonably in response to the claimant's redundancy in terms of Section 98(4) of ERA. The respondent consulted with the claimant about the redundancy situation. The claimant did not challenge the fairness of the selection process. The respondent made reasonable attempts to find the claimant alternative employment, firstly with Arnold Clark and subsequently at their branch in Paisley. The respondent acted reasonably. They sought to avoid the claimant's dismissal by finding him an alternative post. In all the circumstances the claimant was not unfairly dismissed.

19. The claimant submitted that having been dismissed by reason of redundancy he was entitled to a redundancy payment. In terms of Section 141 of ERA, where an offer is made to an employee before the end of his employment to either renew his contract of employment or to re-engage him under a new contract of employment, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer. The Tribunal was satisfied that an offer was made to the claimant before the end of his employment to re-engage him under a new contract of employment at the Paisley branch. The Tribunal was satisfied that the offers of employment as a Sales Executive selling Mitsubishi vehicles and subsequently selling Hondas at the Paisley branch were made before the end of his employment. The Tribunal did not agree with the claimant that the timing of the offers was unreasonable or that the offers failed to take account of his age and health. They were made during the period of consultation, albeit in the case of the Honda Sales Executive on the final day of his employment. They were to

work as a Sales Executive. They were to sell motor vehicles and in the case of the Honda Sales Executive to sell the same type of vehicle that he sold at the Glasgow branch. The Tribunal was satisfied that in all the circumstances the claimant was offered suitable alternative employment which he had
5 unreasonably refused. In all the circumstances, the Tribunal was not persuaded that in terms of Section 141 of ERA the claimant was entitled to a redundancy payment.

20. The claimant also sought notice pay. He submitted that the respondent had
10 failed to give him notice of termination of his employment. The Tribunal was not persuaded that the claimant had been given notice of the termination of his employment. The Tribunal did not agree with the respondent that the consultation period of 30 days amounted to notice that the claimant's
15 contract of employment would end on 31 March 2018. It was not in dispute that the claimant had been employed continuously by the respondent for fourteen years. In terms of his contract of employment (P22 – 29) the claimant was entitled to receive notice of termination of his employment from the respondent of 12 weeks. The respondent having failed to give the
20 claimant notice of the termination of his contract of employment were in breach of contract. Based on his weekly wage of £415 the claimant is entitled to notice pay of £4,980 (12 weeks x £415).

25 Employment Judge: Frances Eccles
Date of Judgment: 14 August 2018
Entered in register: 22 August 2018
and copied to parties