



# EMPLOYMENT TRIBUNALS

BETWEEN

Claimant  
Mr S Bousfield

AND

Respondent  
The Cornwall Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin

ON

28 January 2019

EMPLOYMENT JUDGE N J Roper

## Representation

For the Claimant: In person For the Respondent: Mr N Moore of Counsel

## **JUDGMENT**

The judgment of the tribunal is that the claimant's claims are dismissed.

## **RESERVED REASONS**

1. In this case the claimant Mr Simon Bousfield claims that he has been unfairly constructively dismissed, and also brings a claim that he is entitled to a statutory redundancy payment. The respondent contends that the claimant resigned, that there was no dismissal, and that the claimant is not entitled to a statutory redundancy payment.
2. I have heard from the claimant, and I have heard from Ms Morwena Bennetts and Mrs Abby Cockings on behalf of the respondent.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

4. The claimant was employed by the respondent Council from 3 October 2011 until his resignation which took effect on 31 August 2018. He was employed as a Payroll Administrator (Control) at grade F working 32 hours per week. In this capacity he was part of the respondent's wider Transactional Services team which involved a combination of the Payroll and HR administrative services, finance processing and the First Point Helpdesk. The Payroll and HR Administration teams performed the processing of payrolls not only for the respondent Council, but also for other public sector organisations.
5. The claimant's Statement of Particulars of Employment included a paragraph headed "Role and Responsibilities" which provided: "Your current role and responsibilities are set out in the role profile attached to this statement. The role profile is not to be regarded as an exclusive or exhaustive definition of your role. The Council reserves the right to vary your role profile from time to time to reflect changes in or to the role. You will be consulted about any proposed changes. You will be expected to undertake other work associated with your role at a similar level of responsibility."
6. The claimant's role profile dated January 2010 explained that the purpose of his role was: "To undertake payroll control processes, ensuring that the payment of salaries and wages is performed efficiently accurately and at the appropriate time for Cornwall Council and external clients." It also included the following provision: "This role will ensure compliance with statutory legislation e.g. HMRC, DWP, Teachers' Pensions, LG Pension scheme and the Data Protection Act, along with the Council's policies and procedures." The list of Accountabilities also included: "Year-end returns including P60s, P 14s, P 35s, Teachers' Pensions, and LGPS returns" and "Assist with other administrative duties as required by the Employment Support and Payroll Manager in accordance with the grade of the post and provide assistance and support to other members of the Employment Support & Payroll Team in areas requiring their expertise."
7. The claimant's Role Profile was updated and reissued on 15 December 2016. This document made it clear that the Accountabilities "May vary from time to time without changing the general character of the role or the level of responsibility entailed. Individual objectives will be agreed via the PDS appraisal process." The Accountabilities included: "Year-end returns including P60s, P11Ds, Teachers' Pensions and LGPS returns".
8. Towards the end of 2016 the respondent had reduced need for employees in the specific role of Pension Administrator, and increased need for Payroll Administrators (Control). The respondent decided to merge the specific Pension administration work into the Payroll team. During January 2017 the respondent consulted with all members of the Payroll Control team to explain that the pension administration work would be spread out within their team to increase their knowledge, and that they would be supported with additional training. This additional work over and above existing Teachers' Pensions referral work was added to the 2017/2018 PDS appraisal objectives of all members of the Payroll Control team. They were asked to gain a full understanding of the processes involved, and given training and support.
9. The claimant's PDS appraisal took place on 27 April 2017. The claimant completed the relevant appraisal review forms in November 2017 which shows that he personally acknowledged and created a performance objective namely: "Completion of all Teachers' Pensions forms and assist with telephone and email

- queries". His line manager Ms Bennetts, from whom I have heard, noted on the form that the claimant had been successful in this respect and had "been completing Pensions work as part of the rota through the year, he's gaining knowledge through the MDC and forms to be able to answer questions when required". Other review comments were very positive about the claimant's good relationship with colleagues within the team, his professional attitude, his good organisation, his flexibility, and his willingness to share knowledge and encourage others within the team.
10. The position towards the end of 2017 was, in summary, as follows: the claimant's job duties had always included some work referring to Teachers' Pensions; this had increased slightly from January 2017; the work referred to was clearly within the claimant's job duties and Role Profile as amended; and (as the claimant admitted in cross-examination) he did not have to do very much of the additional Teachers' Pension work and it had very little impact on his existing duties. In addition, it is clear that the claimant had not raised any objection to the changes from the period when they were proposed, and then introduced, to when they were well established.
  11. Unfortunately, the claimant's father then became very ill and subsequently died. The claimant was absent on bereavement leave in early 2018 and following his return was absent from number of weeks on certified sickness absence. Towards the end of this period the claimant wrote to the respondent on 28 June 2018 by way of objection. His letter states: "I would like to give formal notice of my objection to the changes to my role which had been imposed upon me. I work as a Payroll Administrator (Control) in the Payroll Control team, which has now been merged with the Teachers Pensions Administration team. I should make it clear at this point this is not a case of me being resistant to the inevitable evolution of my role. I accept and welcome changes which are clearly payroll tasks, such as the work we have to do resulting from new legislation. This is a fundamental change to the nature of my role which is a clear breach of my contractual and employment rights." The claimant also made: "a formal request to be made redundant rather than continue in the new merged role."
  12. Ms Bennetts responded to the claimant by letter dated 23 July 2018 confirming that following automation of much of the Pension Administrators roles what was left of the duties were merged with effect from February 2017 into the Payroll Administration (Control) role. This was at the same grade (grade F) and similar in nature because both involved technical payroll matters. The work was undertaken by the team on a rota basis and was less than 10% of the work required. For these reasons the respondent considered it to be a minor change of duties and in accordance with the existing role profile and flexibility provision. The respondent confirmed that it did not consider that the change was in any way a fundamental change to the claimant's role. In addition, the respondent confirmed that there was no redundancy situation or redundancy process, and that the respondent would not dismiss the claimant by reason of redundancy as requested.
  13. The claimant then resigned his employer by letter dated 30 July 2018. He started his letter by stating: "It has become clear to me that the factors that led to me being signed off work by my GP will remain and therefore, as my health is my paramount concern, I have to inform you that I shall not be returning to work." The claimant denied that the changes to his job profile were minor and he concluded his letter

- by stating that he regarded his resignation as a constructive dismissal because the respondent was in repudiatory breach of contract.
14. The respondent tried to discuss the matter further with the claimant and asked him to confirm the position. Despite ongoing discussions about the possibility of resolving the matter, the claimant subsequently confirmed his resignation with effect from 31 August 2018.
  15. Having established the above facts, I now apply the law.
  16. Under section 95(1)(c) of the Employment Rights Act 1996 (“the Act”), an employee is dismissed if he 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.
  17. Only if the claimant’s resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides “... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) 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 – (b) shall be determined in accordance with equity and the substantial merits of the case”.
  18. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) “the fact that the requirements of (the employer’s) business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish”
  19. I have considered the case of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”).
  20. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer’s conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”
  21. As explained in his Details of Case which accompanied his originating application, the claimant complains that in 2017 there were changes made to his post and it was merged with that of Teachers’ Pension Administrator. It had little impact on

- him personally until his return from bereavement leave in February 2018, but then the situation began to affect his health. He states: "It therefore became clear to me that, as any return to work in the merged role would have presented a real risk to my health, I had no alternative but to leave this merged post, which I did with effect from 31 August 2018. I resigned from the merged post, not the one in which I had a contract of employment. I did not agree at any point to the change in my contract of employment; in fact this change was not discussed with me prior to the change other than to inform me that the Teachers' Pension Administration work was to be part of my job. This was in contravention of my contractual and employment rights."
22. Unfortunately for the claimant I do not agree with that summary. In my judgment the claimant's pre-existing role as a Payroll Administrator at grade F included some referral work relating to Teachers' Pensions before 2017. After the merger of the work in about February 2017, there was more referral work relating to Teachers' Pension enquiries which on occasions might have gone beyond merely the research of personal payroll data, which is why further training was required, and given. Nonetheless in my judgment this was clearly within the claimant's Statement of Particulars of Employment which enabled the Council to vary his role profile from time to time to reflect changes in his role. The extra work was less than 10% of the total payroll duties which was divided amongst the team on a rota basis. It was a minor change to the claimant's role profile, and the claimant has accepted that the change made very little difference to his working arrangements and his normal contractual duties. The claimant was consulted fully about the changes in advance, and training was provided. In addition, it is clear that the claimant accepted this minor change at the time, and did not raise any objection to the changes until nearly 18 months later.
  23. For these reasons I reject the claimant's assertion that the respondent was in repudiatory breach of contract by imposing an unauthorised and unagreed variation in the terms of its contract of employment with the claimant. Not only was the claim minor, it was within the claimant's Role Profiles, and in any event within the respondent's flexibility provisions to make minor changes consistent with existing duties following consultation. The respondent consulted about the change, the minimal new duties were consistent with the claimant's existing payroll and grade, they were shared on a rota basis, and made no significant impact to the claimant's working arrangements. There was therefore no breach of contract on the part of the respondent.
  24. In any event, even if there had been a breach of contract, the claimant clearly affirmed any such breach by working on under the new arrangements for over a year before raising any complaint about it.
  25. For these reasons the claimant's resignation cannot be construed to be his dismissal, and I find that the claimant's resignation was not a constructive dismissal by the respondent. In circumstances with the claimant resigned and was not dismissed, his unfair dismissal claim is therefore dismissed.
  26. In addition, in order to be entitled to a statutory redundancy payment, the claimant must be dismissed and that dismissal must be attributable to redundancy. On the facts of this case there was no dismissal, and no redundancy, and accordingly the claimant is not entitled to a statutory redundancy payment.
  27. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 14; a concise

identification of the relevant law is at paragraphs 16 to 21; and how that law has been applied to those findings in order to decide the issues is at paragraphs 22 to 26.

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Employment Judge N J Roper

Dated: 28 January 2019