



EMPLOYMENT TRIBUNALS

Claimant

David Preston

V

Respondent

City of Bradford Metropolitan
District Council

Heard at: Leeds

On: 13 July 2018

Before: Employment Judge R S Drake

Appearances

For the Claimant: In Person

For the Respondent: Ms R Wilson (Solicitor)

JUDGMENT

1. The Tribunal finds that the Claimant was not dismissed either expressly or constructively as defined by Section 95 of the Employment Rights Act 1996 ("ERA").
2. The Tribunal further finds that the Claimant was not unfairly dismissed for the purposes of Section 98 ERA and nor that he is entitled to a redundancy payment for the purposes of Section 135 ERA

REASONS

The Claims and the Issues

1. The Respondents were legally represented but the Claimant was not so I took special care to ensure that his explanation of his case, his cross examination and his understanding of procedure were enhanced by my assistance and intervention when necessary,

2. The Tribunal heard oral evidence from the Claimant himself given by way of taking as read a written statement supported by supplementary testimony, cross examination and reference to a number of documents in an agreed bundle. The Tribunal also heard evidence for the Respondents from Ms Alison Milner, Mrs Shelley Clarkson, Mrs Beverly Maybury and received unchallenged witness statements from Mr Martin Stubbs, Mr Imran Rathore and Ms Suzanne Dunkley. These testimonies again were in the form of written statement, supplemental oral evidence, cross examination (with which I assisted the Claimant) and reference to a number of documents in the agreed bundle.
3. The Tribunal had before it the claims which are as follows.
 - 3.1 The Claimant complains of unfair dismissal, and the right to a redundancy payment;
 - 3.2 The Respondents resist these claims asserting that the Claimant voluntarily resigned in circumstances not amounting to unfair constructive dismissal, but that if there was a dismissal, it was fair in that it was because of some other substantial reason being either a major reorganisation or that it was because the Claimant failed to accept an alternative post which it was unreasonable for him to reject when his existing post was made redundant;
 - 3.3 Further the Respondents assert that they acted procedurally fairly, and that they acted reasonably in relying on the reason they can show as being sufficient for dismissal
 - 3.4 However, their primary and main assertion is that the Claimant resigned and was not dismissed and is therefore not entitled to claim either unfair dismissal or redundancy.

The burden of proof of entitlement to compensation for unfair dismissal where dismissal is denied, and for a redundancy payment in such circumstances rests with the Claimant. If the Claimant establishes dismissal, then the burden of proving what the reason was for dismissal and that it was potentially fair rests with the Respondents. I explained all this to the Claimant being as he was unrepresented. The Tribunal also heard detailed submissions by both sides after evidence, and I will refer where relevant to each of those.

The Law

I set out passages relevant to the issues in this case leaving out extracts which are not.

4. **Section 95** of the **Employment Rights Act 1996** (“ERA”) provides that: -
“for the purposes of this part of this Act an employee is dismissed by his employer
.... only if

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

6 Section 95 (or its predecessor in identical statutory enactment) is elaborated and explained by the celebrated decision of the Court of Appeal, Lord Denning MR presiding, in **Western Excavating (ECC) v Sharp [1978] ICR 221**. In that case Lord Denning said and held as follows:

"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 the employer's conduct and he is constructively dismissed"

This case is also authority for the proposition that the breach must be the direct cause of the resignation and resignation must be timely.

7 By reason of my findings below, I am not setting out the full content of **Section 98** of the ERA, since it is unnecessary to do so unless dismissal were or had been proved. I do set out **Section 135** which is still relevant :-

"(1) An employer shall pay a redundancy payment to any employee of his if the employee - (a) is dismissed by the employer by reason of redundancy, or (b) is eligible for a redundancy payment by reason of being laid off or kept on short time ... "

In this case, the Claimant asserts entitlement under sub section (1)(a) and not (1)(b)

What is immediately apparent is that entitlement derives from dismissal which if contested has to be proved by the Claimant.

The Facts

8. I find that all witnesses gave their evidence to me sincerely and with considerable mutual high regard on both sides. Remarkably, there was little or no conflict of evidence apparent in relation to the key issues as identified above. What mattered is what interpretation a reasonable person may put on words used in the circumstances when they were uttered.

9 These are essentially found as follows.

9.1 The Claimant has been employed with the same Respondent since he started work on 15 December 1980 and rose through the ranks to the level of

Policy, Programmes and Change Manager, a position of highly regarded trust and confidence; he clearly held a high reputation in the Respondents' eyes;

9.2 The Claimant had observed and indeed managed the process called "assimilation" on four previous occasions whereby posts were absorbed into others so as to reduce headcount at times when the Respondents perceived the need to cut cost; in August 2017 his own post was identified for consideration for redundancy because of an assimilation process and he was consulted about this at all relevant stages;

9.3 He had twice requested to be considered for Voluntary Redundancy in the recent past, but in keeping with the right to do so, the Respondents declined, as they wished to retain the Claimant and his considerable range of skills and experience; he was clearly held in high regard;

9.4 The Claimant had not produced his contract of employment for me to see, but readily accepted that it incorporated (by reference to sources available internally within the Respondents' organisation) and he was therefore bound by a number of collectively agreed Policies and Procedures including a Redeployment Policy relevant for use in redundancy situations.

9.5 That Policy does not allow for employees, whose posts are considered to be assimilable in other posts or capable of moving to another similar post, to be entitled to expect redeployment or redundancy;

9.6 The Claimant did not challenge the way the Respondents' officers managed and handled the process of assessing their requirements and their plans to assimilate certain posts within others, but he suggested that insufficient consideration was given to the principal question he raised as to the possible assimilation of his post in a new post; in short he felt he didn't have the required level of specific skills to fulfil a new post called "Head of Policy and Performance" as he felt he would be responsible for formulating and writing Policy - whereas the Respondents' view was that the post required management of others doing such tasks, and that given his wealth of experience, the Claimant was more than sufficiently qualified and experienced for that new task;

9.5 The Claimant discussed with his immediate superior Mrs Milner the plan to assimilate his existing role into the new role; Mrs Milner sought to reassure him by showing that the new post was managing the same resources as the Claimant was already managing but that though the work of his subordinates would be different, his role in managing people was essentially the same - but the Claimant was not to be reassured;

9.6 He was informed of the decision to assimilate his role in the new post by letter dated 3 August 2017, so he utilised the Policy appeals procedure and mounted an appeal to a panel chaired by Mr Stubbs on 17 August 2017 at which time he raised the same concerns and Mrs Milner presented management's case for why the new post was not requiring objectively substantial change even though the Claimant subjectively thought it did; the appeal was unsuccessful;

9.7 The Claimant then sought consideration for redeployment and says that he didn't think Mrs Milner and her colleagues properly even addressed their

collective minds to the subject; I find they did, and that the Claimant simply seeks to infer that “they didn’t consider” from they “didn’t agree with him”;

9/7 The Respondents, via the actions of Mrs Milner and Mrs Clarkson, did look at redeployment and made enquiry of the relevant department, only to be told that redeployment couldn’t be considered for someone in a post regarded as assimilable and that this was within agreed Policy , effectively an element incorporated in the Claimant’s contract;

9.7 The Claimant was told, with not inconsiderable regret by Mrs Milner, that he couldn’t be considered for redeployment; she again sought to persuade him to accept the new post already made available to him by 3 August 2017, but told him he was free to look elsewhere within the Respondents’ organisation for a post he might think might better suit him, but that otherwise, there was no alternative available to consider and that the new post was a post he could be expected to take;

9.8 The Claimant decided to resign rather than take the new post and he communicated his clear and unequivocal resignation by letter dated 22 September 2017; he was not expressly dismissed and certainly not by reason of redundancy.

Consideration and Conclusions

10 In answer to the question of whether the Claimant was entitled to resign in circumstances whereby he could do so without giving notice, I have to consider whether anything done by the Respondents amounted to breach of a fundamental term of the Claimant’s contract (such as trust and confidence) and my findings in this respect are as follows according to the facts as found: -

10.1 By his own admission, the Claimant’s contract incorporates agreed Policies which include the terms or bases for assimilation and for redeployment where assimilation is or isn’t possible; he could expect to be bound by them and that the Respondents would act in accordance with them, and I find they have;

10.2 The hallmarks of the findings of fact in this case are characterised by the Respondents’ corporate express effort not to lose the Claimant, and to try to assuage his concerns about the new post, and thus I find nothing has the substance or appearance of an employer ignoring its duties or responsibilities to this employee, or showing it has no intention of being bound by its fundamental duty not to act in a way calculated to undermine trust and confidence, being the sort of conduct case law cites as a basis for constructive dismissal;

10.3 Despite the Claimant’s views to the contrary, I find that a reasonable bystander would not find the content of the new post as so fundamentally different to the existing post to such a degree that by offering it, and by then requiring the Claimant to take up the post in accordance with what the Respondents could lawfully expect of him under his contract, that it could amount to a fundamental change of terms entitling the Claimant to resign and complain of constructive dismissal; I find it could not amount to fundamental breach;

10.4 The Claimant resigned as was his right, but nothing he has shown demonstrates a right to resign without giving notice; what he was required to do

in the assimilated or new role was what the Respondents could lawfully expect of him; the new role was not one he could reasonably refuse, but the Respondents nevertheless gave credence to his concerns and examined them in good faith and with diligence, which is not the mark of an employer seeking to or having disregard to its duty of trust and confidence;

11. Accordingly, I cannot find that the Claimant has established either that he was expressly dismissed or that he was constructively dismissed for, in each case, the purposes of Section 95 ERA.

12 If I had concluded there had been a dismissal, I find that the reason was major restructuring which is a potentially fair reason for dismissal as described as or falling within "some other substantial reason" for the purposes of the definition of such under Section 98 (1)(b) ERA.

13 Further, if I had found a dismissal, then I would equally have found that the lengths the Respondents went to in order to arrive at a reasonable decision as to how to structure their workforce, to deal with the consequences fairly so far as that conclusion affected the Claimant's position, and to exert every possible effort not to dismiss him, were all such that very clearly they acted reasonably in all the circumstances so as to make any dismissal procedurally as well as substantively fair in accordance with equity and the substantial merits of the case for the purposes of Section 98(4) ERA.

14 Accordingly for the reasons expressed in paragraphs 12 and 13 above, I find that had it been necessary for them to do so, the Respondents have discharged the burden of showing what was the reason for any imputed dismissal, and I am satisfied that they acted reasonably in all the circumstances. Therefore, any claim of unfair dismissal fails and is dismissed

15 On the subject of the right to claim a redundancy payment, which was the only remedy sought by the Claimant, his claim must fail as he cannot show for the purposes of Section 135 that he was dismissed, so that claim fails and is also dismissed.

16 I am satisfied, should I need to say so that all parties have acted reasonably throughout these proceedings and all parts of the process leading up to their conclusion.

Employment Judge R S Drake

19/07/2018