EMPLOYMENT TRIBUNALS

Claimant: Mr T Wawiorko

Respondent: Cranswick Country Foods PLC t/a Cranswick Continental Foods

Heard at: Manchester **On:** 21 March 2019

Before: Employment Judge Rice-Birchall
(sitting alone)

REPRESENTATION:

Claimant: Mr J Quirke, Citizens Advice Bureau
Respondent: Mr J Jenkins of Counsel

JUDGMENT having been sent to the parties on 22 March 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues

1. These were the claimant's claims for a redundancy payment, unfair dismissal and wrongful dismissal. The claimant's claim for arrears of pay was dismissed on withdrawal by the claimant.

Was the claimant dismissed?

2. Was the claimant's contract of employment terminated by the respondent?

3. If not, was it terminated by the claimant in circumstances in which the Claimant was entitled to terminate it without notice by reason of the respondent's conduct? This gives rise to the following sub-issues:

    a. Was it a term of the claimant's contract that the respondent was allowed to move him?

    b. If so, did the respondent act reasonably in relying on that term?

Unfair dismissal

4. If the claimant was dismissed, actually or constructively:

    a. what was the reason? Was it redundancy or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held?

    b. did the respondent act fairly in dismissing the claimant?

    c. if the reason was redundancy, is the claimant entitled to a redundancy payment?

Wrongful dismissal

5. Was the claimant wrongfully dismissed? Is he entitled to notice pay?

The evidence

6. I had the benefit of a bundle of documents and I heard witness evidence from Mr Feenan, the respondent's Operations and Logistics Manager, and from the claimant in person.

Findings of Fact

7. The claimant commenced employment in September 2004. He was a well-liked and respected member of staff who did a very good job for the respondent.

8. The claimant's contract appeared in the bundle and the significant paragraphs are referred to in the respondent's witness statement at paragraphs 6 and 7. The crucial clause was found in two interacting documents: one headed "Employment Terms" in the bundle at page 32, and the other headed "Contract of Employment" also in the bundle. The claimant's contract of employment contained a mobility clause which stated, "normal place of work 2 Polo Road, Guinness Circle, Trafford Park" (which the respondent referred to as "Guinness Circle") "subject to the provisions of paragraph 12 (which is a typo for paragraph 11) of the contract below".

9. Paragraph 11 states:

> "Your normal place of work is stated at paragraph 17 (in parenthesis 18) of the summary, but the company reserves the right to change this on a permanent basis upon one month's notice to you."

10. It was not disputed that these clauses were contained in the claimant's contract, and were, further, common to all of the employees who were employed at Guinness Circle.

11. As early as 2017, the respondent's employees were made aware that relocation was a possibility. Obviously that creates some uncertainty for employees, who were anxious to know more about what was going to be happening and the effect on them.

12. The first clear indication of a move afoot was dated 16 January 2017, more than 14 months before the actual move took place. A communication to employees made it very clear that the respondent intended to start a consultation process and would give time to everybody to discuss their thoughts, and informed employees that

the building work had now begun on site (with a long lead-in time as the construction work would take some time).

13. So, as early as January 2017 all employees knew there was a possibility of a move in due course. A consultation process began. It was conducted collectively with works' committees, but it is clear that individual employees' concerns were raised and considered by the respondent, and that measures were taken in response to those concerns. The clear example from the documentation is that there was an increase in pay made by the respondent. The increase was made to the hourly rate of pay rather than by way of a lump sum at the request of the employees.

14. Other employees raised concerns around getting home after the end of the 11.00pm shift from the changed location. In order to alleviate employees' concerns, the respondent agreed to provide, at least for a period of time, a bus for collection from Bury back to three drop-off points at the end of the 11.00pm shift. Those three drop-off points included Eccles, where the claimant lived.

15. Meaningful consultation took place. The respondent took into account the worries and concerns raised by employees and sought to alleviate them. There was good reason for that, which was that the respondent wanted all of its employees to move with it to the new location. It was in their interests to consult meaningfully and take appropriate steps to facilitate the move.

16. Although the respondent consulted meaningfully, this was not a redundancy consultation. Rather, the respondent relied on the mobility clause in the contract. to move its employees to the new site.

17. On 10 April 2017, the claimant wrote his first communication to the respondent. His letter makes it very clear that he felt unable to move to Bury, and had no intention of moving to the new site. He said that this was due to his family commitments, as he had a young family, and he asked the respondent for work at Guinness Circle where he was currently employed for as long as that work was available. Again, it is clear that the respondent listened and took on board the claimant's comments because indeed the claimant did continue to work at Guinness Circle after the relocation of the majority of his colleagues and until the termination of his employment.

18. There came a time when work at Guinness Circle would cease and the respondent wanted the claimant to move to Bury with his colleagues. A date for that move was set.

19. On 14 May 2017, the claimant wrote to the respondent again. Again, he set out his firm intention not to move to the new workplace in Bury. This time, however, he requested a redundancy payment. This was the first time redundancy was raised as an issue at all. As stated above, the consultation had not been a redundancy consultation. The claimant threatened legal action if he did not get paid his redundancy payment. From that letter, it was clear that the claimant considered that the move to Bury was unreasonable because it would increase the time and cost of travelling to and from work.

20. Mr Feenan responded to the claimant's letter. He re-iterated that the respondent was entitled, as a result of the contract of employment and, specifically, the mobility clause in it, to change the claimant's place of work. He also confirmed

that this was not a redundancy situation and that, if the claimant did not turn up for a scheduled shift (at Bury), it would be treated as a disciplinary matter that may result in a dismissal for gross misconduct.

21. The claimant wrote back again on 18 May 2017. The letter was expressed as a grievance but concluded, “It gives me great sadness that I am unable to continue working for the company”. The letter preceded the claimant's annual leave, from which he did not return, as far as the respondent was concerned. The respondent sent the claimant his P45.

The Law

Dismissal or resignation

22. To succeed in a claim of unfair dismissal, the claimant has to establish that he was dismissed by the employer. A contract of employment may terminate in a number of different ways but the circumstances in which an employee is treated as having been dismissed for the purposes of an unfair dismissal claim are limited. In this case, the claimant would have to show that his contract of employment was terminated by the employer, whether with or without notice; or that he terminated the contract by resigning, whether with or without notice, but in circumstances in which he was entitled to do so by reason of the employer's conduct (constructive dismissal).

23. Dismissal does not include termination by the employee in a situation not amounting to constructive dismissal, ie genuine voluntary resignation.

24. Where a contract of employment is brought to an end by the express act of the employer, this is clearly a dismissal whether the employer gave notice or terminated the contract with immediate effect. Notice of dismissal can only generally be effective if and when received by the employee, ie the dismissal has to be communicated to be effective.

25. If ambiguous words are used to terminate a contract of employment, for example when ‘notice’ may have more than one meaning, such as the employee giving notice of leaving one department to move to another with the same employer rather than of ending employment completely, the court or tribunal should ask how they would have been understood by a reasonable listener, taking into account what that listener knew about the circumstances. Later events can be taken into account in that interpretation provided that they are genuinely explanatory of what happened and do not reflect a change of mind.

Constructive dismissal

26. The Tribunal referred to section 95(1)(c) and section 136(1)(c) of the Employment Rights Act 1996 (“ERA”) and to **Western Excavating (ECC) Limited v Sharp [1978] ICR 221** and the summary of the principles of law which apply in claims of constructive dismissal as set out by the Court of Appeal in **London Borough of Waltham Forrest v Omilaju [2005] IRLR 35**.

27. The first question is whether the employer committed a fundamental (or repudiatory) breach of the terms, express or implied, of the claimant's contract of employment. A Tribunal must decide in each case whether a breach of contract is

sufficiently serious to enable the innocent party to repudiate the contract. This is question of fact and degree.

28. The employer's repudiatory breach must be the effective cause of the employee's resignation but it does not have to be the sole cause: **Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493**.

29. It is not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for the resignation: it is for the Tribunal in each case to determine, as a matter of fact, whether or not the employee resigned, wholly or partly, in response to the employer's breach rather than for some other reason: **Weathersfield Ltd v Sargent [1999] IRLR 94**.

30. An employee must not delay too long in resigning, thus affirming the contract and losing the right to claim constructive dismissal.

Reason for dismissal: redundancy

31. A change in location can amount to a redundancy situation.

Conclusions

Did the claimant resign or was he dismissed?

32. The respondent would have continued to employ the claimant, and, in fact, really wanted to continue to employ him. There was a job for him in Bury. In the circumstances of this case, the claimant brought his employment to an end by writing the letter to the respondent to state that he would not move to Bury. The letter was unambiguous when it stated that the claimant was unable to continue to work for the respondent. He decided not to move to Bury knowing there was no longer a job for him at his original place of work.

33. The claimant's letters were unequivocal. They all made it very clear indeed that he would not continue to work for the respondent when the move occurred. It was therefore his decision to stop working and his choice alone. As I have said, the respondent wanted him to continue albeit at the new place of work.

34. Although, from the documents, it appears that the respondent would have dismissed the claimant if he had not turned up for work, it did not come to that because the claimant made his position very clear from the three letters he sent to the respondent. Accordingly, the claimant resigned and was not dismissed by the respondent.

Was the claimant constructively dismissed?

35. Clearly, as the claimant's contract contained an express mobility clause there is no breach of contract by requesting the claimant and his colleagues to move to a new location. However, the claimant says that the respondent did not exercise the mobility clause reasonably and thereby was entitled to treat himself as constructively unfairly dismissed. I disagree.

36. The respondent consulted meaningfully over the move. They took into account concerns that were raised and tried their very best to engage with employees to create solutions. The claimant gave no evidence to suggest that something he had suggested to the respondent had been ignored. All the evidence points to the respondent seeking solutions and making adjustments and accommodations as suggested. The respondent was clearly trying to get all its employees to work at the new site with it because that would have been the most effective way of continuing at the new site. They wanted to take the whole workforce, including the claimant, along with them and increased pay and put on a bus service to facilitate that. They largely succeeded in that aim.

37. It is difficult to see what more the respondent could have done or what it could have done differently. The respondent did all it could and acted reasonably in applying the mobility clause in all the circumstances of the case. Therefore, there was no fundamental breach of contact entitling the clamant to resign and successfully claim that he was constructively dismissed.

38. As there was no dismissal, the claimant' claims of fail and are dismissed.

39. For the avoidance of doubt, had there had been a dismissal, I would have found that that dismissal was fair in all the circumstances of the case for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. There was a good sound business reason for the move to a new site, and the respondent acted fairly and reasonably in all of the circumstances of the case. There would therefore have been no entitlement to a redundancy payment. Where there is a contract with a mobility clause, as in this case the employer can legitimately say "your place of work isn't just the workplace but where I can ask you to work under the contract" and therefore there is no redundancy in that situation.

40. The claimant's claims of unfair and wrongful dismissal and for a redundancy payment fail and are dismissed.

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Employment Judge Rice-Birchall

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Date: 23 June 2019

REASONS SENT TO THE PARTIES ON

3 July 2019

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