EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr G Hattersley	v	**Nationwide Crash Repair Centres Limited**

Heard at: **Hull** **On:** **30 January 2020**

Before: **Employment Judge Eeley**

Appearance:

For the Claimant: **Mr A Mighty, (Lay representative)**

For the Respondent: **Mr D Gagan, (HR Manager)**

JUDGMENT having been sent to the parties on 03 February 2020 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

Background

1. The claimant claims unfair dismissal, a redundancy payment and breach of contract in respect of notice pay. For the purposes of the hearing I had before me an agreed bundle of evidence. I read the documents to which I was referred by the parties. I have read witness statements and heard oral evidence from both the claimant and Mrs Emma Schofield, a team leader within HR shared services at the respondent.

Findings of fact

2. The claimant worked for the respondent as a panel beater and had done so for a number of years. In the beginning his work was based at Grimsby and then it moved to Hull in 2015. I have seen the contract of employment at page 26 dated 13 May 2015 which includes a mobility clause. At the date that the issue of potential redundancy arose in this case the claimant was based in a static role at Hull. He worked 5 to 10 minutes away from home and therefore managed to get to work

using his own transport with minimal costs. As a general rule he worked between 7am and 4pm Monday to Friday although there was some flexibility regarding start and finish times. His hourly rate was £13 per hour. He also had the benefit of an efficiency bonus: if the job that he was working on took a shorter time to complete than had been expected or estimated the claimant got a bonus payment for the time he saved. So, for example, a two-hour job completed within one hour would benefit the claimant by a further second hour's pay at a bonus rate. The bonus rate was £11.50 per hour.

3. Hull was a so-called "rapid work site". This involved slightly lighter, quicker work and overall it was easier to make the efficiency bonus in those circumstances. In addition to his work from Monday to Friday he worked occasional overtime on Saturdays, paid at time-and-a-half.

4. A brief chronology is as follows:

   4.1. On 2 July 2019 the proposal to close the Hull site was announced by the respondent. The members of the workforce were told about a restructure and consultation for suitable alternative employment at adjacent sites began.

   4.2. On 4 July 2019 (page 35 in the bundle) the claimant had his initial one-to-one consultation meeting. During that meeting there was consideration of a 'roaming' role. The claimant said he would consider working away and there were various discussions about Rapid Repair sites at Sheffield and Wakefield. These were considered to be too much of a daily commute. There was a discussion about work at Grimsby. The claimant said that this was potentially suitable alternative employment as he had worked there before. However, he noted that he would be losing time by going there and he would also be losing money so in his view there had to be "something in it for him." The respondent confirmed that rather than dismissing the claimant it wanted to redeploy him. During the course of this meeting the claimant mentioned avoiding heavy work as it gave him a bad back. He liked the rapid work because it was lighter.

   4.3. On 12 July 2019 there was the second one-to-one consultation meeting (notes are at page 39). The respondent offered a roaming role involving a fully expensed car, fuel card, business mileage and a pay increase of £1 per hour. There was a guaranteed bonus for the first two months based on his previous six months' worth of earnings and a retention bonus of two weeks' pay if the claimant remained in employment until June 2020. There would be some pay for travel. The claimant's concerns remained in relation to how he would be able to make a bonus at a similar level to that in his previous post. There was further discussion between the parties in relation to alternative static roles. The claimant went on to indicate that he had received an offer of employment from one of the respondent's competitors at the rate of £13.50 per hour.

4.4. On 23 July 2019 there was a third consultation meeting (page 42). The claimant raised the issue as to whether his contract of employment specified that he was only to work in Hull. The respondent disputed this and pointed to the mobility clause. The claimant referred to a letter from the General Manager in 2015 but the respondent disputed the applicability of this given that it was not a contract of employment and it had not emanated from the HR Department. The respondent went on to assert that it was custom and practice for members to work across sites within the region. The respondent presented the claimant with offer letters in relation to both the roaming role and the fixed location work at Grimsby. It was noted that the Grimsby role would accrue an extra £1.38 per hour which would amount to roughly £11 per day. The claimant put his objections in writing (page 49).

4.5. On 30 July 2019 (page 43) there was a fourth consultation meeting and the claimant was handed redeployment offers with revised contracts. He was told that, for the purposes of the roaming role, he would be provided with a van rather than a car. The claimant, at this point, would still not commit to the move. There was a further discussion about working in Hull and the claimant pointed out that there were no vacancies and he would struggle to earn a bonus commensurate with his previous bonus levels. He was offered an extra hour's paid travel time if he went to the Grimsby role. The claimant was given time to consider his position. He notified the respondent that Turners, an alternative employer, had offered to accommodate him. It was recorded in the meeting notes that if these offers were considered reasonable alternative employment he would be expected to go to Grimsby and he could appeal the offer if he needed to.

4.6. On 1 August 2019 the claimant wrote some letters setting out why the jobs were not suitable. He pointed out that (after tax) he would not be better off financially. He pointed out that there would be no clause to cover fuel or bridge toll price rises. He noted that the Grimsby job would make it difficult for him to achieve his bonus as he would struggle to make time and efficiency savings. He also mentioned physical pressures of the roles. He requested redundancy pay. (Page 52)

4.7. On 2 August 2019 there was a further meeting where he handed over the letters written on 1 August. The discussion was that the claimant should "give it a go" for a month and if he still felt the same about his concerns then these would be heard by someone new (at a higher level within the organisation). The decision to offer that alternative employment would then either be maintained or overturned. The respondent had prepared a further letter dated 2 August 2019 (page 53) offering the redeployment to Grimsby.

4.8. On 5 August 2019 the respondent wrote a further letter (page 55) warning that if the claimant did not attend or notify the respondent otherwise, he would be taken to have resigned from his position. It was confirmed that this would be the case unless he got in touch with the respondent by 9 August 2019.

4.9. In the meantime, the claimant had visited the Grimsby site on 31 July 2019 and he noted (particularly in his letter at page 51) that staff there were saying that they were struggling to achieve bonus and that lots of employees were unhappy and had left the workplace.

4.10. On 7 August 2019 (page 56) there were updated offer letters from the respondent which increased the pay rates to account for the impact of tax upon the claimant's earnings. There was a further letter from the respondent on 7 August 2019 (page 59) which again indicated that the claimant was due to attend work at Grimsby on 5 August 2019, that he had not attended and so was considered to be absent without leave. There was a further letter (this time from the claimant) also dated 7 August 2019 but received by the respondent on 9 August 2019 (page 58). In this letter the claimant refused the redeployment and demanded a redundancy payment. He warned of potential Tribunal proceedings.

4.11. Finally, there was a further offer letter from the respondent on 23 August 2019 offering a Hull job (page 60).

5. To summarise, the offers that had been provided to the claimant by the end of the consultation period were as follows:

5.1. First, the role in Grimsby with an hourly rate of £13. For the first two months there would be a guaranteed bonus based on his past six months' worth of bonus. After two months the bonus would be calculated in the same way as it had been at Hull. The claimant's concerns were that it would not be as easy to make the bonus because it was not a rapid work site. The respondent indicated that it could control what type of work was allocated to the site to ensure that he was supplied with similar work to that which he had done at Hull. The increased hourly rate was in place for the first 40 hours per week. It was increased by £1.38 to a total of £14.38, this would work out at roughly an extra £11 per day. The reason for that increase was to cover travel and bridge costs. The claimant would still be using his own vehicle.

5.2. Second, the 'roaming role' would mean that the claimant would cover the respondent's other sites across the region at an hourly rate of £14. If he had to travel more than an hour to get to and from site he would be paid an hourly rate for his travel as well. He would be paid business mileage and would be provided with a van for storage of his tools. It would involve a mixture of work.

5.3. The offer letters for the roles were amended to take account of the effect of tax.

6. At this point in time the claimant's objections in relation to the Grimsby role were: that there would be an increase in travel time by 1 hour to 1 ½ hours per day; that he would have increased wear and tear on his car; that it was harder, or heavier work which would exacerbate his back problems. (The respondent's position was that it could divert lighter work to him via the central team which monitored and allocated work.) At this point in time the claimant's objections in relation to the roaming/mobile role were that he felt he needed a van (this was in fact offered by the respondent.) He indicated that the increased levels of travel would impact upon his personal life. He indicated that the time taken for him to get his bearings at every new site he visited would decrease his efficiency and therefore adversely impact upon his ability to earn a bonus at previous levels. He considered that both roles would make him worse off after tax although the respondent did in fact adjust the rates in question to account for that. He pointed out that there was no clause for fuel or bridge price rises but of course pay rates may be reviewed over time in any event.

The Law

7. In order to determine whether or not the claimant is entitled to a redundancy payment the Tribunal has to determine whether there was a redundancy situation within the meaning of section 139 Employment Rights Act 1996. In this case there was the closure of a workplace pursuant to section 139(1)(a)(ii). The respondent was looking to redeploy the workforce.

8. There is an entitlement to a redundancy payment under section 135 if the employee is dismissed by reason of redundancy. Section 136 indicates that a dismissal for these purposes can include an express or a constructive dismissal. An employee will lose the right to a payment if, before the end of the employment, the respondent offers suitable alternative employment and the claimant unreasonably refuses it. I have to assess the reasonableness and suitability of the alternative employment looking at all the relevant circumstances and taking into account the claimant's particular characteristics and circumstances. Consequently, there is an element of subjectivity to that assessment (i.e. from the particular claimant's point of view), not just an objective assessment.

9. The offer of alternative employment must start within 4 weeks of the effective date of termination. There is a statutory right to a 4 week trial period. If an employee takes the trial period and then unreasonably terminates the employment within the 4 week period they will lose entitlement to the redundancy payment.

10. So, the questions for the Tribunal in relation to this claimant's claim for a redundancy payment are:

    10.1. Was there a dismissal?

    10.2. If so, was that dismissal by reason of redundancy?

10.3. Was suitable alternative employment offered before the employment terminated which was due to start less than 4 weeks after the termination of the old job?

10.4. Did the claimant unreasonably refuse the offer of alternative employment in all the circumstances?

11. The test to be applied in the unfair dismissal claim is different. The Tribunal has to consider whether there was a dismissal and whether it was because of redundancy. The Tribunal then has to apply section 98(4) of the Employment Rights Act 1996 to determine the fairness of the dismissal. In particular, the Tribunal should consider: whether the claimant was fairly selected for redundancy; whether there was a reasonable and fair consultation process; whether suitable alternative employment was sought and offered and whether, overall, the decision to dismiss was within the so called "band of reasonable responses." The Tribunal should consider both the procedural and the substantive fairness of the decision to dismiss. If the dismissal is found to be unfair on procedural grounds the Tribunal can go on to consider whether there could have been a fair dismissal if the procedural flaw was rectified. The Tribunal can make a reduction in compensation in line with the principles in **Polkey and AE Dayton Services Ltd [1988] ICR 142**.

12. The final legal issue here is the claim for notice pay. That is a claim in breach of contract otherwise referred to as wrongful dismissal. Was the respondent entitled to dismiss the claimant summarily, without notice? In order to do so an employer will generally have to establish a repudiatory breach of contract on the part of the employee which releases the employer from further performance of the contract. A wrongful dismissal can be both express and constructive.

Conclusions

13. Redundancy payment.

13.1. There was a dismissal in this case. In this case it was a constructive dismissal. I conclude this because the respondent had effectively given the claimant an ultimatum to move into a new job as of the beginning of August. This job was not on the same terms as his existing job, there were significant differences between them and therefore an attempt to enforce the change in role was a fundamental breach of contract. The claimant resigned in response to that breach of contract. The reason for the change to a new role was the underlying redundancy situation i.e. the need to shut the Hull workplace. I conclude that the effective date of termination was 9 August which is when the claimant's letter accepting the repudiatory breach was received by the respondent.

13.2. Turning to the issue of suitable alternative employment as noted above, two offers were made: Grimsby and the roaming role. Both offers were made before the date of termination. (Although a further role at Hull was discussed

it was not offered to the claimant before the effective date of termination and so for the purposes of this test is to be left out of account.) I conclude that the Grimsby role was suitable alternative employment. Suitable alternative employment does not have to be like for like work, albeit both parties repeatedly referred to that in the course of the hearing. This is a case of re-engagement on new terms, not renewal of a contract on existing terms. The issue is therefore whether, overall, it is suitable. The test is not whether it is identical to the previous job. It does not have to be an ideal offer from the claimant's point of view. Taking into account the claimant's own circumstances I think the Grimsby role was suitable: the work could be tailored to ensure that the bonus was achieved and the claimant could and should have tried it out for the trial period to check whether in fact this would transpire. Indeed, the claimant had a two-month guaranteed bonus which would facilitate this trial period and indeed he also had a retention bonus offered to him. The rates of pay were also increased to account for the travel. Yes, there was an increase in travel for the claimant, but that would always be the case in circumstances where, as here, the claimant lived only five to ten minutes away from his original place of work. The travel distance in this case was not unreasonable. Much as it would be preferable for all concerned, the claimant could not reasonably expect the new role to be as close to home as his original role. There was some suggestion from the claimant that the increased travel would cause or exacerbate his back problems. However, looking at the evidence as it appeared at the time of the consultation, the claimant did not indicate that the travel caused his back problems. During the consultation he said that it was the heavy work which caused any potential back problems. The nature of the work allocated to the claimant could be amended in the way that the respondent already had done and proposed to do in the future. The respondent clearly wanted to retain the claimant given that there was a shortage of skilled workers of his calibre. Yes, he would have to use his own car (and there would be some wear and tear on it) but that is a reasonable feature of many roles and of course he would be being paid travel mileage and the cost of the bridge was being taken into account. Thus, I conclude that the Grimsby role was reasonable and suitable alternative employment.

13.3. The mobile/roaming role was more difficult. It was less suitable given the amount of travelling it could involve and the increased time away from home and on balance I conclude that the claimant was entitled to say that that would not be a suitable alternative role.

13.4. Looking at the Grimsby role, did the claimant refuse it unreasonably? On balance I conclude his refusal was unreasonable. He was made aware of an appeal mechanism during the course of the consultation meetings. When he sent his resignation letter he had the choice between resigning at that point without an offer of a redundancy payment in the hope that one would be paid. Alternatively, he could try the trial period in the new job and resign at the end of that in the hope that a redundancy payment was offered at that point. In short, there was nothing to indicate that he had anything to lose by trying out the role for four weeks. He could try it out to see if he could maintain his previous earnings and to test whether the role was suitable and workable in

the long run. If the claimant was worried that he might lose a right to claim redundancy pay there is no evidence to suggest that he sought clarification of that, or checked it at any point, either with the respondent or with any other advisor. On balance therefore, the right to a redundancy payment does not arise in this case.

14. Unfair dismissal

14.1. It is clear from what I have said already that the claimant was dismissed by reason of redundancy. There was a fair consultation procedure, a number of meetings and a real effort to provide tailored alternative employment. There was an offer of suitable alternative employment which was refused without it being tested via the trial period. I conclude therefore that the decision to dismiss, albeit a constructive dismissal, fell within the band of reasonable responses and therefore there was no unfair dismissal.

15. Notice pay

15.1. It is a pre-requisite for the finding of a constructive dismissal, as I have already indicated, that there was a fundamental breach of contract in this case by the respondent and that the claimant was entitled to resign in relation to it. Had the respondent terminated the employment properly and with due notice the claimant would have either worked the extra weeks or have been paid in lieu of notice. Neither of these events happened. There was no repudiatory breach of contract by the claimant entitling the respondent to dismiss him summarily and releasing the respondent from further performance of the contract. The claimant did not waive his right to notice pay.

15.2. I have considered what the appropriate amount of notice should be. The claimant was entitled to a statutory minimum of 12 weeks' pay, this is based on the length of his service with the respondent. The claim form and the response form both seem to be in agreement that his monthly pay was £2,253 gross, dividing that by 4 to give a weekly pay of £563.25. I have multiplied that to £6,759 gross. I am required to award that gross but to indicate to the parties that of course it may well be subject to tax and that the claimant may well need to provide a tax return in relation to it.

Employment Judge Eeley

17 March 2020

Sent to the parties on

17 March 2020