Case Number
2303982.2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs. S. Eason	**AND**	**Peasmarsh Place Country Care) Ltd**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London South (Ashford) **ON: 20 February 2020**

EMPLOYMENT JUDGE Mason

Representation
For the Claimant: **Mr. M. Foster, solicitor**
For the Respondent: **Mr. C. Burrows, counsel**

JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim for a Statutory Redundancy Payment fails and is dismissed.

2. The Claimant's claim for monies in lieu of notice fails and is dismissed

3. The Claimant's claim for unlawful deduction from wages succeeds in respect of untaken holiday accrued to the date of this decision.

4. A Remedy Hearing will be listed for 2 hours on the first open date after 19 March 2020 unless the parties advise the Tribunal in the meantime that they have settled.

REASONS

Background

1. The Claimant commenced employment with the Respondent on 24 September 2002 as a Care Assistant. The Claimant was off sick from 17 January 2017 and has not returned to work since.

2. The Claimant says her employment came to an end by reason of redundancy on 17 July 2018 when her place of work was closed down. The Respondent says the Claimant remained (and still remains) in their employment as she was not redundant due to the effect of a "mobility clause" in her contract of employment. Alternatively, the Respondent argues that the Claimant is not entitled to a redundancy payment as she was offered reasonable suitable alternative employment.

3. On 20 September 2018 the Claimant first contacted Acas and an Early Conciliation Certificate was issued on 20 October 2018.

4. On 2 November 2018 the Claimant presented this claim. The Claimant claims:

4.1 monies in lieu of accrued holiday;
4.2 a redundancy payment; and
4.3 monies in lieu of notice.

5. The Respondent lodged a response on 24 December 2018 defending all claims. A Preliminary Hearing (case management) took place by telephone on 2 March 2019 (EJ Moore).

Procedure at the Hearing

6. Both parties were ably represented. It is not in dispute that the Claimant is unwell and suffers with stress and anxiety and I am grateful to both representatives for the care and courtesy they showed throughout the hearing. I am also grateful to Mrs. Hart, the Claimant's daughter, for attending to support the Claimant.

7. The Respondent provided a joint bundle of documents [pages 1-92]. By consent, at the Claimant's request we added to this bundle additional documents (payslip [76A] and updated Schedule of Loss [75A and B]). I was provided with written witness statements for the Claimant and Mr. Steven Winter, Director of the Respondent.

8. Mr. Foster provided a written Skeleton Argument and Mr. Burrows provided copies of the decisions in ***HSBC Plc v Mrs Drage*** EAT/0369/02 & EAT/1036/02 and ***Kellogg Brown & Root (UK) Ltd v Mr D Fitton*** UKEAT/0205/16BA & UKEAT/0206/16BA.

9. Having identified the Claimant's claims and agreed with the parties the main issues and the procedure, I adjourned to read the papers.

10. I then heard from the Claimant who adopted her witness statement as her evidence in chief; she was cross-examined by Mr. Burrows. During the Claimant's evidence, we took breaks as needed; it is not in dispute that the Claimant is unwell and suffers with stress and anxiety. The Claimant did not confer with Mr. Foster during the breaks and she was supported by her daughter. Mr. Winter then gave evidence on behalf of the Respondent. He adopted his witness statement as his evidence-in-chief and was cross-examined by Mr. Foster.

11. Both representatives made submissions. I reserved my decision which I now give with written reasons.

The Issues

12 The issues which the Tribunal is required to determine are as follows:

13. Statutory Redundancy Payment:

13.1 Did the Claimant's employment come to an end by reason of redundancy when she was notified that her place of work was being closed?

13.2 Can the Respondent properly rely on a contractual mobility clause in the Claimant's contract of employment?

13.3 If the Claimant was dismissed by reason of redundancy, did the Claimant lose entitlement to a statutory redundancy payment ("SRP") on the basis she unreasonably refused an offer by the Respondent of suitable alternative employment? (**s141 ERA).**

13.4 Assuming a termination date of 17 July 2018, the parties agree that given the Claimant's length of service (15 complete years), her age at date of termination (60 years) and a weekly wage of £272.52, the multiplier is 22 and the SRP would be £6,131.70.

14. Monies in lieu of notice: Breach of contract (extension of Jurisdiction)/ Unlawful deduction from Wages (s13 ERA 1996)

14.1 Was the Claimant dismissed without notice in circumstances where she was entitled to notice?

14.2 If so, what was her statutory/contractual entitlement to notice? The parties agree that the notice enticement is 12 weeks x £272.52 = £3,270.24.

15. Accrued holiday entitlement: Unlawful Deduction from Wages (**s13 ERA 1996 and s30 Working Time Regulations 1998**)

15.1 Did the Respondent fail to pay the Claimant monies in lieu of accrued holiday entitlement?

15.2 If so, how much is the Claimant entitled to bearing in mind the parties agree the following:

(i) her contractual entitlement is 28 days per annum (in addition to bank holidays);
(ii) the holiday year is 1st April to 31st March;
(iii) if the Claimant's employment came to an end on 17 July 2018 her accrued holiday entitlement was 8.21 days, £447.44; and
(iv) if her employment is continuing, then her entitlement to date is £2,884.48.

Findings of fact

16. Having considered all the evidence, on the balance of probabilities, I find the following facts.

17. The Respondent is registered with the Care Quality Commission and provides care services. It provides care services at Peasmarsh Place Care Home ("Peasmarsh Place") and until July 2018, it also provided care services at Oakside Care Home ("Oakside").

17.1 Oakside was in a Grade 2 listed building in the village of Northiam on the High Street. The Claimant walked to work. About 10-15 employees worked there. At full capacity, it cared for 12 residents.

17.2 Peasmarsh Place is in the village of Peasmarsh set back from a main road.
. Mr. Winter accepted it can be described as "a country pile" up a long drive. In July 2018, about 22 to 25 employees worked there; when Oakside closed, this increased to about 25 – 30 employees. As at September 2018, it had about 16/17 residents.

18. On **24 September 2002**, the Claimant commenced employment with the Respondent as a Care Assistant.

19. In **August 2006**, the Claimant signed a contract of employment [44-49] ("the 2006 Contract"). The Claimant's employer is identified as "Peasmarsh Place County Care Ltd". The contract included the following "mobility" clause:
*"3. **Place of Work***
Your normal place of work is at Oakside. Peasmarsh Place may require you to work at such other places as Peasmarsh Place may reasonably determine from time to time."

20. In **April 2015**, the Claimant signed a new contract of employment [49-53] ("the 2015 Contract"). Again, the Claimant's employer is identified as "Peasmarsh Place". The contract again included a "mobility" clause but worded differently to clause 3 in the 2006 Contract; it read as follows:
"*3. **Place of Work***
Your normal place of work is at Peasmarsh Place Care Home. Peasmarsh Place (CC) Ltd may require you to work at such other places as Oakside Care Home may reasonably determine from time to time."

21. The Respondent says (ET3 para. 4, page 21] that the Claimant's normal place of work at the start of her employment was Peasmarsh Place and that during the course of her employment (on an unspecified date) she was transferred to work at Oakside. However, I find that at all times the Claimant's normal place of work was in fact Oakside:

21.1 I accept the Claimant's evidence [w/s para. 5] that throughout her employment she worked only at Oakside other than two weekend days in December 2016 when there was an emergency at Peasmarsh Place and extra staff were required. The Claimant agreed to work there on that one occasion on the basis the Respondent arranged for her to be driven there and back.

21.2 She also attended occasional training days at Peasmarsh Place and again was driven there and back by the Respondent.

21.3 The 2015 Contract is clearly wrong in stating her place of employment as Peasmarsh Place and is overridden by what actually happened in practice.

22. The Claimant's mental health was frail but she was able to continue working at Oakside until January 2017.

23. I accept the Claimant's evidence that in **January 2017**, she was told by her manager that she was to be moved to Peasmarsh Place; she was not allowed to discuss the move with anyone. There is no evidence from the Respondent to the contrary.

24. I also accept the Claimant's evidence that this made her very anxious:

24.1 She felt that she would be unable to cope in a new and larger environment.

24.2 She also felt that there was a practical problem with getting to Peasmarsh Place which is in the countryside; there is no public transport and she does not drive. Shift work meant she would be working at night which would make the location even more inaccessible. On the other hand she always walked to work at Oakside

25. I accept this situation led to her sickness absence from work which started on **17 January 2017**; she has not returned to work since and remains unwell. She received Statutory Sick Pay (SSP) for the first sick months and then Universal Credit which is continuing.

26. On **4 April 2017**, Dr. Lelly Waters wrote to Ms. Linstead, General Manager of the Respondent [54]. She advised Ms. Linstead as follows:

"Thank you for your letter of 29th March 2017. I can confirm that [the Claimant] presented to the surgery in January 2017. She was distressed and anxious and was having problems with tension and low mood. She had not been eating well or sleeping well because of the stress that she was under and this was exacerbating her symptoms. Her condition was triggered by problems at work. She had been told that she was moving to Peasmarsh Place. She was told that she was not allowed to discuss the move with other members of staff in particular with her deputy manager. As time went by she felt she was being obstructed and pushed out from her place of work. At one point she referred to the cleaner as the cleaner and not Sarah her correct name. She was reprimanded for this.

She started to develop symptoms of anxiety including tightness across the chest and agitation. She started having panic attacks that included anxiety and shaking. This was triggered when anyone from work contacted her. She was referred for some counselling and later was started on some tablets for anxiety and agitation.
I last met with her on 24th March 2017 when she presented with her daughter. She was very distressed, trembling and was feeling some twitching of her muscles. These new symptoms had occurred since starting the SSRIs. These were stopped and she was given some Diazepam.
I can confirm that prior to these problems at work she was fit and well.
Thank you for the job description of [the Claimant's] work. My impression is that she is a conscientious, kind and honest person who would be able to carry out the work you have outlined once her anxiety and depression have resolved".

27. I have not been provided with sight of Ms. Linstead's letter to Dr. Waters.

28. On **26 March 2018**, Ms .Linstead wrote to the Claimant [55- 56]:

28.1 She expressed concern that she had not heard from the Claimant with an update on the progress of her treatment and when she may be returning to work at Oakside.

28.2 She said:
"The situation at Oakside is completely different to that which you remember, which should have a positive impact on how you are feeling. It is a new team, new residents and a new positive focus in service delivery"

28.3 She asked the Claimant for her consent to obtain a medical report from Occupational Health (OH) to assess her long term fitness and that :
"The OH practitioner will be provided with information on how the work environment has changed to eradicate any of the issues which may have been present when you were last at work"
"These changes, I would hope, should go a very long way in diminishing whatever you believed caused your anxiety that led to your continued absence".

29. On **27 April 2018**, Mr. Andy Heslop, Senior OH Advisor, carried out an OH consultation with the Claimant. On **30 April 2018**, he provided a report to Ms. Linstead (cc the Claimant) [58-59]. Relevant extracts are as follows:

29.1 Background:
"[The Claimant] has no previous history of mental health issues and attributes her anxiety directly to a series of incidents of alleged harassment and bullying at work.
I understand that several changes have occurred within the work place during [the Claimant's] absence, and that management have offered to meet with [the Claimant] on more than one occasion at a neutral venue to discuss the changes and her continued absence. Unfortunately, other than providing Fit Notes, [the Claimant's] symptoms have prevented her from being able to communicate with you in any other way for some time now"

29.2 Current Fitness:
"I have assessed [the Claimant] as temporarily unfit for work. This is likely to be the case for the foreseeable future.
[The Claimant] has been issued with a Fit Note by her General Practitioner (GP), its' expiry date being 30 June 2018. In view of the circumstances, I am unable to confirm that [the Claimant] will be fit to return to work when her Fit Note expires"

29.3 Recommendations and Future Outlook
"... having discussed the reasons for her ongoing absence with her ... it would appear that [the Claimant's] stressors are specifically work related."

"[The Claimant] appears to be able to manage the majority of daily activities, the exception being her ability to contemplate a return to work. Her anxiety state, and the physical symptoms associated with it, continues to increase whenever the thought of work arises"
"[The Claimant] is aware of the adjustments that have been offered in an attempt to facilitate a return to work. I can confirm that these adjustments would be appropriate should the employee decide to return to work. However, [the Claimant] has confirmed that she is unable to consider a return to work while she feels as she does. While she continues to experience the emotional and physical barriers preventing her from engaging with her employer, [the Claimant] is unlikely to contemplate a return to work."

30. On **8 June 2018**, the Claimant's solicitor, Mr. Foster, wrote to Ms. Linstead [60-61] to express concern that the Claimant has been badly treated with regard to matters which had led to her absence, the lack of support whilst she was off sick and the Respondent's failure to respond to the OH report for some six weeks. Ms. Linstead replied on **4 July 2018** [62] denying any awareness of the issues raised and pointing out the Claimant was welcome to raise a grievance; she said:
"We have on a number of occasions, sought to engage with [the Claimant] but have not been successful".

31. On the same day (4 July 2018) Ms. Linstead also wrote to the Claimant [63] asking her if they could meet to discuss the OH report sometime before 23 July 2018.

32. On **11 July 2018**, Mr. Foster wrote to Ms. Linstead [64]:
"Please ... note that you will need to deal with the question of holiday entitlement whilst our client has been unwell and make a decision based on the [OH[report as to her ability to return".

33. On **18 July 2018**, the Claimant was told by a colleague that there was a reference on Facebook to Oakside having been closed.

34. On **20 July 2018**, the Claimant received a letter from Ms. Linstead dated **16 July 2018** [65] advising her that the decision had been made to close Oakside for financial reasons. Ms. Linstead stated:
"Including yourself, all staff employed by the Company at the point of closure are assured a position at Peasmarsh Place with no loss of hours. We are very glad that no redundancies are needed to be made"
""Peasmarsh Place is looking forward to welcoming you into the team when you feel fit enough to return to work. We are happy to discuss with you any reasonable adjustments that may be needed to support you in making your return successful including assisting you with travel to and from work".

35. On **7 August 2018**, Mr. Foster responded on behalf of the Claimant [66] He makes it clear that the offer of alternative employment at Peasemarsh Place was not suitable for the Claimant:
"*Given her significant mental disability she is clearly not able to move to a new environment and it is thus not suitable alternative employment*"
He says the Claimant is therefore redundant and asks that she be paid her redundancy payment and monies in lieu of due notice.

36. On **14 August 2018**, Ms. Linstead wrote to the Claimant directly [67-68]:
"My letter of 16th July 2018, in which I updated you of the Board's decision to close Oakside, referred to the non-redundancy situation from Oakside staff moving to Peasmarsh Place, its sister home four miles away, with no loss of employment conditions.
Peasmarsh place is not a new environment for yourself or any other Oakside staff, everyone has attended training days and visited on many occasions, likewise Peasmarsh Place staff to Oakside. I referred to all reasonable adjustments being made, including your travel by the quickest and most convenient journey too [sic] and from work and our willingness to provide these adjustments. Given the above and the advice we have received, we do not believe that a redundancy situation exists."

37. On **4 September 2018**, Dr. Lelly Waters wrote to the Claimant's solicitor, Mr. Foster, [69] as follows:
"As you are aware this lady has had many problems and now has significant trouble with anxiety. Due to considerable problems that have occurred at work, I think it would not be conducive for [the Claimant] to work in a similar unit and I think that working in Peasemarsh Place would be detrimental to her health. I feel that if she was to start working at Peasmarsh Place her panic attacks and anxiety would become significantly worse".

38. On **11 September 2018**, Mr. Foster wrote to Ms. Linstead [70-71] enclosing a copy of Dr Waters' letter dated 4 September. He says that based on this medical evidence, it was inconceivable that the Claimant could move to Peasemarsh Place; this was not suitable alternative employment and therefore she was redundant with effect from 18 July 2018.

39. In **December 2018**, the Claimant did not receive from the Respondent a Christmas card and Christmas bonus of £25 normally paid to employees.

40. In the bundle are a number of the Claimant's payslips from the Respondent:

40.1 Four predate closure of Oakside; three are dated 2016 [76] and one is dated 31 March 2018 and is solely for holiday pay (£1,698.30 gross, £1,566.23 net).

40.2 Only one payslip postdates closure and is dated 31 June 2019 [76A]; this shows no entries and zero pay.

41. The Claimant has not received any payment from the Respondent since July 2018. She cannot recall if she has received a P60 in April 2019. She has not received any recent information about her pension. She has not received holiday pay for the holiday year ending 31 March 2019; Mr. Winter said he assumes that this is because the Registered Manager of Peasmarsh who operates payroll did not properly understand the Claimant's status given the length of time she has been absent.

42. Also in the bundle are Fit Notes submitted by the Claimant [77-92]. These are for the period 13 March 2017 to 30 May 2019.

42.1 All show that she has been signed off as a result of "work related stress" and that she is not fit to work.

42.2 The Fit Notes (6) which postdate closure of Oakside are dated 28 August 2018 onwards [87-92]. I accept her evidence that she continued to submit Fit Notes to the Respondent because she was told to do so by Universal Credit.

The Law

43. Relevant provisions of Employment Rights Act 1996 (ERA)

135 The right.

(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) [n/a]
(2) Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144, 149 to 152, 155 to 161 and 164).

136 Circumstances in which an employee is dismissed.

(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if) —
(a) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice).

139 Redundancy

"... an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
(a) the fact that his employer has ceased or intends to cease –
(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or
(b) the fact that the requirements of that business –
(i) for employees to carry out work of a particular kind, or
(ii) 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"

141 Renewal of contract or re-engagement.

(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment—
(a) to renew his contract of employment, or
(b) to re-engage him under a new contract of employment,
with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.
(2) Where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.
(3) This subsection is satisfied where—
(a) the provisions of the contract as renewed, or of the new contract, as to—
(i) the capacity and place in which the employee would be employed, and
(ii) the other terms and conditions of his employment,
would not differ from the corresponding provisions of the previous contract, or
(b) those provisions of the contract as renewed, or of the new contract, would differ from the corresponding provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee.
(4) The employee is not entitled to a redundancy payment if—
(a) his contract of employment is renewed, or he is re-engaged under a new contract of employment, in pursuance of the offer,

(b) the provisions of the contract as renewed or new contract as to the capacity or place in which he is employed or the other terms and conditions of his employment differ (wholly or in part) from the corresponding provisions of the previous contract,
(c) the employment is suitable in relation to him, and
(d) during the trial period he unreasonably terminates the contract, or unreasonably gives notice to terminate it and it is in consequence terminated.

44. Principles:

44.1 In a claim for a SRP, the burden of proof is on the employee to prove, on the balance of probabilities that there has been a dismissal. If there is no dismissal, then there is no right to a SRP.

44.2 There is no statutory presumption that an employee has been dismissed.

44.3 The question of whether the employee was dismissed is a question of fact for the Tribunal to decide and depends on all the facts of the case. A dismissal can be effected not only by words but also by actions which are inconsistent with the continuation of the employment contract. The test is how the words and/or actions would be understood in context by the objective observer (rather than how, subjectively, they were understood by the parties).

44.4 Whether, on a given set of facts, a dismissal has occurred, may also in some cases give rise to an issue of law.

44.5 Dismissal has to be on a date certain expressly stated (orally or in writing) or unambiguously ascertainable from the communication (***Morton Sundour Fabrics Ltd v Shaw [1967] ITR 54***).

44.6 In certain circumstances, the unilateral imposition of new terms and conditions can result in the dismissal of an employee from the old contract and an entry into a new contract on different terms (***Hogg v Dover College [1990] ICR 39***)

44.7 A party's repudiation terminates a contract of employment only if and when the other party elects to accept the repudiation. This applies whether it is the employer or the employee who is in repudiatory breach. (***Geys v Societe Generale [2013] ICR 117***).

44.8 There will be no dismissal where an employer exercises a contractual mobility clause to move an employee to a different workplace provided:

(i) the clause properly authorises its actions;

(ii) the employer seeking to rely on a mobility cause makes it clear it is relying on the mobility clause (***Curling v Securicor Ltd [1992] IRLR 549***); and

(iii) the contractual power is exercised reasonably.

44.9 If a dismissal is proven in circumstances where the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on the business in the place where the employee was so employed, the employee will be taken to have been dismissed by reason of redundancy (s139 ERA):

(i) The employee's place of work for the purposes of s139)1(b)(iii) is generally the place of work where they report to each day to carry out their duties. This test of the place of employment is factual, not contractual, and should be determined by a consideration of the factual circumstances pertaining prior to the dismissal.

(ii) it will be for the employer to rebut the presumption of redundancy by proving, on the balance of probabilities, that the dismissal was not for redundancy.

44.10 If an employee unreasonably refuses an offer of suitable alternative employment at another workplace, he/she will not be entitled to a redundancy payment. The test of whether the employee's refusal is unreasonable is subjective and the Tribunal will consider the Claimant's subjective view as opposed to what the Respondent deemed to be reasonable.

45. Unlawful deductions from wages:
S13 ERA 1996 gives workers the right not to suffer unauthorised deductions from their wages and s**s.23-26 ERA 1996** sets out provisions relating to complaints to employment tribunal.

46. Breach of Contract
Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 gives the Employment Tribunal jurisdiction to hear claims for damages for breach of contract provided the claims arose or are outstanding on termination of the contract of employment and have been brought in time.

Submissions

Respondent's submissions:

47. Mr. Burrow submits as follows:

47.1 The factual background is established; the Claimant was an employee and her primary place of work was Oakside.

47.2 There is a mobility clause in the Claimant's contract; she signed that contract and took no issue with the error as to her place of work.

47.3 Mr. Burrows refers me to the EAT's decision in ***HSBC v Drage***

(i) Para. 34. "It is quite clear ... that, in relation to the operation of a mobility clause, it is not for the Employment Tribunal or for a court to decide what is reasonable or what a reasonable employer would do"

(ii) Para 36: There is an implied term that an employer when dealing with a mobility clause, should not exercise his discretion in such a way as to prevent the employee from being able to carry out his part of the contract [citing ***United Bank Ltd v Akhtar*** [1989] IRLR 507).

47.4. There was a dwindling number of residents at Oakside and the Respondent's reasons for exercising the mobility clause were reasonable.

47.5 Mr. Burrows also refers me to the EAT's decision in ***Kellogg.***

47.6 The Claimant says Peasmarsh is larger than Oakside but does not say why it is unsuitable; her role and job description remain the same. With regard to location, the Respondent was aware that the Claimant walked to work at Oakside and was willing to look at travel. So if this was a redundancy

situation the offer to work at Peasmarsh was suitable subject to reasonable adjustments

47.7 The Claimant has continued to submit sick notes and this is incompatible with a redundancy.

47.8 It is accepted that as the Claimant's employment continued, she is entitled to be paid for holidays. It's also accepted that she has not in fact been paid.

Claimant's submissions

48. Mr. Foster submits on behalf of the Claimant as follows:

48.1 He relies on his Skeleton Argument

48.2 The Claimant's employment was terminated by reason of redundancy on closure of Oakside.

48.3 It was wholly unreasonable to expect the Claimant to work at Peasmarsh, for the reasons that were made clear to the Respondent.

48.4 The mobility clause must be exercised reasonably and the Respondent did not exercise the clause reasonably in this case. The Claimant made it clear to the Respondent that, for logistical reasons as well as mental health reasons, she would find it impossible to work at Peasmarsh. The medical report dated 4 September 2018 confirms a move to Peasmarsh was wholly unreasonable. The catalyst for her ill health was the proposed move.

48.5 it follows that on an employer ceasing business, this must be an implied termination unless some alternative arrangement is agreed.

48.6 The business was no longer there to be carried out at the place where the Claimant worked so that was either:

(i) an implied termination of the contract on the part of the Respondent; or

(ii) an acceptance of the fundamental breach of contract i.e. to provide a workplace at the place where she was contracted to work, and thus a constructive dismissal on the part of the Claimant.

48.7 The letter of 16 July 2018 makes it clear that due to the closure of Akside (On 17 July 2018) there was not job at Oakside and that was an implied dismissal.

Conclusions

49. Applying the relevant law (which is complex) to the findings of fact to determine the issues, I have reached the following conclusions.

50. With regard to the mobility clause in the 2015 Contract:

50.1 I accept that the Respondent genuinely thought that it had the right to instruct the Claimant to relocate under the mobility clause.

50.2 The clause incorrectly states that the Claimant's place of work is Peasmarsh whereas it was Oakside. The terms of a contract must be sufficiently clear and certain for the courts to give them meaning. However, a clause should be interpreted in line with the meaning it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they

were in at the time of the contract. At the time of the contract the Claimant was not unwell and whilst she may not have given this clause any thought, I believe that a reasonable person in her shoes at that time would have interpreted the clause as giving the Respondent the right to change her place of work despite the error.

50.3 However, I have concluded that the Respondent did not exercise its contractual power reasonably:

(i) By this time (July 2018) the Claimant had been off sick since January 2017.

a. The Respondent knew from her Fit Notes that the reason she was off work was "work related stress".

b. The Respondent also knew from the letter from her GP dated 4 April 2017 [54] that " *Her condition was triggered by problems at work. She had been told that she was moving to Peasmarsh Place. She was told that she was not allowed to discuss the move with other members of staff in particular with her deputy manager. As time went by she felt she was being obstructed and pushed out from her place of work."*

c. The Respondent knew from the OH report (30 April 2018) that "... *[the Claimant's] stressors are specifically work related."*
"[The Claimant] appears to be able to manage the majority of daily activities, the exception being her ability to contemplate a return to work. Her anxiety state, and the physical symptoms associated with it, continues to increase whenever the thought of work arises"

(ii) The Respondent also knew of the Claimant's transport issues.

(iii) Whilst the Respondent offered to have discussions with the Claimant about adjustments, it was also aware from the OH report that she was unable to participate in such discussions. Significantly, no firm proposals or offers of adjustments were in fact made.

51. Despite this, I have concluded that there was no dismissal in circumstances within s136(1) for the following reasons:

51.1 I am satisfied (and it is not in dispute) that there was a redundancy situation at Oakside due to the dwindling numbers. However, there is no consequent presumption of automatic dismissal and the Claimant has not discharged the burden of proof on her to prove, on the balance of probabilities that there has been a dismissal.

51.2 A dismissal has not been communicated to the Claimant expressly whether verbally or in writing - quite the reverse - and a date has not been specified for dismissal.

51.3 I have considered carefully if there any actions by either party which are inconsistent with the continuation of the employment contract. There is some evidence going both ways none of which is conclusive or even persuasive. On the one hand, there is a lack of payslips (other than one dated 31 June 2019) and a failure to pay the Claimant holiday pay, However, in the context of the Claimant having been off sick now for more than three years this is perhaps not surprising. On the other hand, the Claimant has continued to submit sick notes but I accept she has done so on the advice of Universal Credit.

51.4 I have therefore concluded that an objective observer would not have reasonably interpreted the Respondent's communication and actions as a dismissal.

52. I have considered whether the Claimant could succeed in showing a dismissal on the basis the change in her place of work amounted to unilateral imposition of new terms and conditions and resulted in her dismissal from her old contract and entry into a new contract on different terms (***Hogg v Dover College [1990] ICR 39 EAT***). However, I have concluded that in the Claimant's case the new terms were not so radically different as to be regarded as a new contract; the only change was in the place of work four miles away; her role and all other terms and conditions were to stay the same.

53. As there was no dismissal, I have not gone on to consider whether the Claimant unreasonably refused an offer by the Respondent of suitable alternative employment (**s141 ERA).**

54. Mr. Foster submitted, in the alternative, that the Claimant was constructively dismissed. It is certainly arguable that the Respondent committed a repudiatory breach of the implied duty of trust and confidence by the manner in which it exercised the mobility clause. However, such a breach would only terminate the Claimant's contract of employment if the Claimant elected to accept that breach. There is no evidence that a breach was accepted by the Claimant and the Claimant's case throughout has been that her employment came to an end by reason of redundancy, not as a result of an (accepted) fundamental breach of contract. The Respondent has therefore not prepared its case on this basis and I have not heard arguments about, for instance, possible affirmation of the breach. Similarly, the Claimant has not argued that she is "standing and suing"

55. The Claimant therefore has a subsisting contract of employment with the Respondent as there has been no dismissal and the presumption of dismissal by redundancy (s139 ERA) is predicated upon a dismissal by the employer. The Claimant's claim for a SRP and monies in lieu of notice must therefore fail as her employment is continuing.

56 The Claimant's claim for holiday pay accrued to date succeeds as failure to pay is an unlawful deduction from wages (s13 ERA). The Tribunal has no jurisdiction in respect of a breach of contract claim as her employment is continuing.

57. The parties have asked for an opportunity to agree any awards and I have asked listing not to list a Remedy Hearing (2 hours) until the first open date after 24 March 2020.

58. For the purposes of rule 62(5) of the Tribunals Rules of Procedure 2013, the relevant issues are at paragraph 12 - 15; all of these issues which it was necessary for me to determine have been determined; the findings of fact

relevant to these issues are at paragraphs 16 - 42; a statement of the applicable law is at paragraphs 43 - 46; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 49 to 56.

Signed by _____ on 24 February 2020
Employment Judge