EMPLOYMENT TRIBUNALS

Claimant Mrs Carolyn Davis **v** **Respondent** Folio Print Finishing limited

Judgment with reasons

Heard at: Southampton **On:** 6 and 7 April 2021
Before: Employment Judge Rayner
Appearances
For the Claimant: In person
For the Respondent: Mr Andrew Bird, Director

1. The Claimants position was redundant in May 2020. No offer of suitable alternative employment was made.

2. The Claimant was constructively dismissed by reason of redundancy

3. The Claimant is entitled to a redundancy payment of £12,717.69.

4. The Claimant was wrongfully dismissed.

5. **The Respondent will now pay the Claimant the following sums:**
   a. **Redundancy payment of £12,717.69.**
   b. **Pay in lieu of notice of £4663.12.**

6. **The total sum now payable to the Claimant by the Respondent is £17,381.81.**

Reasons

1. The parties attended the hearing by CVP and I gave judgment with oral reasons at the end of the hearing. Following the sending out of the judgment the respondent has requested written reasons, and these are now set out below.

Background and Issues

2. The claimant was employed by the respondent, as a Sales and marketing coordinator from 1 June 1999 until 6 July 2020. At the point of termination of the contract of employment she had 21 years' service. The respondents run a book binding business.

3. The claimant was told that her job was being deleted and that her task would be covered by the managers, and that she was being allocated another job, on the shop floor. The claimant did ot want to work on the Shop floor and refused the job. The respondents asserted that the job was suitable one for her. The claimant refused the job again and no other offer was made. The claimant asked to be made

redundant but the respondent refused on the grounds that another job was available for her to do.

4. The claimant handed in her resignation and brought a claim to the ET in respect of her dismissal and redundancy pay.

5. The claimant was born on 15 December 1958 and at the point of termination of the employment she was 61 years old.

6. The claimant filed a claim to the employment tribunal claiming unfair dismissal and a redundancy payment. She alleges that she was constructively and unfairly dismissed and that she was as a matter of fact and law redundant and entitled to a redundancy payment.

1. The issues in this case are as follows:

6.1. Was the claimant redundant within the meaning ERA 1996
6.2. If so, was the clamant entitled to a redundancy payment;
6.3. Was the claimant offered suitable alternative employment within the meaning of section 141(3) b ERA 1996
6.4. If yes was her refusal of the alternative employment unreasonable within the meaning of section 141 ERA 1996?
6.5. Was the claimant dismissed?
6.6. If so, what was the reason for her dismissal

6.7. Was the job offered to the claimant by the respondent as alternative work suitable alternative employment for the claimant within the meaning of section

6.8. That is was it either an offer of a new contract where the capacity and place in which the employee would be employed, and other terms and conditions of her employment would not differ from the corresponding provisions of the previous contract or

6.9. Would the provisions of the contract is renewed if the corresponding provisions of the previous contract but nonetheless constitute an offer of suitable employment in relation to the employee?

7. The importance of this question is that if the claimants was redundant and if an offer of suitable alternative employment was made to and if she unreasonably rejected such an offer, the claimant will not be entitled to a redundancy payment.

8. In this case the claimant and the respondent agree on the chronology of events and also agree on the factual background to the case. They do not agree on whether or not a job offer that was made to the claimant amounts to suitable alternative employment.

The hearing and the Evidence

9. The case was listed for 2 days, and I heard evidence for the claimant on her own behalf, and from Mr Andrew Bird, owner of Folio Print, Richard Hughes, Managing Director who represented the respondent and Patricia Dix, HR Consultant on behalf of the respondents.

10. I was also provided with an agreed set of documents.

11. Each provided a written statement and gave a sworn evidence .

12. The hearing was conducted by CVP.

2. Findings of **Fact.**

13. The claimant worked for the respondent for 20 years as a sales and marketing coordinator. In this role she was office-based work and her tasks included but were not limited to administrative work and reception work.

14. The claimant told me and I accept that she would meet and greet clients; that she would deal with incoming telephone calls and transfer them to the relevant people; that she dealt with purchasing of all various office and work place consumables; that she assisted with the accounts by ensuring that records were kept, for example of employees holidays and hours of work and that she also took minutes of meetings. She did not do payroll because the company also employed a bookkeeper but she did keep spreadsheets in respect of staff holidays for example.

15. The claimant told me, and I accept that during the course of her employment she had gone to college and gained qualifications relevant to her work, which assisted her in doing her work. She enjoyed her work and took pride in it.

16. From time to time the claimant would assist the company with some aspects of work done by the factory, which she described as hand work. She said this involved folding covers of books for example. She said, and I accept, that in the last year she had done this on maybe three occasions each time for about 2 to 3 hours. She stated that she did this work in the office at her desk during quiet times. She accepted that she had done similar work on occasions to help out during the course of her employment.

17. The Respondent agreed that she had only done this sort of work from time to time but accepted that this was done on a voluntary basis and that this was not part of her contracted work.

18. Whilst her contract of employment does include a term which allows the respondent to allocate her other work, it was not suggested to me that the respondent considered that the clamant helping out on occasions was anything other than a goodwill gesture by the claimant. I find that this is what it was. The claimant was prepared to help out during busy times by taking on small amounts of light work which she could do at her desk, in her own time, and which she could fit in between her administrative duties.

19. By the end of May2020 the respondent company was facing serious challenges as a result of the pandemic. The claimant has been placed on furlough and I accept that members of the respondent staff, from senior staff to more junior staff were, as Mr Byrne suggested, mucking in, to do what was required. There had been a reduction in orders and the respondents had decided that they needed to reorganise the company.

20. Following an exchange of emails about her job and the situation, the claimant met with Mr Richard Hughes, the managing director on 27 May 2020.

21. At the meeting the claimant and Mr Hughes had a frank discussion about the claimant's job. Mr Hughes accepted the notes taken by the claimant at that meeting were a fair reflection of that discussion and accepts that he told the claimant that there was no longer a role for her because the admin role no longer existed.

22. I find that at this point there had been a significant reduction in the orders and therefore the work that the company did, and that there was a consequent drop off of the need for administrative support. Any administrative work that needed doing was being picked up by other senior staff, on an occasional basis and as required

23. Mr Hughes told claimant that her job had basically gone, because it was no longer there, but also said that they were not employing somebody else to do her job. This was true – there was much less need for the administrator, and any admin tasks were being done on an ad hoc basis by manager

24. At this meeting the claimant said that she would accept redundancy.

25. Mr Hughes told claimant that the respondent did not want to make the claimant redundant, but instead they wanted the claimant to take up a role of alternative employment as an assistant in the factory.

26. It is not disputed that the job which the claimant was being offered in the factory was a manual job and was one which was wholly different to the job that the claimant had been employed to do, and had been doing for many years. The Claimant had never worked on the factory floor and had never worked in a manual role floor the respondents.

27. The role offered was not an administrative role in any respect. It was a manual role involving handwork such as folding; glueing; make up and collating; loading feeders on the binder gatherer, loading feeders on the saddle stitch; assisting at the end of a folding machine; stacking products that can go on the end machine collating and duties relating to production.

28. This was not the same that the claimant doing 21 years. It was a wholly different job. It did not utilise any of the claimant administrative skills

29. The respondent has suggested that the claimant could do the job because she had on occasions done folding or handwork at her desk.

30. The claimant does not dispute that she may have been able to do the work, but the claimant asserted from the first meeting that she did not want to work in the factory.

31. The respondent asserted at the meeting on 27 May that it was offering the claimant alternative work and that because they were offering alternative work she would not be made redundant. The job would be offered to the claimant on the same salary.

32. The claimant's objections were that this was a complete change of role and would involve a change amongst other things from a seated role in an office to a manual role standing up in a factory. She said there was no way she could work in the factory eight hours a day.

33. The respondent told claimant that they were not offering her redundancy but were redeploying employing her within the factory and that if she was not prepared to take the role she would effectively be resigning. The claimant was told that she could accept the role of the factory which would take effect from July 1.

34. The claimant was prepared to change her role but was not prepared to move to a factory-based job.

35. Following the meeting the respondent Mr Hughes wrote to the claimant on 28 May 2020, about the offer of what the respondents called suitable alternative employment.

36. He started letter *stating I refer to our meeting on 28 May 2020 when we discussed that your role will cease to exist. The business case for this decision but there is not a need for an individual dedicated to sales and marketing coordinator work based at Folio. We need also to reduce headcount to meet financial targets.*

37. The letter went on to say *we can offer you suitable alternative employment with effect from July 1, 2020 the job role is assistant. As you know you have carried out this role in the past and have filled the role successfully. For the avoidance of doubt the position of sales and marketing coordinator is no longer required, however as we are able to offer you suitable alternative employment you will not be made redundant and as such you will not be eligible for any redundancy payment.*

38. The letter goes on to say *I think it is only fair to make you aware that if you do not accept the offer of suitable alternative employment you will be deemed as resigning from portfolio print finishing Ltd.*

39. Mr Hughes suggested a further meeting.

40. The claimant responded to Mr Hughes on 2 June 2020. She stated that she did not consider the position offered was a suitable alternative to her existing role.

41. She stated *I have worked more than 20 years and in all that time I have never seen any role in the factory suited my skill set as I am in fact skills and very experienced in my current position. I have been flexible over these years as the company has evolved and, at times I have completed some factory tasks where there were pressures in the business, but I have always tried to conduct those tasks in the office. Further I believe the assistant role in the factory would be of lower status, unskilled and completely manual labour, again not suitable alternative to someone that has worked in your office for many years and is now 61. I also some health issues that might affect my ability to perform that role effectively.*

42. Claimant went on to say that she could not see see any possibility of the company being able to offer her alternative work and therefore that she believed that her existing role was now redundant to the business

43. The Respondent replied on 9 June stating that they were prepared to make reasonable adjustments to enable the claimant to carry out the role. The respondent suggested that where possible the claimant could be given seated jobs to do. It was suggested that the claimant could be given lighter duties and that whenever there was internal handwork, that could be assigned to her. A job description was also provided.

44. The respondent confirmed that they still considered the job suitable alternative employment for the claimant.

45. A further meeting took place on 12 June 2020, and at this meeting the claimant and Mr Hughes were joined by Patricia Dix. Ms Dix is a human resources consultant and she provided assistance to the respondents and also gave evidence to the Employment Tribunal.

46. At that meeting there was further discussion about the claimant's job and about the job she was being offered. The claimant disputed that she had ever had a role in the factory. I find that this was right. The claimant had not ever worked in the factory, all that she had done were occasional tasks which could easily be done at her desk, in order to assist in completing a busy order.

47. The claimant again asserted that she did not think the alternative job was suitable for her as a replacement job, because she considered herself to be a skilled worker who had worked in the office the 20 years. She said it was not a job that she would consider. She had not ever worked in a manual role she didn't consider that it was suitable alternative employment. The Claimant again stated that she was happy to be made redundant. The Claimant also noted that she wasn't being offered a temporary job with the expectation that she would return to her work in the office at some point in the future. She was being told that her job no longer existed.

48. During the course of the two meetings there was no suggestion by the respondents that the work in the factory would be temporary in nature only. Nor was it suggested that the claimant could remain on furlough.

49. In their evidence before me the respondents confirmed that the job on the factory floor was a permanent job, not a temporary job, and that her job no longer existed.

50. I find that the only offer being made to the claimant was to accept the alternative job in the factory or be treated as if she had resigned.

51. The respondent stated in evidence and questioned the claimant on the basis that she had not been acting in good faith in rejecting the job. She was accused of wanting redundancy pay. She claimant agreed that she was happy to be made redundant and to receive statutory redundancy pay, but asserted that this was not bad faith on her part, she genuinely did not think that the job was suitable for her and believed that in the circumstances her employer should honour her statutory rights both to a statutory redundancy payment and to statutory notice pay.

52. Following the meeting on 26 June 2020 the claimant wrote to the respondent resigning on the basis of a breakdown in trust and confidence. She said *it is clear my role in the company no longer exists and that you can't offer me a suitable alternative. I fail to understand why you are unwilling to offer me redundancy and I would have accepted that as is fair and amicable.*

53. The claimant again asserted that she did not believe the assistant job in the factory was suitable alternative employment for her because it was of lower status; unskilled and wholly manual labour and none of the claimant's existing extensive skills, responsibility or company experience of office administration were anyway applicable or transferable or relevant to that role.

54. The Claimant also made reference to having undergone surgery to resolve Graves' disease and being in a period of rehabilitation, and stated that this mitigates against her taking on a completely different career path that she neither understood nor sought.

55. Whilst the claimant did put in a letter in which she stated that the was resigning the only reason she did this, was because the respondent had refused to formally give her notice of termination by reason of redundancy and dismiss her. They told her that she must take the job or be treated as if she had resigned. That was the only reason she gave in her notice.

The Relevant Legal Provisions

Redundancy

56. A claimant will be redundant if the employer has ceased or intends to cease to carry on the business purposes which the employee was employed by or the requirements of that business to carry out for employees to carry out work particular kind of ceased or diminished or are expected or diminish. (see Section 139 Employment Rights Act 1996).

57. The assessment of whether there has been a diminution in the requirements of the business for employees to carry out work of a particular kind is always a question of fact for a tribunal to decide. The tribunal should not determine the issue by reference to the employee's contract or, exclusively, his or her function. The parties' intentions or beliefs do not determine the issue either. The existence of a redundancy situation is a legal construct.

58. As was made clear by the House of Lords in *Murray-v-Foyle Meats* [1999] ICR 827, two simple questions of fact arose;

(i) Whether there exists one or other of the various states of economic affairs mentioned in the section. In other words, whether the requirements of the business for employees to carry out work of a particular kind ceased or diminished, and it did not matter that it was necessarily the kind of work undertaken by the claimant which needed to have ceased or diminished (*Packman-v-Fauchon* [2012] ICR 1362, EAT);

(ii) Whether, as a matter of causation, the dismissal was wholly or mainly attributable to that state of affairs, i.e. the diminution of the need for employees generally to carry out work of a particular kind.

59. The test removed the need to consider exactly what the employee did or was required to do under his contract and it put an end to the tension between what were known as the competing 'function' and 'contract' tests of redundancy.

60. An employee who is redundant will be taken to have been dismissed by reason of redundancy unless the employer proves otherwise.

Entitlement to a Redundancy Payment and Suitable Alternative Employment

61. A claimant is only entitled to a redundancy payment if he or she was dismissed in circumstances defined by s. 139.

62. An employee may lose the right to a statutory redundancy payment in circumstances described in ss. 138 and 141;
    (i) The employer must give notice of dismissal because of redundancy;

(ii) The employer must make an offer of re-employment;

(iii) The new job must start immediately after the old one comes to an end or within 4 weeks;

(iv) If the employee refuses the offer, it must have been (a) suitable for the employee and (b) his refusal was unreasonable (s. 141 (2)-(4)).

63. A claimant who is redundant is entitled to receive a statutory redundancy payment, unless they lose that entitlement for one of the reasons set out in the Act.

64. Whether alternative employment is suitable or not requires consideration both of the question of what is meant by suitable alternative employment, and what is meant by an unreasonable refusal of an offer.

65. The question of whether or not a job offer is suitable alternative employment is a question of fact that the employment tribunal. It involves a two stage test.

66. The first question is whether or not the job offered is subjectively suitable for the claimant. This involves considering whether the job utilises similar skills or experiences or whether or not it might be suitable in terms of pay; status; place of work and the nature of the tasks to be done;

67. At this first stage, the test requires consideration of the claimant's contract of employment and job and whether the role is subjectively suitable for the her.

68. The second stage is a determination of the question of whether or not the claimant has been reasonable to reject the role. This requires the tribunal to consider the claimant's reasons for rejecting the particular role and to assess whether they are objectively reasonable or unreasonable.

69. Where an employee resigns in circumstances where there has been a fundamental breach of their contract and employee will have been constructively dismissed. In circumstances where an employ is told that if they do not accept their relation to their contract they will be treated as if they have resigned they may also be considered to have been dismissed constructively otherwise.

Dismissal and/or Constructive dismissal

70. Regarding the termination of the contract, the question of fact for the employment is, who really terminated the contract of employment? If the contract was terminated by the employer there will be a dismissal, and this will be a question of fact for the tribunal to determine in the circumstances of the particular case. See for example *Martin v MBS fastenings Glynwed Distribution Ltd* 1983 ICR 511 CA.

71. The EAT has held that where the employee is inveigled into resigning with the aim of depriving him of his statutory entitlement to a redundancy payment, it is open to a tribunal to find that the employer has terminated the contract under s 95(1)(*a) ERA 1996 (Caledonian Mining Co Ltd v Bassett and Steel [1987] IRLR 165*, *[1987] ICR 425*). In that case, the tribunal found that the employers had instigated, or at least connived in, the resignations of the employees concerned with the express intention of depriving them of their statutory rights.

72. Whether termination of a contract is dismissal or constructive dismissal is not resolved simply by looking at the label put upon it. That there has been a resignation is not enough to say that the employer could not have terminated the contract save by way of constructive dismissal. In accordance with the views expressed by Sir John Donaldson in *Martin v MBS Fastenings (Glynwed) Distributions Ltd* [1983] IRLR 198, whatever the respective actions of the employer and employee at the time the contract was terminated, the relevant question is "who really terminated the contract of employment?".

73. In that case the EAT confirmed that the ET ad been entitled to find that it was clearly the employers who caused the employees to resign. The reality of the matter was that it was the employers who terminated the contract. Therefore, the employees were dismissed in law and were entitled to redundancy payments.

74. The question whether termination of a contract is dismissal or constructive dismissal is not resolved simply by looking at the label put upon it. It is not enough, to say there has been a resignation, therefore the employer could not have terminated the contract save by way of constructive dismissal.

Constructive dismissal

75. In *Kaur-v-Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, the Court of Appeal reviewed cases on the 'last straw' doctrine and Underhill LJ formulated the following approach in relation to the Malik test;

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?"

76. First, the question of fundamental breach. The implied term of trust and confidence is not breached merely if an employer behaves unreasonably, although such conduct can point to such a breach evidentially. However, the implied term is breached if an employer participates in conduct which is calculated or likely to cause serious damage to, or destroy, that relationship (what has been referred to as the 'unvarnished *Malik* test' from the case of *BCCI-v-Malik* [1998] I AC 20).

77. Breaches must be serious. Parties are expected to withstand 'lesser blows' (*Croft-v-Consignia* [2002] IRLR 851)

78. It is also important to remember that there needs to have been no reasonable or proper cause for the conduct for it to be regarded as a fundamental breach of the implied term.

79. Once a breach is established, it is a question of fact and degree whether or not the breach is fundamental. A key factor will be the impact of the breach on the employee. I remind myself that any breach of the implied term of mutual trust and confidence is inevitably fundamental. see *tomorrow the Safeway stores plc 2002 IRLR 9 EAT.*

80. The employers motive for the treatment is irrelevant but an employee is not justified in leaving employment simply because an employer unreasonably what is required is a breach of contract. I remind myself that unreasonable treatment may well be evidence of a breach of the implied term but it may not.

Conclusions

81. I find that the requirement of the respondents for the type of work that the claimant had been employed to do for 21 years had ceased or diminished by May 2020. The claimants job was deleted and at that point and I conclude that the claimant was redundant at that point.

82. The claimant was therefore entitled to a redundancy payment unless she was offered and accepted suitable alternative employment with the respondent.

83. The claimant was offered alternative employment, but I find that the job offered to her was wholly different to the job she had been doing for 21 years, in term of the tasks and the place of work and the nature of the work.

84. The claimant was 61 years old and had spent 21 years working for the respondent in an administrative function based in an office dealing with administrative and sales tasks. She has a front facing role and all aspects of her work involved office-based skills and abilities that she had built up through experience over many years through attending college to gain qualifications.

85. Whilst the factory job was clearly available and was one which needed doing there was no aspect of any of the function which bore any resemblance at all to any of the work that the claimant done over the last 20 years. It was a manual job carrying out repetitive tasks in a production process.

86. Whilst the claimant may well have been able to do some small aspects of the job and have demonstrated her abilities when she had helped out on occasions, this alone did not make the job suitable for her.

87. The respondent wanted the claimant to accept the alternative job in the factory because it would be beneficial to the business. Whilst the respondent company was undoubtedly facing great difficulties, I find the job that they offered to the claimant was a wholly unsuitable one for the claimant . I conclude that the respondent wanted the claimant to take the job, in part at least because it would be significantly cheaper than paying the claimant her statutory redundancy pay or her notice pay. I find that the respondents did not ever consider the statutory test for suitable alternative employment and simply focused on the fact that it was an alternative job which was available for the claimant to do.

88. I conclude that this was not suitable alternative employment for the claimant.

89. In the circumstances I do not need to determine whether or not the claimant's rejection of it was reasonable or unreasonable for her, but I conclude in any event that it was reasonable for her to reject the offer of the alternative job.

90. The claimant was entitled to consider that her age and health and the fact that she had until this point in time carried out a job which was largely seated at a desk-based made the job unsuitable. She was entitled to take into account the significantly different nature of the work itself. She was entitled to consider whether or not taking a manual role would benefit her career and was entitled to conclude that it would not so. She was also entitled to take into account the loss of status that the manual role would bring with it. These were all reasonable considerations for the claimant.

91. The respondent put the claimant in an impossible situation by insisting that she accept an unsuitable role or be treated as having resigned. I have no hesitation in finding that in these circumstances that the respondent was responsible for the termination of the claimant's contract. This was not a situation where the claimant wanted to resign, but rather she was told by the respondents to accept a wholly unsuitable job, or be treated as if she had resigned.

92. The respondent refused to recognise that the claimant was redundant and that, once she refused the suitable alternative employment, she was redundant and that therefore they were responsible for terminating her contract by reason of redundancy.

93. I find that the claimant was dismissed, despite the resignation she submitted. I find that she only sent in a letter of resignation , because the respondent left her no choice.

94. If I am wrong about that, I find that the respondent was in fundamental breach the terms of mutual trust and confidence implied into the claimant's contract, and tht the claimants resignation was a response to that fundamental breach. She was constructively dismissed.

95. By insisting that the claimant should take on a role of no resemblance to the job she had been doing for them the 21 years rather than recognise that she was being made redundant and honouring a statutory entitlement to redundancy pay, the respondents destroyed the trust and confidence and had no reasonable cause for doing so.

96. During the course of his cross examination of the respondent and in his own evidence, Mr Hughes suggested that the only reason the claimant refused the alternative job was because she wanted the redundancy money, and that this was selfish of her and was some sort of betrayal of the company she had worked for.

97. I find that Mr Hughes formed a wholly unreasonable view that the claimant, who had been a valued and long serving employee, was being selfish or greedy by refusing the job offer and insisting on a redundancy payment. At no time did he really consider her objections to the job, or her health or her age, or consider that that her position may be a valid or reasonable one.

98. I find that the refusal to recognise that the claimant was redundant, whether or not a redundancy payment was made, wrong in law but was, in the circumstances a view that was formed because of an attitude to the claimant and an unwillingness to recognise the companies statutory obligations to their employee. This was a breach of the implied term of mutual trust and confidence, and went to the root of the contract. There was no reason to doubt the claimant or suggest any improper motive on her part, and I conclude that in those circumstances the claimant was to resign. I conclude that she was constructively dismissed.

99. In the circumstances I conclude that the claimant was dismissed by reason of redundancy, and that she was entitled to receive a redundancy payment.

100. Further I conclude that the claimant is entitled to notice pay based on the statutory minimum notice for a long serving employee.

Employment Judge Rayner
Date: 25 June 2021

Judgment and Reasons sent to the Parties: 01 July 2021

FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.