Case Number: 3200823/2018

RM

EMPLOYMENT TRIBUNALS

Claimant:	**Mr D O'Connor**
Respondent:	**East London NHS Foundation Trust**
Heard at:	**East London Hearing Centre**
On:	**Tuesday 8th – Thursday 10th January 2019**
Before:	**Employment Judge Prichard**

Representation:

Claimant:	Ms K Annand, Counsel instructed by Thompsons Solicitors LLP, London EC4
Respondent:	Ms N Newbegin, Counsel instructed by Hempsons Solicitors, London EC2

RESERVED JUDGMENT

It is the judgment of the Tribunal that: -

1. **The claimant was dismissed, but not until 22 December 2017.**

2. **The trial period commencing on 3 July 2017 was not a statutory trial period for the purposes of Part XI of the Employment Rights Act 1996.**

3. **The case is now adjourned part-heard to be resumed before the same judge on Wednesday to Friday 1 – 3 May 2019, at East London Tribunal Service, 2nd Floor, Import Building (formerly Anchorage House), 2 Clove Crescent, London E14 2BE starting at 10.00am.**

REASONS

Narrative

1 The claimant, David O'Connor is currently 45 years old. He worked for the respondent NHS Trust from 1 February 1998 until his dismissal, apparently by reason of redundancy, on 22 December 2017. This is a claim / reference under Section 163 of the Employment Rights Act 1996 for a statutory redundancy payment under Part XI of the Employment Rights Act 1996. That is all the claim is for.

2 In the background there may be a separate claim for a contractual enhanced redundancy payment. That claim has not been brought, and will not be brought, in the Employment Tribunal as it could be worth as much as £70,000, which exceeds the maximum for a breach of contract claim in the Employment Tribunal. The amount of the statutory redundancy payment has been agreed at £10,024.50.

3 The claimant has had various roles with the respondent over the years. In 1998 he started as an Enrolled Mental Nurse (EMN) in Homerton Hospital in a forensic ward. Over this period, he achieved qualification as a Registered Mental Nurse (RMN). Then in 2006 he was appointed as a Charge Nurse to a centre for forensic mental health in Homerton, which was in part of the wider Homerton Hospital complex. One year later in September 2007 he moved to the post of Practice Innovation Nurse. This involved a promotion from Band 6 to Band 7. He informs the tribunal that over this period he was acting up in the role of matron at Band 8A, though he did not receive the extra salary for doing so.

4 The records show clearly that in January 2009 he accepted a move down in Band to be appointed to a post of Psychosocial Intervention Practitioner at Band 6 in Clapton Common. This was a role which had evolved through NICE recommendations. He was required to train for qualification in Cognitive Behavioural Therapy for specialist work in psychosis. He saw this as furthering his career. It was a specialist qualification he wished to acquire. That, he says, was why he elected to drop a Band, with a reduction in pay.

5 In that role he was responsible to a consultant psychologist. There he stayed for 8 years before this routine cyclical restructure which specifically affected his role. These restructures have become a regular, almost constant, feature in NHS Trusts. It was resolved in this restructure that the Assertive Outreach Service (AOS) would close and the work would be integrated within the Community Mental Health Teams (CMHT).

6 There was a need for cash-releasing savings. Some of these efficiencies could be achieved through releasing premises, and some involved staff changes. On this occasion the staff changes in this part of the restructure were to affect some 17.5 FTE employees.

7 At a meeting on 24 March 2017 the claimant was informed that his role was to be deleted as a Psychosocial Intervention Practitioner with the Hackney Rehabilitation and Recovery Service. He was informed that this would take effect on 3 July 2017. The claimant was disappointed by this. It was his particular interest to become more deeply involved with psychological interventions. He wished to become more qualified in

psychological therapies. That, he says, was why he had accepted a demotion to Band 6 and a loss of pay to pursue this specialism.

8 As is routine with a restructure, a job matching exercise was undertaken to identify possible suitable alternative employment. Dean Henderson was the Borough director for City and Hackney Directorate within the Trust. He oversaw this process. The claimant's outgoing manager, Janice Robertson, was the team manager over 2 teams - City and Hackney Rehabilitation & Recovery Service, and the, now closing, Assertive Outreach Service. She has since retired. The HR lead for this part of process was Lisa Baker who also gave evidence to the tribunal at this hearing.

9 There have been 3 witnesses at this preliminary stage, Mr Henderson, Ms Baker and the claimant.

10 The claimant was sent a letter of invitation dated 6 June asking him to a meeting on 13 June 2017 in order to discuss suitable alternative employment offers. That letter read:

> "I must advise you that the outcome of this meeting is likely [sic] to be that you will be issued with formal notice of your dismissal on the grounds of redundancy. You will have an opportunity to present your views and ask any questions you wish. We will continue to search for suitable alternative employment for you throughout your notice period. This will be both within the Trust, and you will be registered on the NHS London At Risk Register for as long as you are employed by us. At the meeting we will also discuss the number of roles which had been forwarded to you by the redeployment officer and the reasons for your refusal. I must inform you that should you fail to take what the Trust regards as suitable alternative employment you will forfeit your right to a redundancy payment."

11 At the meeting on 13 June Lisa Baker attended, as did Ms Robertson. 9 roles which the claimant found unsuitable were listed and discussed. The claimant stated that for personal reasons he could not work nights because he had increasing caring responsibilities for his mother who lives with him now, having moved from the Republic of Ireland. Other posts were obviously unsuitable. The post in Richmond was too far to travel. A post in Redbridge required Specialist Drug and Alcohol experience. Another post was for a qualified Registered General Nurse. The claimant was not so qualified. The role in Newham was too far to travel. One for a Community Mental Health Nurse was not suitable because it was on the same ward his mother was being treated on.

12 So, discussion came down to one specific role which was a Band 6 vacancy for a Care-Coordinator in North Hackney Recovery Team. Discussion of that role is at the centre of these proceedings. There was a job matching exercise undertaken by Denise Mervish on 2 June 2017 which apparently found that it was a 100% match to the claimant's PSI practitioner role. The claimant strongly disputes this. The content of the meeting was not minuted. Although the claimant was entitled to be, he was not accompanied. He confirmed that he was happy to proceed on his own.

13 The content of the meeting was later stated, after the event, in an outcome letter from Janice Robertson, pp'd by Lisa Baker. At this stage I do not need to go into the detail of the suitable alternative employment documents that run through this correspondence and the claimant's own response to the letter of 19 June 2017 giving his version of what had happened at the meeting of 13 June.

Scope of this preliminary hearing

14 It has been previously agreed that this judgment will deal only with the question of whether the claimant was dismissed for the purpose of Sections 136 of the Employment Rights Act 1996, 136(1).

15 There are 3 questions that must be answered if the claimant is to be entitled to a redundancy payment.

(1) Was the claimant dismissed within the meaning of Section 136(1) when his PSI practitioner role ceased?

(2) Was the Care-Coordinator role Band 6 in the North Hackney Recovery Team suitable alternative employment within the meaning of Section 141(3)(b) of the Employment Rights Act?

(3) Did the claimant unreasonably terminate his contract during the trial period within the meaning of Section 141(4)(d) of the ERA?

16 At this part of the hearing I was only asked to resolve Issue (1). If the claimant was not dismissed at the end of his PSI practitioner role that is the end of his claim for redundancy payment. In the event I have decided, in the claimant's favour, that he was not dismissed until the end of his employment with the respondent.

17 I have also needed to decide whether this was a statutory trial period within the meaning of Section 138(3)(b)(i).

Narrative

18 What is remarkable about the letter of 19 June is that it does not contain the words "dismissed", "formal notice", "termination" or any such thing. It is solely focused on the question of suitable alternative employment and the claimant's eligibility for a redundancy payment.

19 The claimant made no secret of the fact that he wanted a redundancy payment. That was greatly preferable to him to accepting a Care-Coordinator role which he saw as a backward step, in career terms. The respondent's letter of 19 June states:

> "You [the claimant] explained that you have a set of skills that will be very hard to replace. You stated you are really invested in your career academically. You feel like you have been forced to take this post and would prefer to be paid redundancy. If not, you would consider going to an employment tribunal to claim constructive dismissal. We apologised that you felt this way and Lisa explained that all redeployment posts are subject to a 4-week trial period to assess your suitability of the post.
>
> Lisa explained that she would explore the option as to whether the option of redundancy would be possible for you. This has been further explored and I can now confirm that unfortunately this would not be an option as the Trust's Management of Staff Affected by Change Policy is clear that the Trust will consider all reasonable practicable steps to avoid compulsory redundancies. We also feel that we have found suitable alternative post for you to be slotted into.

> I must inform you that if you unreasonably refuse any suitable alternative employment offers you will forfeit your right to a redundancy payment."

20 The indication in the invitation letter of 6 June about the claimant being "…likely to be issued with a formal notice of your dismissal on the grounds of redundancy" did not materialise in the outcome letter of 19 June, not at all.

21 The claimant knew that he would have to go through the trial period. If he rejected the trial out of hand, he considered that he would definitely lose his right to a redundancy payment.

22 Whether it is a trial period, for the purposes of s 138(1)(b) and 138(3)(b)(i) of the ERA is debateable. What is remarkable is that a trial period under the ERA is 4 weeks. There is no general power or right for either party to extend such trial period for longer than 4 weeks apart from that conferred by Section 138(6) of the ERA, specifically for the purpose of training, as follows:

> "**138** …..
>
> (6) For the purposes of Subsection 3(b)((ii)) a period of retraining is agreed in accordance with the subsection only if the agreement pay is
>
> (a) made between the employer and the employee …..
>
> (b) is in writing
>
> (c) specifies the date on which the period of re-training ends; and
>
> (d) specifies the terms and conditions of employment which will apply in the employee's case after the end of that period."

It is a prescriptive regime. There is no suggestion here that the parties complied with that.

23 In the event, however, the claimant's "trial period" lasted more than 1 week. On the claimant's evidence, which I accept, he had discussed the question of annual leave with Janice Roberts before he started the trial period for the Care-Coordinator role. If someone is transferred to an alternative role in the Trust all existing booked leave would be honoured in the new role. The claimant stated that he would not have taken booked leave during the trial period, or taken carer days off, if it was going to cut into the 4 weeks of the trial period.

24 Somehow Janice Roberts managed to get a responsible assurance that the claimant would have four working weeks to trial the new role, however this was to be achieved. This advice was later recognised to be wrong. We do not know whom she got the assurance from. Lisa Baker did not recall any such discussion prior to 3 July 2017 when the new role commenced on the Monday. I accept that the claimant's stance was that if the leave could not have been added to the trial period that he would not have taken leave at all. It was important to him to cooperate fully with the trial period, not because he wanted the role, but because he did not want to jeopardise his right to a redundancy payment, by any of his conduct.

25 The claimant accepts for the purposes of these proceedings that his previous PSI role was deleted with effect from 3 July 2017 and that that role was no longer available to him. He started working in the new role on Monday 3 July on a trial period, at which time it was believed by all that it was statutory trial period.

26 On 28 June the claimant wrote to Lisa Baker confirming he had met Derek Miller the manager of the North Recovery Team where he would be working to discuss the new role. He confirmed:

> "I can confirm that I will be given one month [sic] trial from 3 July 2017".

Derek Miller also wrote to Lisa Baker the same day stating that the claimant had been open with him about not wanting to move into the role and the possibility of taking the Trust to the employment tribunal after a 4-week trial. Mr Miller expressed disappointment with the Trust that they had not pre-briefed him about the fact that the claimant was being managed under the disciplinary procedure on account of his administration, and also managed under the sickness procedure. He would have liked to have been informed of that as it created some embarrassment between him and the claimant when they met. Mr Miller's letter eventually received a response on 12 July, perhaps surprisingly, from Janice Robertson the claimant's outgoing manager. Mr Henderson confirmed that it would be normal under the policy for the outgoing manager to take the lead in supervising the transition into the new role. The claimant, and to an extent the judge, found this rather odd.

27 The letter states:

> "Following your confirmation that your trial period for the post of care co-ordinator AfC Band 6 in the North Recovery Team commenced on 3 July 2017. I can confirm the following changes to your terms and conditions."

It confirmed that his pay and banding remained identical and that his immediate line manager was Derek Miller, which the claimant already knew. It then stated:

> "As this post constitutes suitable alternative employment you are entitled to a trial period. This trial period will last for four weeks.
>
> If you choose to work beyond the end of the four-week trial period any redundancy entitlement will be lost and you will be deemed to have accepted the new employment. In the event that the Trust wished to end the new contract within the trial period for a reason connected with the new job you will preserve the right to a redundancy payment."

28 That last sentence is a reference to Section 138(2)(b)(ii) which provides that there will be a dismissal for redundancy payment purposes if:

> "… the employer for a reason connected with or arising out of any difference between the new contract and the previous contract terminates the new contract or gives notice to terminate it and it is in consequence terminated".

It reflects that if, after all, the role is not a suitable alternative, and the employer terminates it during the trial period on the grounds that it is not suitable alternative employment, then the right to a redundancy payment will not be lost.

29 The letter then continued:

> "Please sign and return one copy of this letter to me within five working days from the date of this letter and retain the second copy for your own records. Please note that any unreasonable refusal of an offer of suitable alternative employment may mean that you forfeit your entitlement to a redundancy payment."

Nowhere in this letter is there any statement that the claimant has been dismissed or is under formal notice of dismissal or termination for redundancy, notwithstanding that the claimant's previous role had been deleted and no longer existed for him or anyone else to carry out.

30 The claimant has not been through a restructure before in his professional life. He therefore did not know what to expect. It would be wholly unrealistic for him to have been expected to understand the arcane mechanics of redundancy, suitable alternative employment, and the mysterious concept of a disappearing dismissal under Section 138 ERA.

31 I consider the only safe and sensible approach in a case like this is to base my judgment of the contractual reality on the correspondence between the parties rather than any oral discussions or notifications. The contractual reality of the situation has to be judged objectively.

32 The claimant understandably objected to being told to make an election as to whether to accept the post or not within 5 days from 12 July the effect of that would be to curtail the 4-week trial period which, in the normal way, would end on 31 July (3 July + 28 days). He saw this as

> "…a deliberate attempt to bullying me into signing the Trust letter without having sufficient time to seek union advice/support".

33 During the course of July, Lisa Baker agreed that the trial period could be extended, by adding 8 days of leave. On 2 August 2017 she wrote to the claimant with a copy to Derek Miller in response to his query stating:

> "Dear David,
>
> Your trial period commenced on 3 July for four weeks taking into account your eight days of leave during this period, your trial period is due to end on 9 August 2017.
>
> Regards…

34 Apparently, it is not uncommon for the Trust to extend trial periods in this way. It was only after this had happened that they realised that what they had been doing for years was without statutory authority and unlawful, as explained above. Section 138(6) provides the only possible extension of a 4-week trial period specifically for training purposes. It has to be the subject of a written agreement.

35 The next event was an email from Derek Miller the Operational Lead for the North Hackney Recovery CMHT to the claimant, cc'd to Mr Henderson and Ms Baker. It was

obvious that, in terms of the Care-Coordinator role, the trial period had been a great success. It read:

> "Hello David,
>
> As discussed with you in supervision on Friday it has been a pleasure to have you in the team and from what I can see you have integrated well into the team and the new way of working. I can see from your entries and interaction with clients, that they are very thoughtful and good quality. We also discussed some small success stories you had with some clients that can be challenging in various areas. We discussed that there are several areas that is new to you in the post which is expected but again you have a lot of transferrable skills that can be capitalised in the team. I also had a lot of good feedback from other colleagues.
>
> As stated to you based on the above I have no concerns with you continuing in this post as I believed that you will continue to be an asset to the team.
>
> Regards…."

36 That was to be expected. The claimant had work before as a Care-Coordinator. In fact, he did so when he was returning to work following periods of illness when he needed lighter duties. He had last worked full-time as a Care-Coordinator from 2001 – 2004 i.e. 13 years previously. In undertaking the trial period, although the claimant had made his views on the role well-known to Derek Miller the manager, he had not said to colleagues on the North Recovery Team that he had no intention of accepting the role beyond the trial period, as he did not wish to antagonise them.

37 On the strength of Mr Miller's feedback, the next event was a letter from Lisa Baker to the claimant dated 9 August 2017, the date that had previously been stated to be the last day of the 4-week trial period. It stated:

> "I am writing further to Janice Robertson's letter of 12 July 2017 which confirmed the changes to your role following consultation on the disestablishment of the Assertive Outreach Service and Rehabilitation changes.
>
> In this letter you were informed you would be slotted into the post of Care-Coordinator in the North Recovery Team which commenced on 3 July 2017.…
>
> I am therefore pleased to confirm that you have successfully completed your trial period and I would like to confirm that this suitable alternative employment post will now be a permanent change to your terms and conditions of employment….
>
> …As such **please note that refusal of this suitable alternative post will mean that you will forfeit your redundancy payment** as per Section 16 of the Agenda for Change Handbook.
>
> All other terms and conditions of your employment remain unchanged and this constitutes an amendment to your terms and conditions of employment with East London NHS Foundation Trust. I would be grateful if you would signify your acceptance of these changes by signing both copies of this letter returning one to me and the Human Resources Department and retaining the other for your records.
>
> Should you not agree with this the Trust's Management of Staff Affected by Change policy in the event of a complaint about misapplication of the Change Management Principles and Procedures, this will be dealt with in accordance with the Trust's Grievance Policy and Procedure under a

> Formal Stage 2 Appeal Hearing. Therefore, should you wish to utilise this please refer to Section 10 …"

38 The claimant "replied" on 8 August (apparently the day before) contending that the Care-Coordinator role was not a suitable match for his deleted PSI role. He explained he had delayed notifying his decision:

> "Before coming to this decision, I felt it was important to give the maximum amount of time the 4-week trial allows working in this role which started on 3 July… I believe waiting until now has allowed me to make an informed choice based on experience in the role"

39 Then, by an email on 9 August Lisa Baker he stated that if he chose to submit a grievance his right would be reserved, pending the grievance. In the meantime, she said he should continue working in the role and that he would not thereby lose any right to a redundancy payment, pending resolution of the grievance.

40 Ruth Hydon, the claimant's Unite union representative, wanted to formalise that statement into a contractual agreement to extend the trial period, without which she was apprehensive that the claimant might lose entitlement to a redundancy payment. There then followed a formal letter dated 10 August confirming that the trial period had been extended from 9 August for a period of four weeks until 6 September. As it was then, the claimant had not attended work since 9 August. The original letter had told him that if he worked beyond 9 August he would be deemed to have accepted the new role and lose his right to a redundancy payment.

41 The claimant then brought a formal grievance on 17 August 2017. Predictably it took longer than 4 weeks to resolve that and on 6 September Ms Hydon on the claimant's behalf stated that it was not appropriate to extend the period further and she asked Ms Baker to consider giving the claimant special leave:

> "I asked you on Friday to look into special leave for David given there is not currently a job for him – as Derek has said in his email just now, where will he be returning to?"

She went on to criticise the Trust for apparently not being willing to meet her or her member.

42 It was not until 13 September, by a letter from Dean Henderson, that the Trust eventually shared the discovery that they had had no power to extend the four-week trial period. He stated:

> "We have now sought legal advice regarding this situation and if your trial period into the above post can be extended further whilst your grievance is dealt with. I can confirm that based on this legal advice your trial period into the post of Care-Coordinator legally ended after the first four weeks of your trial on 9 August 2017 [sic] the Trust is therefore now in a situation whereby we take the view that you have objected what the Trust views as suitable alternative employment and you have forfeited your right to redundancy pay. However, we wish to hear your grievance first.
>
> …….
>
> As the Trust feels that the post for Care-Coordinator in the North Recovery Team is suitable alternative employment for you I expect you to return to this post immediately whilst your grievance

> is being dealt with. I can assure you this will not be worked as an extension of trial period but just in the interim so there is meaningful work you can undertake while your grievance is dealt with. You should therefore commence back in this role immediately as I am aware you have not attended for work since 6 September".

It is to be noted that this letter still misstates the final day of the trial as 9 August. That was the date calculated by adding on 8 leave days to the end of 31 July. In fact, there was never any warrant for the extension to 9 August even.

43 Predictably the grievance took a long time to resolve. The grievance hearing did not take place until 9 November. The claimant did not return to work and was subsequently off sick with "work related stress". Such sick pay as he was due was taken from the cost centre for the new role. The cost centre for the old PSI role had been deleted.

44 There was a grievance meeting on Thursday 9 November 2017 with the Borough Director Gill Williams. The following Wednesday 22 November, the claimant was sent a letter confirming the outcome. The grievance was not upheld and that was a final decision (as this was itself an appeal under the procedure). Following this the claimant was sent a letter from HR asking him, in view of the grievance outcome, whether he would accept the role of Care-Coordinator, or not. He sent a long and detailed response saying that he still refused it - in his own view, reasonably. This refusal will be the subject of the resumed hearing.

45 On 6 December he was sent a letter from Mr Henderson headed "Invite to final redundancy consultation meeting". He was asked to come to the meeting on Wednesday 13 December at the Trust headquarters. This letter also introduced another possible alternative role Community Recovery Worker, Band 6 in Newham. (Note here the claimant previously rejected Newham roles on the grounds they were too far to travel to). The meeting took place a week later because the claimant had a hospital appointment.

46 On 20 December 2017 the claimant was sent a letter initially stating that his last working day with the Trust would be 12 January and the remainder of his 12 weeks' notice (9 weeks) would be paid in lieu. It was followed up by a second letter of the next day, 22 December, stating that he did not need to return to work at all and that his entire notice entitlement would be paid in lieu.

47 That, says the claimant, was his date of termination. Not so, says the respondent. The date of termination was the date of the deletion of his PSI role on 31 July 2017. That dismissal might have disappeared under Section 138, they argue, if the claimant had accepted the Care-Coordinator role in North Recovery Team, but he did not. He had never been paid any money in lieu of notice at all, and therefore it was right that he should now be paid, at this later stage.

48 One of the arguments the respondent will be running is that the dismissal on 22 December was not from the deleted role of PSI worker but from the new role of Care-Coordinator and that that role was emphatically not redundant and therefore the claimant was not entitled to a redundancy payment. It is a deeply unattractive argument they are committed to running, in that they made the mistake, and misled the claimant, not realising that the statutory trial period could not have been extended. He had automatically forfeited the right to refuse the role by working in it after 31 July.

Legal Analysis and conclusions

49 The statutory scheme is extraordinarily complex. It has been substantially unchanged since 1965. The primary sections are as follows:

> "**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)

(Section 137 has been repealed. It related to women returning after childbirth - now covered by other legislation).

> "**138 No dismissal in cases of renewal of contract or re-engagement**
>
> (1) Where -
>
> (a) an employee's contract of employment is renewed, or he is re-engaged under a new contract of employment in pursuance of an offer (whether in writing or not) made before the end of his employment under the previous contract, and
>
> (b) the renewal or re-engagement takes effect either immediately on, or after an interval of not more than four weeks after, the end of that employment,
>
> the employee shall not be regarded for the purposes of this part as dismissed by his employer by reason of the ending of his employment under the previous contract." …….
>
> "**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 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 redundancy payment if he unreasonably refuses the offer.
>
> (3) This subsection is satisfied where …
>
> … (b) those provisions of the contract as renewed or 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."

138 Those are the essential provisions I must consider. The debate in this case has been extensive. I have been referred to an enormous amount of case law on the question of the extent to which notice of termination needs to be communicated. I have also suggested authorities myself.

139 I appreciate it has always been the law that termination of employment must be communicated in some way so that employee may know it has been terminated. There is a line of cases under Section 97 of the Employment Rights Act ("effective date of termination") stating that time limits should not start running against claimants unless they know that the time limit has started running. One of the most best known of those is *Gisda Cyf v Barratt* [2010] IRLR 1073 UKSC*.*

140 Another line of authority considers contractual principles concerning the termination of employment. The leading case on this now is *Geys v Société Générale London Branch* [2013] ICR, 117, SC where a majority of the Supreme Court rejected the "automatic" theory of termination. It had thitherto existed for some decades as a theory of how employment contracts may come to an end. (The alternative way was "elective"). Of particular relevance to this case has been the judgment of Baroness Hale paragraph 42 ff.

141 Of the general caselaw under redundancy legislation, the case closest to the present on the facts is *Meek v J Allen Rubber Co Ltd* [1980] IRLR 21, EAT. It was a case where a lorry driver was told that, because of the closure of one of the plants, his job had ceased to exist. However, Mr Meek was told he was entitled to redundancy pay (which is a distinction from the present case). He was also told at the same time that there was a vacancy at another depot in London for an HGV driver although it would be on irregular hours and mainly nights. To give him a chance to fairly assess the role he was given a trial period of six months. The Employment Appeal Tribunal confirmed, as the respondent now knows, that there is no warrant under statue for such an extension of the trial period. Because Mr Meek had not rejected the job within a four-week trial period he had lost his right to redundancy pay. The Employment Appeal Tribunal also confirmed that, in relation to a valued employee after 18 years' service, this was a very unhappy result. Also:

> "The trial period suggested by the company was for humane purpose of seeing whether in the view of difficult domestic circumstances the job would suit him"

Nonetheless they held that the tribunal was quite right to dismiss the claim for a statutory redundancy payment. They considered the claimant's counsel was right to make the point that Mr Meek was told at the point of termination that he was entitled to redundancy pay.

142 The respondent in this case has never said that the claimant was entitled to redundancy pay. The entire restructure took place without any redundancy payments being made. That is in accordance generally with the aims of the restructure policy.

143 The leading case on trial periods is *Optical Express Ltd v Williams* [2007] IRLR, 936, EAT confirming again that the statutory trial period is a four-week trial period.

144 A common law "trial period" has been discussed in other cases e.g. *Air Canada v Lee* [1978] ICR, 1202, EAT. This concept has arisen in constructive dismissal cases.

145 Unless there is a formal statutory trial period under Part XI of the Employment Rights Act, there is no right to a statutory redundancy payment. That is what this case and these tribunal proceedings are about. (Interestingly the *Optical Express* case also had in the background a contractual enhanced redundancy payment, as the present one may also have).

146 I was referred to the case of *Francis v Pertemps Recruitment Partnership Ltd UKEATS/0003/13* a decision of Langstaff P and members. It is relied upon heavily by the claimant. Paragraph 21:

> "However, section 138 goes on to set out situations where the statute provides that, despite that definition [i.e. of dismissal], there is actually no dismissal where the contract is terminated that is where the employee's contract is renewed or he is re-engaged under a new contract. If looked at colloquially therefore the question upon which the claim for unfair dismissal is predicated is whether the contract is terminated, whereas the question on which the right to a redundancy payment depends might be put broadly as the employment relationship being terminated."

For myself I found that a helpful distinction that acknowledges the rather mysterious concept of a disappearing dismissal.

147 Another recent case I have found helpful was the case of *Sandle v Adecco UK Ltd* [2016] IRLR 941 EAT, judgment of HHJ Eady. This reviews several of the cases concerning the need to communicate dismissal by words or actions. Dismissal has to be on a date certain. The case of *Hogg v Dover College* was cited. This was the historic authority where the tribunal held that it was possible to bring an unfair dismissal case from within employment. Mr Hogg's old contract was replaced by a new contract with half the hours, and half the salary. The difference was so substantially great that it could not be portrayed as anything but a dismissal and re-engagement on a different contract. There is no such great difference between the contracts in the present case.

148 The Hogg case was followed *Alcan Extrusions v Yates* [1996] IRLR 327 EAT, which also involved "radically different" new terms. I cannot find that the Care-Coordinator contract role in any way raises a *Hogg v Dover College* kind of issue where a dismissal simply happens. The claimant's grade, status and salary would remain identical before and after the change. It was broadly to do with psychiatric nursing and recovery. I do not consider the respondent would wish to argue that. If it was "radically different", then the role could hardly have been suitable alternative employment

149 As stated earlier I must base my objective assessment of the contractual reality on the correspondence. The parties' recollections of meetings inevitably differed. When two sides are so strongly in disagreement, memories can become selective and tendentious. In the *Sandle* case at paragraph 26:

> "Where the question of termination is to be determined in the light of language used by an employer that is ambiguous, the test is not the intention of the speaker but rather how the words would have been understood by a reasonable listener in the light of all the surrounding circumstances"

That approach aligns with the contract law cases. That seems to be an accurate statement of the test I have to apply. That means the approach in *Geys v Soc Gen* is a more useful guide than the Section 97 ERA ("EDT") cases.

150 "Reasonable listener" is another way of saying objective. The reasonable listener is also disinterested. I have reviewed the correspondence in detail throughout the course of this long hearing on a single issue. My initial doubts remain. The letter of 6 June stated the claimant was likely to be issued with formal notice of dismissal. This never materialised in the correspondence.

151 The correspondence does not seem to reflect dismissal followed by disappearance of the dismissal. That was the shape of the legislation which the respondent needed to follow. The lack of any "formal" notification of such dismissal, in a process characterised by formality at every turn, is, I consider, fatal to the respondent's contention that the claimant was dismissed.

152 The claimant's belief is that he had a subsisting contract with the Trust which underlies the various changes in role which he has had throughout the whole term of his employment with the respondent. In the light of the correspondence the claimant received. I would that as an objectively reasonable interpretation of what was being communicated to the claimant.

153 It follows in my view from the reading of the sections that if the claimant was not dismissed, the trial period in the new Care-Coordinator role cannot have been a statutory trial period under the Part of XI of the Employment Rights Act 1996. It could only be a statutory trial period if it started immediately on an actual dismissal (as per s138(1)(a) & (b). It therefore follows that the trial period was not in fact a statutory trial period.

154 It is not necessary for me at this stage to say what other kind of trial period it was. Maybe, as Ruth Hydon suggested, it was a "contractual" trial period, and they were sensible and fair in allowing the claimant time for annual leave and also extra time for his grievance to be dealt with. But this is a strict statutory regime which needs to be followed to the letter, in order for the claimant to qualify for a statutory redundancy payment.

155 I consider therefore that the claimant was not dismissed until 22 December 2017 and therefore the remaining issues for decision will have to be considered now, with the addition of the extra question, now introduced by the respondent's counsel namely was the claimant's final dismissal a dismissal from the PSI worker role which was redundant or from the Care Co-ordinator role which was not.

Employment Judge Prichard

Date: 22 February 2019