



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Watts

**Respondent:** Evelyn 190 Community Trust t/a Evelyn 190 Centre

**Heard via:** CVP **On:** Friday 29<sup>th</sup> April 2022

**Before:** Employment Judge A Frazer (sitting alone)

**Representation:**

Claimant:  
In person

Respondent:  
Mr W Brown (Solicitor)

## JUDGMENT

1. The Claimant's claims for notice pay and redundancy pay are well founded and do succeed.
2. The Respondent shall pay the total sum of £13, 077.72 to the Claimant as set out in Annex A below.

**Annex A**

Notice pay	£740.22
Redundancy pay	£12, 337.50
<b>GRAND TOTAL</b>	<b>£13, 077.72</b>

# REASONS

1. I sought to clarify the issues with the parties at the start of the hearing. They were as follows:
  1. Whether the Claimant was dismissed or whether he resigned.
  2. When was the effective date of termination?
  3. If so, was the dismissal by reason of redundancy, having regard to the definition at s.139 ERA
  4. If the Claimant was dismissed, was he given proper notice?
2. The Claimant had raised in his witness statement that he wanted to claim constructive dismissal. Mr Brown objected and submitted that if he were claiming this then he would need to make an amendment application. I ask for submissions from the parties as to whether this would require an amendment application. Mr Brown submitted that it would as the box for unfair dismissal was not ticked and the first the Respondent had known of any UFD claim was in the Claimant's witness statement. I went through the principles of **Selkent Bus Company Ltd v Moore [1996] ICR 836** with the Claimant and explained I would have to consider an application in accordance with that test. I asked him whether he wanted to make an application and he said that he was happy to go forwards with the claims as they currently stood.
3. I confirmed with the parties that the Respondent's name was correct and was informed that this had been subject to an amendment at the last case management hearing.
4. I had before me a bundle of document running to 69 pages, a witness statement from Mr Watts, a witness statement from Alan McKenzie and a witness statement from Maureen Vitler, former secretary of the Respondent. Mr Watts stated that Mr McKenzie would not be attending to give evidence and I said that I would be able to place less weight on that statement than if he had been there in person and his evidence tested under cross-examination. Mr Brown did not object to Mr McKenzie's statement going in as a hearsay statement.
5. I heard oral evidence from the Claimant and from Ms Vitler before lunch. I had closing submissions from both parties. Mr Watts had expressed concerns that he had only just received Mr Brown's submissions so I gave him an opportunity to read them when I was reading the documents earlier on that morning and indicated that if he wanted some further time to read after lunch I would grant him that.

## Submissions

6. On behalf of the Respondent Mr Brown submitted that while he sympathised with the Claimant's situation the organisation had run out of money. The Claimant left before the Respondent made the decision to make him

redundant and under s.135 he was only entitled to payment if he was dismissed. There was no termination by the employer. The Claimant himself said he wasn't dismissed. Ultimately however the employment ended at some point. The Claimant's last working day was 15<sup>th</sup> January. Mr Watts unilaterally terminated his employment by his conduct. The Respondent had assured him that he was not redundant and was due to meet with Phillipe Granger on 20<sup>th</sup> January. It had hoped that funding would come out of the meeting but no funding materialised. Mr Watts jumped the gun – he was not dismissed for redundancy. He says he would have gone back to the employer if they had paid him. He doesn't qualify for redundancy. He was not entitled to notice as he was not dismissed. The amounts claimed were not in dispute.

7. Mr Watts said that he didn't walk out. He said that he was advised he wasn't going to be paid. He asked for a letter seeking clarification. He said that he continued to be an employee waiting for confirmation from his employer as to his continued employment given that they couldn't afford to pay him. The organisation was no longer able to function and redundancy should have been paid. He had asked for clarification and they had responded to say they would be contacting him. They didn't contact him for a year and six months. He had to claim JSA. He didn't have any money. He was fortunate to find a job on Bench Outreach on a casual basis on 3<sup>rd</sup> February. He would have returned had they been able to pay him. Other staff had been made redundant and it was his view that if they were made redundant then that situation applied to him too. The Respondent had not provided accounts. They have advised that they are seeking to dissolve the organisation. They advised that the money returned from Audrey should have been paid. They were not in a position to pay the Claimant nor to carry on as an organisation. Their breach of contract was in effect a dismissal. They could not expect the Claimant to carry on working without being paid. I

## The Law

8. The right to a redundancy payment is contained in s.135 of the Employment Rights Act 1996 which says '*an employer shall pay a redundancy payment to any employee if the employee –*
- a) *is dismissed by the employer by reason of redundancy or*
  - b) *is eligible for a redundancy payment by reason of being laid off or kept on short time.'*
9. Section 136 defines the circumstances of dismissal as follows:
- (1)(a) *the contract under which is he employed by the employer is terminated by the employer (whether with or without notice)*
  - b) *he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract*  
or

- c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate is without notice by reason of the employer's conduct.*

10. Redundancy is defined in s.139 as follows:

*(1) For the purposes of this Act 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 wher the employee was so employed or*
- b) *i) the fact that the requirements of that business 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 by the employee was employed by the employer have ceased or diminished or are expected to cease or diminish.*

## **Findings of Fact**

11. The Claimant was employed as a Housing Law Advisor by the Respondent from 4<sup>th</sup> November 2003. He made a claim to the Employment Tribunal on 9<sup>th</sup> April 2020 for redundancy pay, notice, holiday pay and arrears of pay. There was a judgment for redundancy, notice pay, unauthorised deductions from wages and holiday pay given by EJ Sage on 26<sup>th</sup> November but the judgment as to notice pay and redundancy pay was set aside by way by way of a reconsideration on 22<sup>nd</sup> July 2021 by EJ Kahill.
12. The Respondent is a charitable trust and is an unincorporated association. In December 2019 the organisation was anticipating that it would have a funding shortfall. There were some discussions in December 2019 and early January 2020 regarding the charity's financial position. There was a deficit in cashflow of around £50,000. The charity had expected a funding stream to come from Lewisham Council but it never materialised.
13. There were notes of a committee meeting at page 49 of the bundle on 10<sup>th</sup> January 2020. In terms of the future of employees at that point in time it records that there was a discussion around staffing structure, job descriptions, possibly working 4 days a week until other source of funding is secured and not ruling out possible redundancies. Therefore, it was in the contemplation of the Respondent to make redundancies at that point of time but no firm decision had been made. The note goes on to say that the Respondent was going to contact Peninsula about seeking advice about redundancies and changes to terms and conditions if the organisation went down to 4 days a week. It was agreed that rev Louise Codrington Marshall would contact Phillipe Granger from Time Rushy Greenbank who may be able to offer support to save the organisation. Time Rushy Greenbank had been

recommended to the Respondent by the local authority as it was hoped that they may be able to help the Respondent to move out of its current financial predicament.

14. On 13<sup>th</sup> January 2020 one of the trustees, Reverend Louise Codrington Marshall emailed Phillipe Granger to ask for advice. Mr Granger responded and a meeting was arranged for 20<sup>th</sup> January.
15. A further management committee meeting took place on 13<sup>th</sup> January and the meeting with Mr Granger was to take place on 16<sup>th</sup> January. It stated in the notes that Peninsula had stated that it would cost the organisation £2, 700 to deal with their staffing issues and that no decision would be made until Audrey Hart, project co-ordinator, returned from holiday and they had a better position on finances. There was a record of what was required of Audrey upon her return.
16. The Claimant was due to be paid on 18<sup>th</sup> January. By 9<sup>th</sup> January staff knew that the organisation was in crisis and at a meeting the Claimant asked the Chair of the Committee, Yvonne Hepburn, if staff would be paid. He was told that they would be.
17. On 15<sup>th</sup> January Ms Hart returned from leave and the Claimant asked if staff would be paid. He handed to Ms Hepburn a letter which he wrote which is at page 53. This says *'I have been today been informed that I will not be paid my monthly pay on 18<sup>th</sup> January 2020 and that it appears that I will not be paid for work I have already done. I have not received the appropriate notice or confirmation that I am being made redundant. However as you cannot pay me, you have made me redundant. Can you please arrange for me to be paid all monies owed to me including for work done, for my notice period and for holiday owed. Can you please also arrange for me to receive my redundancy pay either from the Evelyn 190 Centre or make an application for me to receive statutory redundancy pay from the government. Please confirm the day you have made me redundant and provide me with a P45.'*
18. The Claimant then received a letter from Rev Louise Codrington Marshall dated 17<sup>th</sup> January 2020 which confirmed receipt of his letter of 15<sup>th</sup> January. This said *'I am unsure of the content of this letter as no processes have taken place to indicate a redundancy situation at this moment in time. I can acknowledge with regards to payment of wages that this has concern for you and other employees. You are aware of the current situation and we will be able to confirm more details next week.'*
19. Caseworkers continued to work for the Respondent albeit on an unpaid basis and the Respondent commenced a redundancy exercise with the remaining staff from 7<sup>th</sup> May. The remaining two staff were made redundant in June following consultation.
20. On 20<sup>th</sup> January 2020 the Claimant phoned Audrey Hart to ask her about his wages. She said that there was some money to pay some of the wages but that the management committee would not agree for the payment to be made.

21. The Claimant claimed benefits. He started new employment with Bench Outreach on 3<sup>rd</sup> February 2020. He did not receive any further communication from the Respondent and so on 19<sup>th</sup> February took steps to claim through the employment tribunal.
22. The Respondent stated that it anticipated that some money would come to pay him which had been taken from the accounts but this did not come back till March. The Respondent had also got into other debts by then.

## Conclusions

23. The Respondent committed an anticipatory breach of contract of the Claimant's contract on 15<sup>th</sup> January by indicating that it would fail to pay him his wages on 18<sup>th</sup> January. He claimed the situation had amounted to a redundancy by way of the letter of 15<sup>th</sup> and requested documentation going to termination. From his view at that point in time he had considered that the Respondent was – by its conduct - dismissing him. The Respondent – by letter of 17<sup>th</sup> January however - stated that he was not redundant and that it would get in touch with him about payment. The Claimant then waited for further communication from the Respondent but obtained a further job on 3<sup>rd</sup> February having received no further communication about his future employment and pay.
24. The Claimant received no further communication so sought another job. There were no words of dismissal and no words of resignation. The Claimant's case was that the Respondent's breach of contract was so fundamental that it was a redundancy. I consider that when he wrote his letter on 15<sup>th</sup> January the Claimant was looking into the circumstances of where the organisation found itself and considered that he was owed a redundancy payment.
25. This is a case where in my finding there was a termination by the employer by way of ambiguous words and/or conduct. The Respondent failed to pay the Claimant and then having received his letter stating his belief that he had been made redundant, corrected this and said that it would get back to him but failed to do so. There was no evidence of follow up by the Respondent.
26. While this is not the exact facts of **Hogg v Dover College 1990 ICR 39 EAT** as that concerned the unilateral termination by an employer by removing an employee from his post and offering him new terms which were fundamentally different, it is without any doubt that the Respondent's conduct, considered objectively, was an indication by an employer that it had no intention of retaining its employee. There was a wholesale failure by the Respondent to communicate with its employee in the face of something so urgent and pressing as the employee's query about pay and future continuity of employment. While I took into account the Respondent's letter of 17<sup>th</sup> January saying that there was no redundancy situation, given that the Respondent had failed to communicate in response to the Claimant's request for clarity, the only inference to be drawn from such a lack of response was that the reality of

the situation was that there was no paid work available for the Claimant to do owing to the financial crisis the Respondent found itself in.

27. The Claimant, responding to the failure in communication by his employer, was then compelled to mitigate his loss by seeking alternative employment. By 3<sup>rd</sup> February the Claimant in my finding the Claimant had been dismissed. As he says, the Respondent had done nothing to secure his future employment by suggesting other means of working such as lay off or short time and as such by their conduct had dismissed him.
28. Having regard to redundancy however the question is what was the reason for the Claimant's dismissal? Was it by reason of redundancy having regard to s.139? At that point in time the Respondent stated that it had not decided to make any redundancies. The Respondent says that it did not make any redundancies until June.
29. The Respondent was only able to keep people on after January by not paying them. The evidence was that staff had to be moved out of the building as it was unsafe. It was accepted that after the meeting with Rushy Green Timebank in January if there had been a prospect of securing the Claimant's job and paying him he would have been contacted. He was not. There was no communication with the Claimant about other means of carrying out his work such as regarding short time or lay off. I can only necessarily infer that the requirements of the Respondent for employees to carry out the work of housing advisor had by 3<sup>rd</sup> February ceased or diminished or the Respondent would have contacted the Claimant to get him back in. I find that the Claimant was dismissed by reasons of redundancy and award the sum of £12, 337.50 as redundancy pay. The Claimant is also entitled to notice pay which is agreed at the sum of £740.22 taking into account sums offset by mitigation.
30. These amounts and the outstanding unpaid wages will most likely need to be recovered from the Secretary of State.

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Employment Judge A Frazer  
Dated: 6<sup>th</sup> May 2022