



EMPLOYMENT TRIBUNALS

Claimant: Mr Christopher Mitchelmore
Respondent: BT Plc
Heard at: Exeter by CVP **On:** 23 and 24 August 2021
Before: Employment Judge Smail

Representation

Claimant: Mr D Leach, Counsel
Respondent: Ms A Jervis, Advocate

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 17 June 2020, the Claimant claims damages for breach of contract. The Claimant retired from the Respondent on 30 June 2020. This is a breach of contract claim accepted as being outstanding at the date of termination of the Claimant's employment. The Tribunal has jurisdiction.
2. The claim is that the Respondent capriciously or arbitrarily rejected the Claimant's application dated 12 December 2019 for early release from employment, and the related maximum eighteen months salary payment, under the Respondent's UK Voluntary Paid Leaver Scheme. This was a voluntary redundancy scheme. A successful applicant gets a leaver's payment of 1.5 weeks salary per year of service and an early leaver payment of six months salary. There is an overall maximum of eighteen months salary. The Claimant had forty-two years service which is an excellent achievement; it is clear that his payment, if agreed, would have been the maximum eighteen months salary.

3. The Claimant was employed as an Exchange Engineer. He had maintained BT exchanges in Devon and Cornwall some of which were in remote areas for a great many number of years.
4. On analysis of the evidence, the reason why the Claimant was not approved for early release and the accompanying payment was that he had already served notice of intention to retire with effect from 30 June 2020, some six months away. The decision on his application was made by Mr Lee Chudy, a Senior Regional Manager in the South West. His reason was that the application was not financially viable. The Claimant had six months to go before retirement. In the circumstances, it was not possible to justify commercially or financially, paying him eighteen months salary; an equivalent of twelve months extra. That is the reason the Claimant did not get the early release and the accompanying payment. HR may have identified other reasons but Mr Chudy's reasoning was the one that counted; and the basis for his decision was clear, as recorded above.
5. The Claimant by his Counsel submits that the decision was capricious or arbitrary by reference to what happened to others. Mr Croft was allowed early release notwithstanding he had fifteen months to go. In Mr Chudy's reasoning, and there is reference to a discussion with HR whereby it was agreed that Mr Croft's early release was "almost financially viable", being fifteen months versus eighteen months. The difference of three months could be justified, as recorded in the notes of the decision with HR, by having to avoid dealing with a disgruntled employee for fifteen months.
6. There is an assumption in Mr Croft's case that he would have had the full payment of eighteen months. There is no evidence to contradict that and on the balance of probability this assumption was accurate. Mr Croft's case was materially different from the Claimant's and does not generate even a prima facie case that the Claimant's decision was arbitrary or capricious. Mr Croft and the Claimant appeared in a spreadsheet of decisions made by Mr Chudy, they were all engineers.
7. Mr Newcombe was a Manager; as it happened, the Claimant's line manager. He encouraged the Claimant to apply for the early release payment. Mr Newcombe also applied for early release in December 2019. He was granted it with, I assume, the full payment. There is reason to think that Mr Newcombe was lucky to get this payment. It was understood in the business that Mr Newcombe was due to retire in the foreseeable future. A replacement was being recruited for him and it was envisaged there would be a period of the replacement shadowing Mr Newcombe. It is right that no specific date had been given by Mr Newcombe for retirement; he had mentioned March 2020 in conversation with the Claimant, but he had not served official notice on the Respondent.
8. I have not heard from Mr Newcombe in this case. It does seem to me that the Respondent might have refused the payment on the basis that retirement was planned even if no specific date was given. There is reason for thinking Mr Newcombe was lucky as I have mentioned. He had not, however, already served notice of intention to retire. Does Mr Newcombe's case give rise to a prima facie case that the decision in the Claimant's case was arbitrary or capricious?

9. In my judgment it does not. It is self evident that the business could not justify to shareholders, or anyone else of that matter, conferring a gratuitous twelve months benefit on the Claimant when he was due to retire in six months anyway. Yes, he had been a long serving and valued employee and I am sorry to hear the onset of heart problems. The scheme, however, was not a long service award nor was it early ill-health retirement; it was a scheme to encourage voluntary redundancies. I am told it was accepted nationally that there were too many engineers employed within BT. The Claimant was already leaving within six months; his leaving was already within the foreseeable future.
10. Even if I am wrong on the burden of proof and Mr Newcombe's case did transfer the burden to the Respondent to explain its decision, the Respondent does explain the exercise of the discretion in a rational manager. The case is reflective of the first question Ms Jervis asked the Claimant in cross examination: how could the Respondent justify paying eighteen months when the Claimant had only six months to go? It would of course have been nice for the Claimant to leave with such a payment, but it was not contractually due nor commercially nor financially viable.
11. Had I been of the view that the exercise of discretion was irrational, capricious, arbitrary - whatever label - then I am satisfied that there would have been scope for me to find breach of a legal cause of action. There are two primary implied terms of breach of contract. First, that an employer will not exercise a discretion in an irrational manner; and secondly, that the employer will not commit an act or omission designed or likely to destroy the relationship of mutual trust and confidence between employer and employee without reasonable cause. I have helpfully been taken to the Braganza v BP Shipping Ltd [2015] UKSC 17 line of cases by Counsel for the Claimant.
12. There is not a legal obstacle to this claim. There is a fundamental factual problem; namely, the decision to refuse the application for early release and the accompanying payment under the scheme was rational. The financial unviability of the proposal was recognised at every level of review. First by Mr Chudy, the decision maker; and then at the grievance and then at the grievance appeal. I reject the Respondent's position that the grievance and grievance appeal were irrelevant; had the grievance or the grievance appeal questioned the rationality of the exercise of the discretion then the business unit whose original decision it was would have been likely to reconsider their decision. However, the basis of refusal was confirmed at every level as being rational.
13. There was no failure to take into account a relevant consideration. No irrelevant consideration was taken to account, and certainly this was a decision which a reasonable employer could have taken. Indeed, in my judgment, the reverse applies. How could a reasonable employer have taken the decision to approve the award of eighteen months pay when the Claimant only had six months to go? In terms of the implied term of mutual trust and confidence, there was reasonable and proper cause for the employer to take the decision that it did.

14. Mr Newcombe may have been lucky; a decision in the Claimant's case was clear and entirely rational.

Employment Judge Smail
Date 27 September 2021

Reasons sent to parties: 4 October 2021

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