EMPLOYMENT TRIBUNALS

Claimant: Mr Mark Gibson

Respondent: Delice De France Limited

Before: **Employment Judge Price**

Heard at: **Considered on the papers**

Appearances

For the claimant: In person
For the respondent: Mr Uduje

JUDGMENT ON RECONSIDERATION

1. The Judgment of 17 May 2023 regarding the claim for redundancy pay is revoked.

2. The claim for redundancy pay fails.

REASONS

Procedural history

1. Judgment and reasons in this claim dated 17 May 2023 were sent to the parties on 21 May 2023, an application for reconsideration was made on 2 June 2023 by the claimant. Both parties were directed to respond and inform the tribunal if they wanted the matter considered at a hearing. On 13 September 2023, the respondent stated 'The Respondent is happy for the matter to be dealt with on the existing evidence and respective submissions of the parties at the original hearing'. On 8 September 2023 the claimant corresponded with the tribunal to say 'I am happy to have the point in question heard at a hearing...'.

2. As neither party had expressly stated that they were content to have the matter heard on the papers, a hearing was listed for the 28 November 2023. Directions

were given prior to the hearing which amongst other matters required the parties to submit any further evidence they wished to rely upon 7 days prior to the hearing date. No further evidence was submitted by either party.

3. The directions made clear that if the reconsideration application was allowed, the claim for redundancy pay would be reconsidered on the same day at the hearing. The issues that the tribunal would have to decide if the application were allowed were set out to the parties.

4. The claimant wrote to the tribunal on the 27 November 2023, expressing his dissatisfaction with the process to date. In this email, he suggested that both parties had already written to the tribunal and stated that they were happy to have the matter dealt with on the papers and that if he had to attend a hearing, he would withdraw his application for reconsideration.

5. In response to the claimant's email, the respondent confirmed that they were happy for the matter to proceed on the papers. However, given the nature and content of the claimant's email they sought the application to be dismissed.

Respondent's application to dismissal reconsideration application

6. The rules governing the employment tribunal procedure provide that reconsideration applications must be considered at a hearing, unless the parties agree otherwise. What I understand the claimant is now requesting is for the matter to be considered on the papers. The respondent has agreed to the same. The fact that the claimant has consented to the same, late in the day, is not a reason to dismiss his application for reconsideration and I do not do so.

The application for reconsideration

7. The context of the application is a claim for redundancy pay. The claimant's role was made redundant in May 2020, this was largely as a result of a downturn in business due to the impact of covid and the national lockdown measures. He was however offered another role. He accepted this role.

8. It was not in dispute that the claimant was offered the role of Regional Account Manager on 14 June 2020 and that he accepted this and there was continuity of employment. However, at this stage the claimant was 'furloughed'. He was taken 'off' the furlough scheme for a week in November, before being put back on to it. He was then told he would again be taken off the furlough scheme and commence work on 1 December 2020. He resigned that morning, prior to starting work.

9. One of the issues in the claim was therefore whether or not the claimant had resigned whilst in his 'trial period' under section 138 of the Employment Rights Act 1996 and whether he was therefore entitled to claim redundancy pay. It was not disputed that if he did not resign in the relevant period as set out in section 138, he would not be able to make this claim.

10. In summary, the reconsideration application was premised on the fact that the claimant believed that the issue of when his trial period started for the purpose of section 138 of the Employment Rights Act 1996 had been agreed at a

preliminary hearing of this matter in May 2022. In his email dated 8 September 2023 to the Tribunal he stated 'This is because it was already agreed during the preliminary hearing, that the trial period, if applicable, would not have started until the 1st of December'.

11. I make a finding of fact that this issue was not conceded at the preliminary hearing in May 2021 in which I sat as the Judge. I make this finding for the following reasons. As the claimant stated in his application for reconsideration '*In the preliminary hearing back in May 2021, the Respondent's defence to the 4-week trial period was that it should have started when the new role took effect on the 2nd of July 2020. Judge Price suggested in the preliminary hearing that it was not possible to trial a new role, unless I was in fact doing the role and that furlough needed to be a consideration…*' This alone demonstrates that the issue was discussed at the case management hearing, that both parties knew it was an issue and it was not one that the respondent had agreed.

12. This is supported by the fact, no concession was recorded in the note taken of the hearing, nor was it recorded in the case management order produced as a record of the discussions and directions made at the preliminary hearing. The parties were expressly directed in this order to write to the tribunal if the list of issues was not accurate. Neither party did this.

13. Furthermore, the respondent and the claimant both addressed this issue in their evidence and submissions before the tribunal at the final hearing. Indeed as the claimant's reconsideration application recognises, the respondent, in their outline submissions, maintained that the date the trial started was July 2020 when the new role was accepted by the claimant.

14. Nevertheless, as the claimant states that he understood that the matter was not in issue and that he may therefore not have addressed this in evidence as he otherwise would I allow the application. I take into account that he is unrepresented and that the issue was not expressly set out in the list of issues despite having bene raised and discussed at the preliminary hearing for case management in May 2022. Although finely balanced, I consider that it is in the interests of justice to allow the reconsideration application. I therefore revoke the Judgement of 17 May 2023 in respect of the claim for redundancy pay. For the sake of clarity the other parts of that judgment remain as decided on 17 May 2023 as they are not the subject of the application for reconsideration.

<u>The claim for redundancy pay</u>

15. Both parties stated that they were content for this matter, including the redundancy pay claim (if the reconsideration application were allowed) to be dealt with, without a hearing. Both parties were afforded the opportunity to submit further evidence or make further submissions and chose not to. The directions provided to both parties made clear the issues that would be considered by the tribunal if the application for reconsideration was allowed.

16. The directions stated as follows:

'That if the reconsideration application is allowed the following issues will be considered by the tribunal:

Whether or not the Claimant's claim for redundancy pay should succeed. In deciding this the tribunal will consider the following issues:

Was the claimant's contract of employment renewed or reengaged within the meaning of section 138 (1) of the Employment Rights Act 1996 and section 141 of the Employment Rights Act 1996?

If so, did the provisions of the new contract differ wholly or in part from the previous one?

If so, when was the trial period as defined by section 138 (3) of the Employment Rights Act 1996?

If so, did the claimant terminate the employment for any reason in the period starting with the beginning of the claimant's employment under the new contract and ending with the period of four weeks beginning with the date on which the employee starts work under the renewed or new contract?

Was the new employment suitable alternative employment within the meaning of section 141 of the Employment Rights Act 1996?

Did the claimant unreasonable refuse the offer of new employment?

During the trial period did the claimant unreasonably terminate the employment?

Was the claim brought in time?

If the reconsideration application is allowed, any and all issues concerning the claim for redundancy pay will be considered afresh, no previous decisions made by the tribunal about the redundancy pay, or any issues previously agreed by the parties about the redundancy pay will stand and both parties should approach the claim on that basis.

If the reconsideration application is allowed, all evidence submitted to the tribunal will be considered, however should the parties wish to consider any further evidence this should be sent to the Tribunal by 10am on Monday 27 October 2023.

If the reconsideration application is allowed, the tribunal will hear oral evidence should the parties chose to call witnesses. Any further witness statements must be submitted by 10am on Monday 27 October 2023. '

The legal framework

17. Section 136 provides as follows:

(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)…

18. Section 138 provides that as the heading suggests there is 'No dismissal in cases of renewal of contract or re-engagement'. This has been referred to in commentary as the 'disappearing dismissal'. At sub section 1 this provides an exception to when an employee is dismissed.

'(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'.

19. However, in accordance with sub section (2), subsection (1) does not apply if—

'(a)the provisions of the contract as renewed, or of the new contract, as to—

(i)the capacity and place in which the employee is employed, and

(ii)the other terms and conditions of his employment, differ (wholly or in part) from the corresponding provisions of the previous contract, and

(b)during the period specified in subsection (3)—

(i)the employee (for whatever reason) terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated, or

(ii)the employer, for a reason connected with or arising out of any difference between the renewed or new contract and the previous contract, terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated.

(3) The period referred to in subsection (2)(b) is the period—

(a) beginning at the end of the employee's employment under the previous contract, and (b) ending with—

(i) the period of four weeks beginning with the date on which the employee ***starts work under the renewed or new contract****, or*

(ii)such longer period as may be agreed in accordance with subsection (6) for the purpose of retraining the employee for employment under that contract; and is in this Part referred to as the "trial period".

(4) Where subsection (2) applies, for the purposes of this Part—

(a)the employee shall be regarded as dismissed on the date on which his employment under the previous contract (or, if there has been more than one trial period, the original contract) ended, and (b)the reason for the dismissal shall be taken to be the reason for which the employee was then dismissed, or would have been dismissed had the offer (or original offer) of renewed or new employment not been made, or the reason which resulted in that offer being made' (my emphasis added).

20. Section 141 of the Employment Rights Act 1996 is also relevant. It provides an exemption from the right to a redundancy payment where there has been a renewal or reengagement of the otherwise redundant employee.

21. Sub section (4) provides as follows,

'The employee is not entitled to a redundancy payment if—

(a)his contract of employment is renewed, or he is re-engaged under a new contract of employment, in pursuance of the offer,

(b)the provisions of the contract as renewed or new contract as to the capacity or place in which he is employed or the other terms and conditions of his employment differ (wholly or in part) from the corresponding provisions of the previous contract,

(c) the employment is suitable in relation to him, and

(d) during the trial period he unreasonably terminates the contract, or unreasonably gives notice to terminate it and it is in consequence terminated'.

22. The only case I was referred to by the parties in submissions was *East London NHS Foundation Trust v O'Connor* [2020] IRLR 16, EAT, in which HHJ Auerbach helpfully set out the following in relation to dismissals within the context of section 136 (and generally).

23. For there to be a dismissal, 'the employer must communicate to the employee that it is terminating the contract under which the employee is employed, and must communicate that it is doing so with effect on a date which is either expressly stated or unambiguously ascertainable from the communication' [81]. However, 'The communication may be by express words (whether oral or written) or it may be by words or deeds which convey that the employer is dismissing, on an identified, or uniquely identifiable, date' [82].

24. The requirement under section 136(1)(a) is that the employee be notified (by some form of communication or conduct) that the contract under which he is employed is being terminated. That is not necessarily the same as a notification that the role in which he is currently employed under that contract is coming to an end. Similarly, and consistently, the references elsewhere are to the "end of

the employee's employment under the previous contract" (section 138(3)(a)) and "the end of his employment" [87].

25. Whether a communication that the current role is to end amounts to a communication that the contract is being terminated on that date, must be determined by the Tribunal in light of the wider context, and all the facts of the particular case [88].

26. Whilst a dismissal may be affected by conduct, and the test is what the reasonable observer would understand by it, there can be no dismissal unless they would understand that the contract of employment has been unequivocally terminated [91].

Issues

27. The issues between the parties were (a) whether the claimant was dismissed in or around July 2020 and (b) whether or not sub section 1 of section 138 of the ERA applied, or if sub section 2 applied. The claimant maintained that there was a new contract which differed wholly or partially from his previous one and that he resigned in the period (a) beginning at the end of the employee's employment under the previous contract, and (b) ending with— (i)the period of four weeks beginning with the date on which the employee starts work under the renewed or new contract. The respondent contended that there had been no dismissal under the previous contract, or if there had been, that the claimant did not resign in the prescribed period which ran from when the new terms of employment applied.

Conclusions

28. I have heard no further evidence or submissions since the final hearing. Both parties were given the opportunity to present any further evidence and did not do so. Both parties had the opportunity to attend a hearing where they could have addressed this point further or made submissions, they choose not to do so. Therefore, in deciding the issues I have taken into account all the oral and documentary evidence provided at the original hearing and also the submissions made by both parties at that time.

Was the claimant dismissed?

29. On 18 May 2020 a sale operations announcement was made by the respondent that the headcount of the business was reducing from 394 to 220. It was proposed that approximately 150 people would lose their jobs. This announcement also included slides or a document with a new organisation structure, from this it was clear that the claimant's role of national account executive was being deleted and that his role was at risk of redundancy. It was also clear that consultation period would run until and end on 1 July 2020.

30. The claimant then had an individual consultation meeting on 19 May 2020 at which it was recorded he was told the sum of his redundancy payment and that the likely termination date of employment would be 1 July 2020. It was also recorded that although the company would look at alternative vacancies there

was a recruitment freeze on, and he was invited to apply for new roles elsewhere outside of the company.

31. However, it was also clear from the information provided on 18 May 2020 by the respondent that there was a new role being created called regional account manager. The claimant was informed that he was being considered for this role, alongside other employees whose roles were also being deleted and a selection criteria would be applied.

32. Around this time, the claimant was given a redundancy schedule with a termination date of 1 July 2020, which set out the redundancy pay that would be due to him. This totalled £1614. The claimant was then sent a further letter dated 20 May 2020 that stated '*as you are employed as a national account executive in sales you are potentially affected by the proposal, and unfortunately are therefore at risk of redundancy. You should regard receipt of this letter as a forewarning of potential redundancy with a proposed effective date of 1 July 2020*'. The letter went on to apologise for the situation and stated that it did not reflect on the claimant's abilities.

33. The claimant wrote to the respondent on the 3 June 2020 by email. In this email he stated that he was following up from a phone call he had had the day previous and that he understood that the redundancy would take effect from 1 July 2020. No response was received that disputed this assertion. In this email he also queried the calculation of his redundancy pay.

34. On the 14 June 2020 the claimant received a letter stating he had been selected from the pool and so his role was no longer at risk of redundancy. I find that this letter was inaccurate in one regard as it is not now disputed that the claimant's role had been deleted and the role he was subsequently engaged in was different (albeit the degree of difference was not agreed between the parties). I find that the claimant's role therefore had been made redundant and he was in fact being offered a new role called a regional account manager with a new line manager. This was one of the newly created roles in the respondent's new organisational structure as proposed in the consultation information.

35. I find that the claimant's previous role of national account executive was deleted. Although it does not follow from this that he was dismissed. The Claimant was told in May that his role was to be deleted, that he was at risk of redundancy, but it was at this stage only a warning and a proposal. The Claimant was then told on 14 June 2020 that he is no longer at risk. Given all of the circumstances of the case, in particular, the fact that the claimant was only ever given a likely termination date, and that prior to the end of the 'selection period' he was told he was not at risk of redundancy, I find that claimant was not dismissed. However even if he had been dismissed, I find that he did not resign within the trial period as prescribed in section 138 such that he would be entitled to be treated as being dismissed for the reason of redundancy. I form this view for the following reasons.

Did the claimant resign within the prescribed 'trial period'?

36. The respondent contends that the period described in section 138 (3) started in July 2020 and ended four weeks later as that is when the claimant 'started work' within the meaning of section 138 in his new role.

37. It is agreed that the claimant was put on the terms of the furlough scheme in this period. The notice given to the claimant by the respondent in March 2020 described the furlough scheme as one 'for those who were not able to be given work'. A further notice given to the claimant in April 2020 by the respondent made the point that it was a condition of the respondent putting the claimant on furlough was expressly said to be that the claimant could not work whilst he had been given the designated status of a furloughed worker. It also stated that '*at no point will the company instruct you to attend or complete your normal duties whilst you are assigned this employee status*' (referring to furlough).

38. It was agreed between the parties that throughout this period until 2 November 2020 the claimant was furloughed. The claimant was sent a letter on 28 October 2020 stating that he was 'required to recommence his duties on 2 November 2020'.

39. It was also agreed that the claimant came off the furlough scheme at this point, a point he accepted again in his reconsideration application when he stated '*The fact that I was taken off furlough for a few days in November 2020'*.

40. The claimant worked at home, this was the usual practise for the claimant's role in the respondent's company and not solely as a result of lockdown. He was asked to attend the premises and pick up a car and did so on 2 November 2020. The claimant expressed on numerous occasions how unhappy he was with this as he did not want to be financially penalised for having the company car if he did not use it.

41. As the claimant recorded in an email on 5 November 2020 he had a conference call with Nick (his new line manager) on Monday 2 November 2020 and then again the next day on Tuesday. He also discussed annual leave with his manager on 4 November 2020 as the claimant was unhappy that the days of his remaining annual leave for the year had been allocated. He had asked about furlough in both of these calls, however it had not in his words been discussed as the board had not made any decision. Indeed the claimant himself says that he was told during these calls in relation to work to 'carry on and wait for IT to get us back on line'. The claimant states in his application for reconsideration he was not doing any 'value added work' for the company during this week.

42. I find that the claimant did not start work within the meaning of section 138 of the Employment Rights Act 1996 until he was taken off the furlough scheme on 2 November 2020. He did not start work in July 2020, as he was placed on terms of employment that expressly stated he must not work. I therefore find that the claimant started work in his new role after a period of furlough on 2 November and that was when he started work within the meaning of section 138 (3) of the Employment Rights Act 1996.

43. The claimant's argument that he did not do what he considered substantive work in November 2020, does not in my view, change the position. It was agreed that (a) he was required to be available to work; (b) he attended

meetings with his manager; (c) he had to come to the companies offices to collect his car to be ready to travel for work. I find these requirements and acts were sufficient to have 'started work' within the meaning of section 138. Indeed, it would be difficult to see how this is not 'starting work'. If this were not to be considered starting work, what would be? If the starting line were drawn were substantive or 'value added' work began, it would create great uncertainty and cannot be what parliament intended when it enacted section 138. For example, would induction meetings or meeting with human resources not count?

44. In most circumstances it will be clear when work commences, in this case furlough delayed the 'start' of the work, despite contractual relations having commenced earlier. However, when furlough came to an end, and when the claimant was asked to be available to work and to actually take steps for that to happen (such as collect his car and attend meetings with his manager) I find that work had 'started'.

45. The claimant argues that 'I believe she can exercise discretion and should have done' in reference to the finding I made about when the claimant started work. However, there is no discretion provided to the tribunal by the wording of section 138, that can be exercised.

46. The claimant resigned on 1 December 2020, as such he did not resign within the trial period as specified by section 138 (3) (b) and as such section 138 (1) operates to mean that he is 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.

47. For these reasons the redundancy pay claim is dismissed.

Employment Judge **Price**

Date: 11 December 2023

JUDGMENT SENT TO THE PARTIES ON
28 December 2023

FOR THE TRIBUNAL OFFICE