Case Number: 2301566/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr K Weedon	and	John Bourne & Co

Held at Ashford on 9 December 2016

Representation	**Claimant:**	Mr M Cole, counsel
	Respondent:	Mr I Wheaton, counsel

Employment Judge Wallis

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant was constructively dismissed by the Respondent;
2. The dismissal was fair by reason of redundancy;
3. the Claimant was entitled to a redundancy payment;
4. if the parties cannot agree remedy, they should apply to the Tribunal office for a remedy hearing.

REASONS

Issues

1. By a claim form presented on 19 August 2016 the Claimant claimed unfair constructive dismissal, a redundancy payment and notice pay. He claimed that he had resigned because of a breach of contract namely that he was required by his employer to change his workplace, but did not have a mobility clause in his contract. He considered that the move suggested that he was redundant, which the Respondent denied. In the alternative, it was suggested that the imposition of new terms was a fundamental breach. The Claimant produced a list of issues which was discussed and agreed at the start of the hearing., as follows:-

a) what terms were effective between the parties on 20 May 2016;
b) was the Respondent in breach of those terms;
c) did the Clamant resign in response to that breach;
d) did the Claimant delay in resigning and thereby affirm the contract;
e) if so, was the Claimant dismissed by reason of redundancy for the purposes of section 139;
f) what was the place where the Claimant was employed by the Respondent;
g) did the Respondent cease to carry on, at that place, the business for the purposes of which the employee was employed;
h) was the Claimant dismissed within the meaning of section 95(1)(c);
i) what was the reason for dismissal (the Respondent contended that the reason was the Claimant's failure to follow a reasonable instruction and failure to present himself for work, which constituted some other substantial reason);
j) did the Respondent act reasonably in all the circumstances;
k) is the Claimant entitled to a redundancy payment and if so in what sum;
l) is the Claimant entitled to a basic award and/or a compensatory award for unfair dismissal and if so in what sum;
m) should any award be reduced on any grounds;
n) should any payment or redundancy be increased by reason of any failure by the Respondent to comply with a relevant statutory code.

Documents & Evidence

2. I had an agreed bundle of documents and written statements form the witnesses. In addition I had written outline submissions from the Respondent. The Claimant produced copies of **Bass Leisure Ltd v Thomas 1994 IRLR 104** and **Exol Lubricants Ltd v Birch and Perrin EAT/0219/14.**

3. When I reserved my decision at the end of the hearing, both representatives helpfully suggested that they provide further written submissions and those submissions have now arrived and have also been considered. I record my thanks to both representatives.

4. I heard evidence from the Claimant himself Mr Kevin Weedon and then from the Respondent's witnesses Mr Peter Bourne, the Respondent's managing director, and Mr Graham Grieves, the Respondent's transport manager.

Findings of fact

5. The Claimant was employed as a lorry driver by the Respondent and predecessor companies. In his claim form he put the start date as 1 November 1996, but his evidence was that he began on 17 September 1993. I found that his terms and conditions of employment were governed

by a contract that he entered into with a predecessor employer in 1994 according to the document itself. Nothing turns on this date; it appeared that he transferred to the employment of the Respondent on that date. I found that the only agreed changes to those terms related to pay rises over the years and a change of workplace as set out below. I rejected the suggestion by the Respondent that he had agreed another contract in 2011; the correspondence at the time was quite clear that the Claimant had not agreed that proposed contract.

6. I found that at the time that his employment began the Claimant was based at Detling quarry, although his contract is silent on the point and does not contain a mobility clause. He would drive to the quarry in his own vehicle, collect his lorry and his instructions for the day, and then load the lorry and carry out deliveries. The Respondent and its predecessors supply chalk, aggregate and soils to customers. The Claimant kept his work wear, maps, CB radio and other equipment at the office/mess room at the quarry. He returned his lorry to Detling at the end of the day.

7. The journey from the Claimant's home in Rochester to Detling was around 15 to 20 minutes.

8. There was no dispute that when the Claimant transferred to the Respondent, they confirmed in writing that they would honour his current contract. I noted that the Claimant agreed with the Respondent in 1996 that he would vary his working hours from 8am to 4.30pm, to 7am to 4pm with a one hour break.

9. In 2009 the Respondent ended its operations at Detling and moved to the quarry in Charing. I found that it was agreed that the Claimant would be reimbursed his increased travel costs for six months, and on this basis he agreed to move to a new workplace at Charing.

10. There followed some brief periods working at Detling in 2009 and 2010, but after that the Claimant worked solely from Charing, keeping the lorry and his equipment there, obtaining his instructions there, and so on. He received his orders by fax from the headquarters of the Respondent's business in Newenden.

11. In March 2016 the Respondent decided to sell the operation at Charing. In a letter to the Claimant of 30 March 2016 the Respondent said that the new owners would be taking possession on 8 April 2016 and 'we will therefore no longer be able to base your lorry there and would ask that from that date you base your lorry at our Sevenoaks depot'. The Respondent suggested in the letter that the distance that the Claimant had to travel was the same. I accepted the Claimant's evidence that it was a slightly longer distance, but in terms of time it would take much longer because it involved using a commuter route.

12. I noted that the Respondent was aware that the Claimant had domestic duties to consider, relating to an elderly parent and a disabled son.

13. The Claimant presented a grievance on 5 April 2016 suggesting that there had been no redundancy consultation; objecting to the proposed relocation; and pointing out that there was no mobility clause in his contract. He enlisted the help of his trade union.

14. A grievance meeting was held on 14 April 2016 in which the Respondent assured the Claimant that they would do what they could. I accepted that the Respondent genuinely wanted to assist the Claimant.

15. By letter of 20 April 2016 the Respondent notified the Claimant that they had found a location on a farm in Snodland, about 5 miles from the Claimant's home, where the lorry could be parked. As the Respondent was to rent the space, they wanted the lorry to earn its keep and asked the Claimant to ensure that he began work by 7am; they anticipated that he would not have to leave home any earlier than he had for Charing, because his journey would be shorter. I noted that the Claimant had some concerns about the suitability of the venue, particularly in the winter months. There was no office or other facility for storage of equipment.

16. They also required him 'as a quid pro quo' to sign and return the 'standard contract to which all of our other drivers are signed up'. They noted that this would increase his unpaid break by half an hour to one hour, thus impacting on his earnings, but envisaged that his savings on travel to work expenses would compensate for this.

17. The Claimant was reminded of his right to appeal the decision.

18. The proposed contract had a number of standard clauses. Under the heading 'place of work' it stated 'you will be based at the above address (this referred to the head office at Newenden) or any current or future company site within reasonable travelling distance of your home'.

19. In an email of 22 April the Claimant expressed his appreciation of the Respondent's arrangement of the new location for parking at Snodland, but explained that he could not sign the contract because he could not accept some of the terms. He did not think that he could leave at the same time and start work at 7am. He considered that the mobility clause was unworkable because he was unable to commit to any alternative workplace. He could not agree that his hours would be varied to suit the needs of the business, and he was unable to work on Saturdays. He wanted to remain on his current terms.

20. Mr Bourne acknowledged the Claimant's letter promptly on the same day and suggested that the Claimant continue to work 'on the old contract' for three months while the new terms were discussed. The Claimant agreed.

On 26 April Mr Bourne asked the Claimant to send him a copy of his contract.

21. The Claimant then took some advice and wrote to the Respondent on 3 May to explain that he now understood that because he considered there was a potential redundancy situation, he should try the alternative venue for four weeks only, as the statutory trial period.

22. Mr Bourne replied immediately noting what was said and again requesting a copy of the 'old' contract. On 6 May he wrote to the Claimant to propose a meeting 'in order to find a compromise'; he asked for details of the clauses that the Claimant found unacceptable. He also once again requested a copy of the Claimant's contract.

23. The Claimant did not respond until 17 May; his father had been unwell. He explained his concerns about the proposed contract. He said that if no resolution could be found he may have to advise the Respondent 'that I do not find what has been put to me as the intended terms and conditions associated with the alternative location as being suitable and therefore I reserve my right to claim redundancy pay with Friday 20 May being my last day of employment'.

24. Mr Bourne was by that time unable to meet the Claimant until 24 May, which was after the expiry of the four week period relied upon by the Claimant. He responded to the Claimant on 19 May; in short, he did not believe that there was a redundancy situation.

25. On 19 May the Claimant resigned by email. He reiterated 'I do not find what has been put to me as the intended terms and conditions associated with the alternative location as being suitable and therefore I reserve my right to claim redundancy pay with Friday 20 May being my last day of employment'

26. The Claimant's last working day was 20 May 2016.

Submissions

27. On behalf of the Respondent, Mr Wheaton submitted that it was for the Claimant to prove dismissal. He noted that the implied term of trust and confidence was not relied upon by the Claimant. He submitted that the Claimant's evidence showed that he the principal reason for resignation was that he objected to the new terms and conditions. He confirmed in cross-examination that f he could have agreed terms he would have moved to Snodland.

28. Mr Wheaton submitted that the Claimant did not get past the first hurdle. The Respondent had tried to resolve matters. If there had been a constructive dismissal, it was not for redundancy. The Respondent

accepted that the Claimant's contract was silent about his place of work. Mr Wheaton accepted that the Tribunal was likely to treat Charing as the place of work. The Respondent had not sought to move the Claimant a considerable distance; if they had, the Claimant's objection would have been valid. But Snodland was a shorter distance and there was no evidence to support the Claimant's fear that once he signed a new contract he would be moved to the Sevenoaks depot.

29. If there had been a dismissal, it was for some other substantial reason.

30. In the further submissions, Mr Wheaton drew my attention to a passage in the Buckland judgment about tribunals 'taking a reasonably robust approach to affirmation: a wronged party, particularly if it fails to make its position entirely clear at the outset, cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the other party has offered to make suitable amends.'

31. He submitted that in this case the Respondent did make suitable amends and that there was no redundancy situation.

32. On behalf of the Claimant. Mr Cole said that his main submission was that the Claimant was entitled to a redundancy payment under section 135. There had been a constructive dismissal under section 136(1)(c) . The Claimant was redundant pursuant to section 139(1)(a)(ii) because the business had ceased in the place where he was employed. The location of the place of work was a factual question, see Bass (above).

33. He submitted that section 163 referred to a presumption of redundancy that the Respondent had to rebut.

34. He reminded me of the key facts and submitted that the Respondent had wanted to impose new terms as a 'quid pro quo' for the move to Snodland; those proposed terms were repudiatory and showed an intention not to be bound by the Claimant's contract.

35. There was no delay on the part of the Claimant and certainly none that would waive the breach.

36. He submitted that there had been a constructive dismissal because the Claimant had resigned in response to the requirement to move to Snodland. The Claimant's answers in cross-examination should be taken in context. If the reason was not redundancy, then it was unfair because there was no fair reason. A refusal to follow an instruction to work from Snodland could not be an unreasonable refusal if there was no mobility clause and thus a basis for such an instruction.

37. In his further submissions, Mr Cole provided a copy of Buckland (see below) and submitted that absent a mobility clause, the Respondent could not require the Claimant to work anywhere but Charing.

38. He submitted that the breach was fundamental (see Bass), and that there was no right for the Respondent to cure or ameliorate the breach.

Unfair Constructive Dismissal

39. In a claim of unfair constructive dismissal, an employee resigns in response to a fundamental breach of a term of their contract of employment by the Respondent. The Claimant must show that there had been a fundamental breach of an express or implied term of that contract. The test is whether or not the conduct of the "guilty" party is sufficiently serious to repudiate the contract of employment. In Western Excavating (ECC) Limited v Sharp [1978] ICR 221, Lord Denning said

"if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employers conduct. He is constructively dismissed."

40. In the case of Bournemouth University v Buckland (EAT0492/08), the EAT confirmed the test in the case of Malik v BCCI, that to prove an alleged breach of the implied term of mutual trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence. More relevant to this claim, the Court of Appeal also confirmed that once a breach has occurred, it is not possible to remedy it. The Court endorsed the four-stage test offered by the EAT, as follows;-

(i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the 'unvarnished' Malik test should apply;
(ii) if, applying the principles in Sharp, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
(iii) it is open to the employer to show that such dismissal was for a potentially fair reason;
(iv) if he does so, it will then be for the tribunal to decide whether dismissal for that reason, both substantively and procedurally, fell within the band of reasonable responses and was fair.

41. Once a fundamental breach has been proved, the next consideration is causation - whether the breach was the cause of the resignation. The

employee will be regarded as having accepted the employer's repudiation only if the resignation has been caused by the breach of contract in issue. If there is an underlying or ulterior reason for the resignation, such that he would have left the employment in any event, irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, the Tribunal must decide whether the breach was an effective cause of the resignation; it does not have to be the effective cause.

42. The third part of the test is whether there was any delay between any breach that the Tribunal has identified, and the resignation. Delay can be fatal to a claim because it may indicate that the breach has been waived and the contract affirmed. An employee may continue to perform the contract under protest for a period without being taken to have affirmed it, but there comes a point when delay will indicate affirmation.

43. If it has been established that there was a constructive dismissal, the last part of the test is whether it was fair or unfair in all the circumstances. In considering this part of the test, the reason for the dismissal will be the reason for the breach of contract that caused the Claimant to resign. Accordingly, if the reason fits the statutory definition of redundancy, then the reason will be redundancy.

Redundancy

44. An employee is dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that the employer has ceased or intends to cease to carry on the relevant business completely, or in the particular place where the employee was employed; or because the requirement of the business for the employee to carry out work of a particular kind has ceased or diminished or is expected to do so (section 139 Employment Rights Act 1996).

45. Section 136(1)(c) is the constructive dismissal provision.

Conclusions

46. Having made the findings of fact I considered the relevant law and then returned to the list of issues in order to draw these conclusions.

47. The first issue was what terms were effective on 20 May 2016. For the reasons set out above, I concluded that the terms were those agreed by the Claimant at the start of his employment, save for variations in respect of pay, hours and workplace, which was specifically varied form Detling to Charing. There was no mobility clause.

48. The next issue was whether the Respondent was in breach of those terms. I concluded that the Respondent could not require the Claimant to work anywhere other than Charing. I noted the Exol case, but I considered that this was limited in its relevance here because the drivers in that case had a workplace separate from the place that they parked their lorries; I was satisfied that the Claimant's workplace was Charing because he not only parked the lorry there, he kept equipment there and received instructions there.

49. I accepted that the Respondent continued to require the Claimant's services as a driver, and that they had tried to accommodate his concerns about location.

50. I had to decide whether a requirement that he work elsewhere (in other words park the lorry elsewhere) was a fundamental breach. I noted the Bass decision, that 'requiring an employee to work where (s)he cannot be required to work' was 'obviously fundamental'. I considered whether, if the location was more favourable to the Claimant by being closer to his home, this would constitute a breach or ameliorate any breach. I noted that a breach cannot be ameliorated (Buckland). I also noted that the Claimant was prepared to work from Snodland, but was unable to accept the new terms and conditions that went with it.

51. I concluded that there was a fundamental breach here. The location was closer to the Claimant's home, and thus not a disadvantage, although it had some drawbacks as it was a farm yard with no office; nevertheless, he was prepared to try it. However, it came with new terms including a mobility clause that the Claimant could not accept. I concluded that the location itself could not be considered in isolation without the new terms, because the Respondent had made it clear that the new terms were an essential part of the offer; a 'quid pro quo'. A requirement that the Claimant move his workplace was a breach; it may not have been fundamental because it was closer to his home, had it not been underpinned by the new, less favourable terms. I accepted that that was what the Claimant had tried to explain in cross-examination. I concluded that there was a fundamental breach.

52. I concluded that the Claimant resigned in response to the breach, and that he did not delay in so doing. He made it clear to the Respondent at an early stage that he could not accept the new terms.

53. Accordingly, there was a constructive dismissal. The next issue is whether it was fair or unfair in all the circumstances, having regard to the reason for dismissal and other relevant circumstances. I concluded that the reason that the Respondent acted as they did was because they no longer carried out their business at Charing. I considered that those circumstances fell within the definition of redundancy. Accordingly, I concluded that the reason was redundancy.

54. As the Respondent was to sell Charing quarry and cease operations there, and as the Claimant did not have a contractual mobility clause, it was only with his agreement that any alternative employment could replace his employment at Charing. The Respondent notified the Claimant of the situation before the sale, and he was offered an alternative location to park, albeit with strings attached by way of a new contract, and he declined. I concluded that in all the circumstances the dismissal was fair by reason of redundancy. It follows that the Claimant was entitled to a redundancy payment.

55. I should mention that in coming to this decision I was also assisted by the case of David Webster Ltd v Filmer EAT/167/98 in which the Claimant was required to move to new premises, there was no contractual right to require him to do so, and he was found to have been constructively dismissed when he resigned in response to that requirement. The dismissal there was found to be fair by reason of redundancy.

56. I heard no evidence about remedy. It may be that the parties are able to reach an agreement about that. If they cannot do so within 28 days of the date that this reserved judgment is sent to them, they should apply to the Tribunal office to arrange a remedy hearing.

Employment Judge Wallis
16 December 2016