EMPLOYMENT TRIBUNALS

Claimant: Mr G Engel

Respondent: Hughes Of Beaconsfield Limited

Heard at: Reading **On: 1 February 2019**

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: Mr N O'Brien (counsel)
For the Respondent: Ms C Hitchen (consultant)

RESERVED JUDGMENT

The claimant's complaints are not well founded and are dismissed.

REASONS

1. In a claim form presented on the 26 May 2017 the claimant made a complaint that his employer was required to pay him a redundancy payment (section 135 Employment Rights Act 1996 (ERA)) or alternatively that he was unfairly dismissed and entitled to a basic award (section 112 (4) and 118 (1) (a) ERA). The respondent denied that the claimant was entitled to a basic award because of the operation of section 141 (4) ERA.

2. The issues to be decided in this case are whether the claimant was entitled to a redundancy payment: if so, whether the claimant lost the right to a redundancy payment by operation of section 141 ERA. If the claimant was not entitled to a redundancy payment, was the claimant constructively dismissed; if so, what was the reason for the claimant's dismissal, was it a potentially fair reason; was the claimant unfairly dismissed, if the claimant was unfairly dismissed is the claimant entitled to a basic award. The amount in issue between the claimant and the respondent is £14,730.

3. The claimant gave evidence is support to his own case. The respondent relied on the evidence of Mr Robert Turle and Mrs Alison Smith. I was provided with a trial bundle containing 153 pages of documents. I made the following findings of fact.

4. The claimant commenced employment with the respondent on 22 February 2016 as a Technician. The claimant is a car mechanic.

5. The claimant's contract of employment provided that: "*In using this job title, it is clearly understood that you may be required to carry out such other reasonable duties as from time to time may be necessary".* The place of work is described in the following way: "*Your work location will be as at the address above, however the company may require you, with due notice, to transfer to another location within a reasonable travelling distance.*"

6. During his 35-year period of employment with the respondent the claimant worked at sites in Beaconsfield (22 years), Amersham (4 years) and Farnham common (9 years). The claimant worked predominately on Mazda vehicles, however he has also worked on Skoda, Seat and Mercedes vehicles.

7. The respondent has three grades of technician. Maintenance (who carry out routine service work), System (carry out routine service and low/mid-level technical diagnostic work) and Diagnostic (carry out more complex technical work). The claimant was System technician.

8. On 4 October 2016 the respondent announced that the Farnham Common site was going to close. As a result, there were going to be redundancies, but the respondent hoped to redeploy many of the employee to other positions with the group. It was announced that the site would be closing on the 31 December 2016.

9. The respondent had vacancies which meant that there was potential for all the technicians, including the claimant to be offered new employment. The respondent had identified 20 vacancies (on 4 October 2016) of which two were technician roles (one at Aylesbury and one at Beaconsfield).

10. The respondent carried out collective consultation with elected representatives and then proceeded to carry out individual consultation with employees.

11. The first individual consultation meeting with the claimant took place 17 October 2016. Mr Tearle and Mrs Smith met with he claimant. The claimant was asked why he had not expressed interest in any of the roles.

12. The claimant's response was that he was 63 years of age and did not want to be retrained. The claimant also stated that he was tired and that he wished to do less complicated work.

13. Mr Tearle informed the claimant of the possibility of a position at Wendover involving used car preparation. The claimant stated that he would like to be made redundant. The claimant was told that the respondent was trying to redeploy all staff to suitable roles and that redundancies would only be considered if there was no suitable role.

14. At the second consultation meeting Mr Tearle explained that there was a position at Wendover which suited the claimant's skill set. The role involved the preparation of second-hand vehicles, servicing vehicles and low-level diagnosis problems. The claimant was also told that he would be working on about 30 Mercedes vehicles per month and carry out pre-delivery inspection checks on new cars. The claimant agreed to a trial period.

15. On 14 November 2016 Mr Tearle wrote to the claimant to formally offer him the transfer to the Wendover Service Department. The claimant was informed that his basic hourly rate of pay will not change "*if you move across and carry out work the same diagnostic level as you do now*". The letter continued as follows:

> *"However, you expressed an interest in "stepping back" and doing less complicated work and working reduced hours. At your request I have looked at this change and I am able to offer a four day week carrying out standard used car checks, with the occasional requirement to carry out more complicated tasks in line with your current skill level… Given that this role is a newly created position, I propose that we try it on a four week trial basis. If both parties agree after this trial period it has not worked out as hoped then a redundancy payment would be made."*

16. The claimant was offered the opportunity to take January off as unpaid leave to enable him to rest before starting the new role. It was also stated that if the role was considered to be suitable alternative employment and the claimant turned down the role, he would forfeit any right to a redundancy payment and his notice period would begin.

17. Mrs Smith wrote to the claimant on 15 November 2016 to formally confirm the transfer to Wendover. In her letter Mrs Smith stated that: "*As agreed with Robert Tearle your basic hourly rate not change from £13.05 during the trial period of four weeks… should the work be more closely aligned to the maintenance level then in fairness to all other Technicians on this level, the hour rate would be changed to £11.80.*" Mrs smith confirmed that the claimant would be working four days a week and that all other general terms and conditions of employment remained unchanged.

18. The claimant gave evidence that soon after he received the letter of the 15 November 2016, he had a meeting with Mrs Smith. Mrs Smith denied that any such meeting took place. I prefer the evidence of Mrs Smith on this issue, her recollection was clear and consistent. In contrast the claimant in his evidence about this alleged meeting appeared to refer to matters that took place in the two consultation meetings at which both Mr Terle and Mrs Smith were present with the claimant.

19. The Farnham Common site closed on 31 December 2016. The claimant began work at Wendover on the 3 January 2017.

20. Two days later on the 5 January 2017 the claimant resigned. The claimant's resignation letter read as follows:

> *"Alison*
> *Sorry but the job at Wendover is not suitable, I will not be staying after the 4 week trial.*
> 1. *Do not feel I have the appetite to retrain on Mercs they are very different from Mazda and Toyota that I have worked on in the group*
> 2. *The job is very different sales – retail*
> 3. *You said in the letter will be reducing hourly pay by £1.25 and I will be losing 10 hours over time at 1½ hours this could work loss £4600 year*
> 4. *No natural light in work shop dark bad for eyes*
> 5. *Early start*
> 6. *Its just not me sorry not happy at Wendover has caused me a lot of sleepless nights."*

21. The claimant says that it became apparent after only a couple of days that the role at Wendover was not suitable. He points out that for whole month he carried out PDI checks: the work was repetitive, not skilled and not what he was trained to do.

22. Mr Tearle met with the claimant and discussed his resignation letter. The claimant confirmed that he intended to leave at the end of the month.

23. The claimant said in his evidence part of the reason for resigning was the failure of the respondent to provide him with the promised 'about 30 Mercedes vehicles per month' to work on and instead required him to carry out a constant stream of PDI checks. I reject that contention. The claimant's resignation was in so sensed caused by this. Mr Terle's evidence, which I accept on this point, was that the claimant resigned before he put in place the necessary arrangements to receive 30 cars per month and because until the claimant was replaced there would be no one to carry out the work, not knowing when or whether the claimant would be replaced he did not want to put in place arrangements for the delivery of the vehicles only to have to put them on hold again when the claimant left at the end of his notice period.

24. The claimant asked that he receive a redundancy payment. The claimant was told by the respondent that it was their view that he was offered suitable alternative employment and he is not entitled to a redundancy payment.

25. For the purposes of this Part XI ERA (redundancy payments) an employee is dismissed by his or her employer if the contract under which he or she is employed by the employer is terminated by the employer (whether with or without notice), or the employee terminates the contract under which he or she is employed (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct. (Section 136 ERA)

26. Where an employee's contract of employment is renewed, or he or she is re-engaged under a new contract of employment in pursuance of an offer made before the end of his or her employment under the previous contract, and 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 is not regarded as dismissed by his or her employer by reason of the ending of his or her employment under the previous contract.

27. This does not apply if the provisions of the contract as renewed, or of the new contract, as to the capacity and place in which the employee is employed, and the other terms and conditions of his or her employment, differ (wholly or in part) from the corresponding provisions of the previous contract, and during the trial period the employee (for whatever reason) terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated. Where the latter applies the employee is regarded as dismissed on the date on which his employment under the previous contract ended, and the reason for the dismissal 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. (Section 138 ERA)

28. Where an offer is made to an employee before the end of his or her employment to renew his or her contract of employment, or to re-engage him or her 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 the employment. (Section 141 (1) ERA)

29. The employee is not entitled to a redundancy payment if his or her contract of employment is renewed, or he or she is re-engaged under a new contract of employment, in pursuance of the offer, the provisions of the contract as renewed or new contract as to the capacity or place in which he or she is employed or the other terms and conditions of his or her employment differ (wholly or in part) from the corresponding provisions of the previous contract, the employment is suitable in relation to him, and during the trial period he unreasonably terminates the contract, or unreasonably gives notice to terminate it and it is in consequence terminated. (Section 141 (4) ERA)

30. An employee is dismissed by his or her employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. (Section 95 (1) (c) ERA)

31. 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 intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat him or herself as discharged

from any further performance. If they do so, then they terminate the contract by reason of the employer's conduct. They are constructively dismissed. The employee is entitled to leave at the instant without giving any notice at all or, alternatively, they may give notice and say they are leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him or her to leave at once. They must make up their mind soon after the conduct of which they complain; if they continue for any length of time without leaving, they will lose their right to treat them self as discharged. They will be regarded as having elected to affirm the contract.[1]

32. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. The test of whether there has been a breach of the implied term of trust and confidence is objective. The conduct relied on as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

33. The claimant's submissions included an exhortation that I should prefer the claimant's evidence over that of the respondent's witnesses. The point has been made that the notes of the consultation meeting produced to me were a typed version of an original contemporaneous note that has not been produced to me. I found the respondent's witnesses accounts credible and I am not persuaded that there is any significant error or omission in the notes of the consultation meetings. The notes are not a verbatim account of what happened but are intended to record what was discussed without necessarily recording everything that was said. I accept their integrity in this regard.

34. The claimant's submission suggested a tension between the content of the letter of the 15 November 2016 and Mr Terle's evidence on the question whether the claimant's pay was to be changed. It is said that it was not as Mr Terle stated a matter that was to be left in the claimant's hands, by the claimant choosing whether he does System Technician level work or Service Technician level work. The claimant also contended that the respondent has by the letters of the 14 and 15 November 2016 obfuscated the circumstances in which the claimant will get a redundancy payment because the letters are confusing and say different things. They left the claimant believing that he would be entitled to a redundancy payment if he decided that the role at Wendover was not suited to him. It is said that the claimant was forced into accepting role that he did not want and that he was confused about what his options were: it is said that there is

[1] Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761

uncertainty in the new role as regards his salary and it is not said that whether he gets a pay reduction is a matter of his choice. The claimant states that the role was not suitable alternative employment. Having regard to the claimant's experience and length of service the role was not unreasonably refused by the claimant. The claimant further contends that there was a repudiatory breach of contract in that there was a breach of the implied term of trust and confidence.

35. The respondent's submissions set out in written document which was read to me and a copy provided.

36. I have come to following conclusions on the questions I have to decide.

37. I am asked to first consider whether the claimant was entitled to a redundancy payment. The claimant will be entitled to a redundancy payment if he was dismissed because of redundancy. Was the claimant dismissed because of redundancy?

38. The claimant was to be transferred to work at Wendover with a change to his hours of work, all other terms of his employment were to remain the same, with the proviso that "should the work be more closely aligned to the maintenance level" the hourly rate of pay would be reduced. The transfer was to take effect on the 3 January 2017. The claimant was to be re-engaged under a new contract of employment in pursuance of an offer made before the end of his employment under the previous contract, and the renewal or re-engagement took effect either immediately on, or after an interval of not more than four weeks after, the end of that employment. On consideration of section 138 (1) the claimant is not regarded as dismissed by the respondent by reason of the ending of employment under the previous contract.

39. Section 138 (1) does not apply if the provisions of the new contract, as to the capacity and place in which the claimant is employed, and the other terms and conditions of employment, differ (wholly or in part) from the corresponding provisions of the previous contract, and during the trial period the claimant (for whatever reason) terminates the new contract, or gives notice to terminate it and it is in consequence terminated in the trial period.

40. The respondent states in its submissions that "it is not in dispute between the parties that the claimant's previous role was no longer available, and it is also not in dispute that the claimant accepted the formal offer of an alternative role, subject to the statutory trial period (under s138 ERA), from which the claimant subsequently resigned on 5 January 2017." In the circumstances it is accepted by the parties that the claimant is to be regarded as dismissed on the date on which his employment under the previous contract ended, and the reason for the dismissal taken to be the reason for which the employee was then dismissed, redundancy.

41. Section 141 ERA applies to the claimant's case. An offer was made to the claimant before the end of his employment to re-engage him under a new contract of employment, with re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of the employment

42. The employee is not entitled to a redundancy payment if he is re-engaged under a new contract of employment. The provisions of the 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. The employment is suitable in relation to him. During the trial period he unreasonably terminates the contract, or unreasonably gives notice to terminate it and it is in consequence terminated. (Section 141 (4) ERA)

43. Was the employment suitable? In considering the new role I am required to carry out an objective assessment of whether having regard to the nature of the job offered and the claimant, the job is a match for the claimant.

44. The respondent contends that while there was a material change in location the new location was a reasonable and suitable alternative. It involved less driving time and was nearer the claimant's home. The respondent refers to the claimant's previous contract of employment which included a clause that provided that the respondent may require the claimant, with due notice, to transfer to another location within a reasonable travelling distance. The claimant told Mr Tearle during a consultation meeting that the travel to Wendover was not a problem for him. In his evidence before me the claimant did not rely on the location as giving rise to an issue for him.

45. The claimant's terms and conditions of employment were to remain the same. The claimant's pay was only an issue in the event that the claimant chose to carry out a less technical role, a maintenance level role as opposes to a system level role. This was a matter which arose because the claimant had stated that he wanted to step back, do less complicated work and work fewer hours. The matter was in effect in the claimant's hands to determine. The respondent wanted the claimant to continue to work and was willing to adjust the role to fit the claimant's needs. The claimant could have chosen to continue to do the systems level work and it would not have resulted in any reduction in pay.

46. There would have been overtime available for the claimant to do in the new role. The claimant had been promised the opportunity to work on about 30 Mercedes cars a month. This would have been put in place had the claimant not resigned so early on in the role. I accept that Mr Tearle did not take action to secure the 30 vehicles because the claimant resigned and it was not known at the time whether a replacement for the claimant could be found.

47. The claimant's role was that of a systems technician. The new role involved the claimant doing the same type of work. The claimant was required to carry out used car checks as part of the role. These are known a PDI's. In the notice period PDI's formed the major part of his work load. This was because of the fact that the claimant had resigned and the arrangements that Mr Tearle had planned were not actioned. The new role was a suitable role for the claimant having regard othgis skill set and experience. The fact that the claimant had worked on Mazda cars and he was no longer going to be working on Mazda cars in my view does not significantly affect the nature of the role that the claimant was expected to perform. The claimant's work on Mazda cars was not a contractual entitlement it was the result of circumstances, before the redundancy the claimant worked for the respondent in a Mazda dealership, the claimant could have been required to work on any type of vehicle.

48. I agree with the respondent's assertion that having regard to the nature of the role offered and the claimant, taking account of the claimant's skills and ability, that the role was a perfect match for the claimant. I note that the claimant's resignation took place two days into the new role. The claimant has not given evidence of any matter that arose in the two days that led to the decision to resign. In his evidence the claimant stated on a number of occasions that the respondent pressured him to accepting the role at Wendover. I am satisfied that it was the claimant's unwillingness to carry out the role at Wendover that led to the resignation and not the nature of the role itself.

49. Was it reasonable to refuse the role? The claimant resigned after just two days into a four-week trial period. This led to the work that had been planned to have to be rearranged. The claimant could not have made any reasonable assessment of the role in the period before he resigned. As stated, the nature of the role itself not the reason for the resignation.

50. The claimant's reasons for resigning have to be considered looking at it from his point of view on the basis of facts as they appeared tor ought to reasonably to have appeared to him at the time that he decision had to be made. The claimant's objections to the role must be reasonable.

51. In his resignation letter the claimant set out his reasons for leaving. The claimant stated that he *did not have the appetite to retrain on Mercedes which are very different from Mazda and Toyota that he has worked on.* Before the transfer the claimant spent much of his time (about 50%) working on vehicles other than Mazda vehicles. The claimant assessed himself in his appraisal as having a good ability to work on vehicles other than Mazda. The claimant's core training as a technician meant that he had the ability to work on any vehicle. The claimant's skill and experience meant that he would have been able to pick up the work quickly. To perform the new role the claimant did not require any further training.

52. The claimant stated that the new role "*is very different sales – retail".* This is unexplained. The nature of the claimant's work would have been that of technician.

53. The claimant stated that his hourly pay would be reduced. This is not correct on its face. The claimant's hourly pay would only have been reduced if the claimant chose to carry out the lower level role. The claimant stated that he would be losing 10 hours over time. This too was not correct. The claimant's entitlement to overtime arose after he had worked a certain number of hours. It was the claimant who wished to reduce the number of hours that he worked.

54. The claimant states in this resignation letter that there is *"No natural light in work shop dark bad for eyes"*. The claimant did not raise this issue with the respondent before resigning. The allegation is a contentious matter. The respondent denies that there is any issue with the lighting in the workshop.

55. The claimant's resignation letter set out *"Early start"* as one of his reasons for his resignation. The matter was not raised as an issue before the claimant's resignation. I accept the evidence which has been given by Mr Tearle that the respondent would have been willing to *"look at start times if he wanted to do different times"*. This is classically the sort of matter that might be considered in a trial period, varying start finish times to reflect change of circumstances, e.g. such a travel time. In this case I note that the claimant was travelling a shorter distance and taking less time to get to work.

56. In concluding his letter of resignation, the claimant stated: *"It's just not me sorry not happy at Wendover has caused me a lot of sleepless nights"*. This in my view probably most accurately reflects his reason for resigning the role after two days. The claimant stated in evidence that he had reached the age of 63 and wished to step back. It suited him to be made redundant. While it is understandable that the claimant might feel this way it doe not render the decision to refuse the role, in this context, reasonable. I have come to the conclusion that the claimant's refusal of the role was not reasonable.

57. The claimant is not entitled to a redundancy payment because he was re-engaged under a new contract of employment. The provisions of the 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, however the employment was suitable in relation to the claimant. During the trial period the claimant unreasonably gave notice to terminate the contract and it was in consequence terminated.

58. Was there a constructive dismissal? The respondent contends that there was no breach oif contract. There can therefore be no constructive dismissal. The claimant states that he was misled by the respondent and

that the respondent's conduct amounted to a breach of the implied term of trust and confidence.

59. The claimant relies on the terms of the two letters that were written, setting out the terms of the transfer and the trial period, which he says were contradictory. The claimant says that the letters showed that the claimant was going to have pay cut. It is further stated that the claimant was told one thing during the consultation meetings but that this was not followed up and supported in the letters: the claimant was left with the impression that he would receive a redundancy payment if either the claimant or the respondent thought that the role was not suitable. The claimant says that he was pressurised into accepting the role at Wendover.

60. I do not accept that any of the matters relied on by the claimant as amounting to a cumulative breach of trust and confidence are made out. The letters of 14 and 15 November 2017 from Mr Terle and Mrs Smith respectively are not in my view contradictory. I accept the evidence which was given by Mrs Smith about what was said to the claimant about payment of a redundancy payment: it would not be paid if the role was considered suitable alternative employment. I also not accept that the claimant was informed that he would receive pay reduction: the pay reduction was in the claimant's own hands and determined by the nature of the role he wanted to perform systems level or maintenance level. In the course of his evidence the claimant was not clear as to how he was pressurised into taking on the role at Wendover. I am unable to accept his evidence that he was pressurised: the respondent was keen to keep the claimant in employment, but this was not in any sense conduct which was a breach of contract.

61. The claimant was not dismissed.

62. The claimant's complaints are not well founded and are dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 26 February 2019

Sent to the parties on: 1 March 2019

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For the Tribunals Office