



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr C Reilly

v

**Trustees of the Royal Air Force
Museum**

Heard at: Watford

On: 14 & 15 March 2018

Before: Employment Judge McNeill QC

Appearances

For the Claimant: Ms N Humphries, Law Student

For the Respondent: Mr P Maratos, Employment Consultant

JUDGMENT

1. The claimant's claim for unfair dismissal is well founded and is upheld.
2. The claimant's claim for a redundancy payment is upheld.
3. The respondent is to pay compensation to the claimant in the total sum of £48,042.28, which includes a basic award of £10,298.50 and a compensatory award of £37,743.78.

REASONS

1. The claimant was employed by the respondent in 1994 as a Museum Support Grade (MSG) 5. With effect from 2 March 1998 he was promoted to the position of Controller at what was then MSG3. He complained to the tribunal that he was unfairly dismissed by the respondent on 3 October 2016 and that he was entitled to a redundancy payment and some unpaid wages.
2. I heard evidence from the claimant and from Mr Hawkins, a former Operations Manager employed by the respondent. I also read a statement from a trade union representative, Ms Rixon. I heard evidence on the respondent's behalf from Ms Robinson, the respondent's Head of Human Resources (HR) since July 2016.

A preliminary procedural matter

3. The claimant's ET1 was presented to the tribunal on 9 March 2017. Initially, the only claim that was accepted was the claim for unpaid wages. At that time, the claimant's primary case was that he was still employed by the respondent and his claims for unfair dismissal and a redundancy payment were in the alternative, as he explained in an application to the tribunal for reconsideration dated 31 March 2017. Initially, the respondent only responded to the claim for wages. A similar claim was brought by one of the claimant's colleagues, Mr Carroll. His claim proceeded in the same way as the claimant's but has now been resolved.
4. The claimant's application for reconsideration was allowed and the unfair dismissal and redundancy payment complaints were permitted to proceed. On 25 May 2017, the respondent filed further particulars of its response. In those further particulars, the respondent denied the unfair dismissal and redundancy payment claims and set out in some detail its reasons for its denial.
5. On 24 August 2017, there was a case management discussion in front of EJ Manley. At that discussion the issues for determination by the tribunal at the final hearing were set out. They included issues as to whether the claimant's employment had been terminated and if so, whether the termination was on 3 October 2016 or on some other date up to 9 March 2017. The normal issues as to reason for dismissal and fairness were spelt out.
6. At the case management discussion, it was suggested by the tribunal that the claimant, who was then unrepresented, might benefit from some legal advice. EJ Manley said it was possible that amendments to the claim form or new claim forms might be necessary.
7. On 1 March 2018, the claimant filed an amended claim form in which he set out his claim for unfair dismissal with greater particularity. This hearing was listed for three days beginning on 13 March. On 2 March, the respondent asked for the three day hearing to be converted to a preliminary hearing for three hours to consider the application to amend. On 6 March, EJ Lewis, having considered the matter, allowed the application to amend. He directed that the three day hearing would proceed. His reason was that the parties had prepared since August 2017 on the basis of a possible dismissal on 3 October 2016. Witness statements were exchanged on 7 March 2018 and both parties in their witness statements addressed evidence relevant to unfair dismissal and the redundancy payment claim.
8. The parties attended for the start of the three day hearing on 13 March but were sent away because of an administrative error by the tribunal. They were asked to attend the following day. At the start of the hearing on 14 March, Mr Maratos on behalf of the respondent, asked me to reconsider EJ Lewis' decision to allow the amendment. No written application for reconsideration had been presented in accordance with rule 71 of the Employment Tribunals Rules of Procedure and I did not accept the

respondent's argument that I could consider an oral application to reconsider simply because it was being made in the course of a hearing. The provision allowing for applications for reconsideration to be made in the course of a hearing relates to decisions made during the course of that hearing. On this basis alone, the application must fail. I nevertheless considered the merits of the application as arguments had been advanced by both parties.

9. Having considered the respondent's further particulars filed in May 2017, the definition of the issues to be determined on 24 August and the terms of the amended ET1, I concluded that the respondent had been well aware of the claimant's claims of unfair dismissal and a redundancy payment since August 2017 at the latest and had prepared on that basis. Mr Maratos could point to nothing in the amended claim form which caused any real prejudice to the respondent in going ahead. In the circumstances, had I considered it right to consider an application for reconsideration, I would have found against the respondent.

Findings of Fact

10. The claimant's job as Controller was one which he carried out for a little more than 18 years. It was a security role. He worked in the control room at the museum. By early 2016, he was responsible, with five colleagues, for the safety of people on the site. The job involved security cover 24 hours a day, 7 days a week, 365 days a year. It included monitoring the CCTV system, dealing with alarm systems, issuing keys, making sure staff were on site and being the hub of museum communications for daily activities and also for one-off events. The job was not a customer-facing role.
11. The job suited the claimant well. He had caring responsibilities for both elderly parents and a young daughter and there was a flexible shift pattern. He could also earn extra money from overtime which helped him take care of his family. He could work night shifts. His P60s for the years 13-14, 14-15 and 15-16 showed that he was earning gross pay of around £37-£38,000 a year, about £7,000 of which related to night shifts.
12. In February 2016, the claimant attended a meeting, at the respondent's request, with the rest of his department. He was informed that there was going to be a re-organisation and that the Controller's job was to be deleted. Controllers would be offered alternative jobs. In a document headed "Organisational Change Assessment for the Royal Air Force Museum" dated 8 February 2016 it was stated under the heading "Museum Controllers": "Posts will be deleted" and then there was a bullet "New Visitor Experience Supervisor [VES] posts will be introduced." The new VES posts were described as having "a positive visitor experience" as their prime focus. VESs would have a secondary specialist role which could be volunteer management, compliance with health & safety, security, commercialisation or event and general logistical support. The VES role involved operational duty management responsibilities and line management responsibilities. Staffing rotas would be aligned to ensure numbers reflect visitor footprint and meet the needs of the site safety and

security. It was stated that revised terms and conditions would be introduced to support implementation of the new proposals.

13. On 26 February 2016 the claimant attended a one-to-one consultation meeting with the respondent. At that meeting, he was told that security was moving to a “customer focus” and there was a need to be on the shop floor. He said he would consider all options but needed details. He was told that he was expected to slot into the VES position. He explained his personal situation and his caring responsibilities. He was told that the majority of staff would be on days and were expected to be flexible, to cover earlies, lates, occasionally overnight and also to cover events. There would be no shift pay, overtime pay or time off in lieu. He was told that the VES role was a completely different job from his Controller role. It was expected that individuals would put their name down for weekend overtime. Some comments were made about the level of the claimant’s pay which he perceived as suggesting that he was living beyond his means.
14. The claimant expressed the view that the VES position would involve a demotion. His current position was senior to a supervisor job. He was told that the new position would involve minimal time in the control room. He considered that the alternative was not suitable for him and he therefore applied under the respondent’s voluntary exit scheme. He then corrected his paperwork to reflect the fact that, in the event of redundancy, he was entitled to be dealt with under the Civil Service Compensation Scheme. He was denied voluntary exit, which was granted to one of his colleagues, and his application under the Civil Service Compensation Scheme was refused.
15. On 2 March 2016, there was a Pay Negotiations Committee (PNC) meeting attended by members of staff, members of management, including the Chair of the PNC, Mr Philip Walsh, and trade union representatives including Ms Rixon. During the course of that meeting, the trade union representatives referred to the additions to the new job descriptions but that salary had gone down. It was asked what the options were if someone decided at the end of the consultation that they did not want to accept the new role. Mr Walsh said that there were a number of options available: voluntary exit saying the job was not for them; resignation or claiming that they had been made compulsorily redundant.
16. On 18 April 2016, the claimant emailed Mr Waxman, Assistant Director London. He set out his view in relation to the offered pay which he said was £25,000. He explained his difficulties in relation to the loss of shift allowance, the loss of opportunity and in relation to overtime. He said that the new job proposed involved major changes:

“I’ve been in a non-public facing job for a little over 18 years and now I’m expected to go public facing with the SMT appearing to have no consideration for this. The duty manager cover and also the commercial side of the job is something I’m not familiar with and have never wished to be involved with yet I am supposed to go from controller to supervisor which outwardly appears as a demotion, also being led to believe I would have no chance of promotion unless I took educational qualifications. These are a few of the differences why I think the new position is not a suitable alternative.”

17. There was a meeting on 28 April 2016 attended by the claimant, Mr Waxman, Ms Rixon and Mr Bale, HR representative. Mr Waxman explained shift allowances and the night-shift, which was to be outsourced, would no longer be available. The museum was raising the base salary for the new position to £25,000. Mr Waxman mentioned ring-fencing. There was some argument before me as to the meaning of what Mr Waxman said, which was recorded in the notes of the meeting. It seemed clear to me that Mr Waxman was clearly indicating that the claimant's earnings would not be more than £25,000, taking into account shift payments which were going to be shared out on an equitable basis on the basis of 1 in 6. It was acknowledged that the claimant's earnings would decrease.
18. That interpretation was supported by a letter sent to the claimant on 23 May 2016. In relation to salary it was stated as follows:

"Your basic salary is currently £23,230. The basic salary of the new role is £25,000 on implementation of the new structure. It was agreed through the consultation processes that as there were not enough volunteers for night team the job would be outsourced. The result is there would be no further night shift allowances paid to any staff as there would be no such night shifts. You said within your shifts you did premium time shifts, Saturday, Sundays, Bank Holidays. We've agreed the following with the PNC. Based on a 1 in 6 equitable basis we have calculated that your current basic pay and the premium rates that you have received are still less than the new salary of £25,000 per year that you've been offered. Had this been greater we had agreed at PNC to pay protect the difference."
19. In a document headed "Comparison between Job Descriptions" which I was told was prepared by Mr Bale, there was a comparison between the VES and the controller roles. This document was not referred to during the course of the evidence but both parties agreed that I could read it and refer to it in this judgment. In that document differences between the two roles were set out. The main differences were the place of work, the need to create "a visitor experience second to none" in the supervisor role and a different layout in the job descriptions. It was said that the new supervisor role would have some budget responsibility (which the claimant had not had before) and that each supervisor might have a specific role. Mr Bale said he would grade the similarity between the jobs at 80%.
20. On 8 June 2016 the claimant put in a grievance. It concerned the manner in which the meeting of 28 April 2016 had been conducted. The claimant said he felt belittled, frustrated, bullied and harassed and that he was being pressurised into making a decision on his future there and then. A grievance meeting was held on 8 July 2016 and he received the outcome, not upholding any of his grievances on 15 October 2016.
21. On 20 September 2016, the claimant attended a departmental meeting at which he was informed that staff would be given their new contracts in the following week to be signed and returned by 12 October and that the new changeover date would be 3 October.

22. On the same day the claimant wrote a letter to Mrs Appleton, Chief Executive. He referred to his grievance. He then said that he felt no-one should be placed in the position he had been placed in. "With this in mind I will complete my contract and when the new post comes into force I will expect my redundancy as my job will have been deleted." He then went on to say that he had lost all trust and confidence with the museum as an employer.
23. On 23 September, Mrs Appleton responded to the letter. She said that she hoped matters could be resolved positively and she was going to ask Ms Robinson and Mr John Sugg to follow up by meeting with the claimant. She said that a clear process had been followed.
24. On 27 September there was a letter from Mr Sugg to the claimant headed "Revised Contract of Employment Visitor Experience Supervisor". In that letter, it was stated that a contract of employment was being provided and the change in salary would come into effect on 3 October. Two copies of the contract of employment were enclosed "confirming changes discussed". The claimant was asked to review the contract, sign, date and return one copy to a member of the HR team by Wednesday 12 October. The letter finished: "I very much look forward to working with you and the rest of the visitor experience department to successfully implement the changes and to continue to develop our team."
25. On 3 October Mr Reilly wrote to the HR department of the respondent in the following terms:

"My contract with the museum ceases on Monday 3 October due to my position as controller with the safety and security department at the RAF Museum London being deleted. I have previously advised the CEO, Mrs Appleton, and the assistant director, Mr Waxman, that I do not believe the new position of visitor experience supervisor is a suitable alternative. As my present position of controller has been deleted making me effectively redundant I will be expecting my redundancy payment under the Civil Service Compensation Scheme to be forwarded to me within 14 days."
26. Ms Robinson responded to that letter on 6 October. She said that the claimant had been "slotted in" to the VES role following a period of consultation and that came into effect on 3 October 2016. She said: "As you have not been made redundant, the Civil Service Compensation Scheme would not apply". She then indicated that the respondent was keen for the claimant to remain in the respondent's employment.
27. On 16 October 2016, a letter was sent by Ms Robinson to the claimant noting that a response had not been received to her earlier letter of 6 October. It indicated that the respondent was still keen to resolve concerns and to resolve the issue. The claimant was not attending work at that time and he was informed that payroll were to class his absence from work as unpaid leave rather than to process him as a leaver.
28. On 7 November 2016, there was a meeting between the claimant, Mr Sugg, Visitor Experience Manager, and Ms Robinson. Again the claimant set out his position in relation to the VES role. He reiterated that Mr Waxman had

initially said it was a completely different role to the Controller role, later saying that the jobs were comparable. He referred to the fact that Mr Waxman had said to him that his options were to resign or take the new job. He referred to the reduction in pay and Ms Robinson indicated the restructure did mean reductions in overtime. There was further discussion about the job and the claimant said he did not want to work for the respondent any more. He would be taking matters further. He would be in touch with a solicitor and had no trust in the respondent.

29. On 17 November 2016, the respondent set out its position that the VES role was largely similar to the Controller role. It then said that: "as the museum continues to consider the visitor experience supervisor role to be a suitable role, it does expect you to attend work and to undertake the duties of this work."
30. On 28 November 2016, the claimant submitted a sick note. The stated reason for his absence was stress. He was paid full pay whilst on sick leave until 3 March 2017. There was a lack of clarity as to whether that was on the basis of his Controller earnings or on the basis of the VES earnings. It appeared it might initially have been Controller earnings and thereafter VES earnings.
31. On 11 January 2017 the claimant underwent an occupational health assessment in order to assess if he was fit for work. On 9 March 2017, the claimant wrote to Ms Robinson in the following terms:

"With regard to my employment by the Trustees of the RAF Museum I write to confirm that I am ready and willing to work as a controller under my old contract and as previously advised I do not accept the alternative role of supervisor proposed by you last year. I have not been dismissed and I would remind you I am entitled to be paid in accordance with my old contract. I will not however accept pay including sick pay under your proposed new contract for the position of supervisor."
32. I observe here that neither party contended before me that the old contract as Controller was subsisting at this point, that is on 9 March 2017.
33. There was then further correspondence relating to sickness absence and the provision or non-provision of fit notes. That correspondence, mainly from the respondent, proceeded through June to August 2017.
34. On 20 December 2017 the respondent sought to bring matters to a head in a letter headed "ongoing employment". It was stated, for the avoidance of doubt, that the claimant was still employed by the respondent. The respondent then said "If you wish to return to work but you consider yourself to have a disability please let me know. If you fail to respond to this letter and do not report to work we take it that you are resigning effect from 8 January 2018 and we will process the necessary documentation." That reflects the respondent's position before me: that employment terminated on 8 January 2018.

Law

35. It is common ground between the parties that the claimant is no longer employed by the respondent. The first issue to determine, as matters have developed, is whether the claimant was dismissed on 3 October 2016 or on any subsequent date. An employee is dismissed in the circumstances set out in s95(1) of the Employment Rights Act 1996 (ERA) so far as relevant to this case, if:
- (a) The contract under which he is employed is terminated by the employer (whether with or without notice)...
 - (b)
 - (c) 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" (constructive dismissal).
36. It was not in issue that the respondent was not prepared to continue to employ the claimant under his existing contract of employment as Controller following the restructure and the respondent properly and realistically accepted that the claimant never agreed to a variation of his contract
37. Where there is a change to an employee's contract of employment which involves his previous contract being wholly withdrawn from him or where an employer unilaterally imposes radically different terms of employment which involve a removal or withdrawal of the old contract, that will amount to a dismissal: see **Hogg v Dover College** [1990] ICR 39 and **Alcan Extrusions v Yates and others** [1996] IRLR 327. This proposition of law was agreed by the parties.
38. If there is a dismissal, the question arises as to whether the employer has made out a potentially fair reason for dismissal within s98(1) or (2) of the ERA and, if so, whether the dismissal was fair or unfair, taking into account the provisions of s98(4) of the ERA. The reason for dismissal is for the respondent to make out but is a matter to be considered on all the evidence. The relevant potentially fair reasons in this case are redundancy or some other substantial reason, namely a business re-organisation.
39. In relation to a potential constructive dismissal, the issues were (1) whether the respondent repudiated the contract of employment; and (2) if so, whether there was a resignation in response to that repudiation or whether the contract was affirmed by the claimant.
40. In relation to redundancy, I took into account s139 and s141 of the ERA: in particular, whether the respondent's requirements for employees to carry out work of a particular kind had diminished or were expected to diminish and whether the offer of the VES role was an offer of suitable employment. The claimant relied on **Redman v Devon PCT UK** EAT/01161/11/ZT in submitting that it was important to look at the particular employee and his reasons for refusing the offer in determining whether an offer of employment was suitable and whether it was unreasonable to refuse the offer made.

Analysis and conclusions

41. The claimant's job as Controller was deleted in the restructure. That was the respondent's own evidence. The claimant never accepted the alternative job as VES. There was what has been graphically described in **Hogg v Dover College** as a "pistol to the head" situation. Mr Waxman, on behalf of the respondent, told the Claimant that he either had to accept the VES job or resign.
42. The VES job I was radically different from the Controller job. Although it had a security element, it was plainly a customer-facing job, out of the control room, of a very different nature from the Controller job. The VES job was, as the respondent itself said, about "creating a visitor experience" and involved some budget responsibility, which the claimant had not previously had. The suggestion by the respondent that the VES was a largely similar role to the Controller job verged on the far-fetched. Further, the claimant would not be able to earn more than £25,000 a year in the VES job when he was used to earning some £37,000-£38,000 a year in his existing job.
43. At one stage, the respondent's representative suggested in submissions that the claimant could supplement his income by undertaking night shifts; but the night shifts had been TUPE transferred to a contractor and there was no evidence that such work would have been available for the claimant if he had requested it, nor indeed that the respondent at any stage actually inquired to see whether such work might be available for the claimant.
44. I concluded, looking objectively at all the circumstances that the claimant's old contract was withdrawn from him and radically different terms of employment were imposed on him. That constituted a dismissal. The date of the dismissal was 3 October 2016 which was the date when the old contract was to be withdrawn and the date when the new contract was to be imposed and the date when the claimant wrote to the respondent unequivocally indicating to the respondent that his employment with the museum ceased on that day.
45. If I were wrong about that, I would in any event have found that this was a constructive dismissal. The unilateral imposition of a new contract on the claimant at a significantly lower rate of pay was repudiatory and the failure to operate a fair consultation process, with a "take it or leave it" approach by Mr Waxman, was a breach of the mutual term of trust and confidence. The claimant accepted the respondent's repudiatory breach of contract by resigning.
46. Did the claimant's acceptance of his sick pay or indeed his later letter indicating that he considered himself still to be employed involve any affirmation of the contract? In my judgment, it did not. The claimant was protecting his position under protest. He considered he was redundant. He was being refused a redundancy payment and it is understandable in the circumstances that he continued to accept pay from the respondent. On a proper objective analysis I do not consider that a contract of employment subsisted between the parties after 3 October 2016, even if both parties from time to time suggested and acted in a way which would indicate

otherwise. Applying basic principles of mutuality of obligation, it seems to me that the claimant had no obligations vis a vis the respondent after 3 October 2016. That does not mean that his sick pay is a windfall: he will have to give credit for it.

47. The claimant was redundant within the meaning of s139. His post had been deleted and the work which he had been required to do as a Controller had diminished. The fact that one of his colleagues was offered voluntary exit and Mr Walsh's own comments at the PNC meeting on 2 March 2016 as to compulsory redundancy indicated the respondent knew there was a redundancy situation. This was the reason or principal reason for the claimant's dismissal.
48. The offer of alternative employment was not suitable for Mr Reilly given the large reduction in his pay that it involved and his family commitments.
49. The claimant's representative did not seek to develop any submission that the dismissal, if made out, was procedurally fair. There was no real attempt to find any alternative work for the claimant. No alternative to the VES position was offered or even considered and there was no offer of a trial period on the VES role. There was no genuine individual consultation here in the sense of consultation that took into account what the claimant had to say on any of the reasons he advanced as to why the VES job was not acceptable to him. There was a deliberate decision not to offer the claimant the benefit of voluntary exit and a denial of his redundancy entitlement under the Civil Service Compensation Scheme.
50. I concluded in all the circumstances that this was an unfair dismissal.
51. It followed from my findings on redundancy that the claimant was entitled to a redundancy payment.
52. The claimant confirmed that there was no separate claim subsisting for unlawful deductions.

Remedy

53. The parties agreed that the basic award payable was in the sum of £10,298.50. The parties further agreed that the compensatory award would inevitably exceed the statutory cap because it would be calculated by reference to the payment to which the claimant was entitled under the Civil Service Pension Scheme. In terms of any amount due under the Civil Service Pension Scheme which exceeded the statutory cap, it would be academic for the tribunal to decide the specific amount payable over and above the maximum compensatory award. It is simply noted here that the claimant said that his total entitlement under the scheme was £73,914.00 and that the respondent said that his entitlement was £57,836.20. It was a matter for the claimant whether he wished to seek to recover any further sums in the civil courts. It is accepted that any sums he received by way of sick pay would have to be set off against any such further entitlement.

54. The compensatory award was agreed between the parties to be in the sum of £37,743.78.

Employment Judge McNeill QC

Date: 25 April 2018

Sent to the parties on:

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For the Tribunal Office