EMPLOYMENT TRIBUNALS

Claimant: Elaine Clark

Respondent: Foray Motor Group Ltd

Heard at: **Southampton** **On:** **14 January 2019**

Before: **Employment Judge Housego**

Representation

Claimant: Ms C Kelly, of Counsel, instructed by Bonallack & Bishop, solicitors

Respondent: Mr D Scrivens, human resources manager of the respondent

JUDGMENT

1. The respondent is ordered to pay to the claimant a redundancy payment of £13,716.

2. All the other claims are dismissed.

REASONS

1. The claimant was employed by the respondent (and predecessor businesses) for 27 years. The respondent is a substantial car sales and servicing firm, employing about 400 people. The claimant was Group Inventory Parts Manager, on a salary of £40,000 a year.

2. The respondent is a Ford main dealer. It uses a lot of parts. It had a scheme called National Clearance Centre "NCC" which involved buying from smaller dealers parts they had bought but had not used. The respondent would offer to buy them at a discount. They got cheaper parts, and the seller got some cash back from unused parts that were also taking up storage space. At its height this part of the business was running at hundreds of thousands of pounds a year. It was largely the creation of the claimant and one other. This was a section of the business that was wholly within the respondent.

3. Ford introduced a new system, called Parts Plus. This meant that Ford owned all the parts, and a computerised system knew when they had been used and automatically reordered more. It was to start with the bigger franchises and was intended to roll out to all. This effectively removed the basis for the NCC.

4. It had other ramifications for those employed by the respondent in the parts section of the business. About 40 people were affected, of whom the claimant was one.

5. It is common ground that the role of the claimant was redundant and that she did not want any other role that could be offered to her. She agrees that the notice of dismissal was genuinely by reason of redundancy, and was a fair decision.

6. That notice of termination of employment was dated 01 February 2018, to expire on 25 April 2018. The notes of interview with the claimant clearly state that if the claimant decided to leave early she would not be paid notice pay for the rest of the notice period but would still receive the full redundancy payment, which was quantified at £13,716. There was no requirement to follow the statutory procedure in S142 of the Employment Rights Act 1996 ("the Act") if she wanted to leave early.

7. I heard evidence from the claimant and from her manager Jason Beckley and from the human resources manager Daniel Scrivens. I was provided with all the relevant documentation.

8. It is common ground that on 16 March 2018 the claimant's line manager Jason Beckley asked the claimant to leave work and told her that she would not be required to work any more, took her computer from her and her telephone (leaving her the sim card and number), got her to clear her office and then drove her home in the company car that she used. She had personal contacts on her computer, and asked for them. Mr Beckley

got IT to transfer them to a memory stick and gave it to her before he drove her home. That would have been all her contacts, business as well. The claimant says that she later found that she could not open it, but agrees that she did not tell the respondent this, so that they thought she had a complete list of all her contacts, work and personal.

9. The claimant had the use of a car, but it was a pool car, to be used for going to and from work only, so that it was not a P11D benefit and she had no right to use it for personal use, so that whatever the position as to end date, she had no right to the car after 16 March 2018.

10. The claimant avers that this was a bringing forward of her dismissal date with immediate effect, with the promise of pay in lieu of the remainder of her notice.

11. The respondent says that this was to place her on garden leave, so that she was still an employee when dismissed.

12. There are no minutes of the meeting of 16 March 2018, no internal memoranda, and no letters were sent about it.

13. The reason Mr Beckley did this was that during her notice period the claimant would do all that she was asked, save that she would not cooperate in connection with the NCC part of her work, on the basis that she was being made redundant because it was to stop and so there was no point. No disciplinary action was taken as a result of this. Mr Beckley had worked with, or in close proximity to, the claimant for many years and they got on well. He did not want to sour the situation by so doing, so he simply wanted her out of the business immediately. He accepts that he did not give any specifics – such as the use of the term *"garden leave"*. He just made it clear that the claimant was leaving work for the last time that day. As he had taken her computer there was no prospect of her working remotely and it was clear to both of them that the claimant no longer worked for the respondent – the question of whether she was still an employee or not at 16 March 2018 was not raised by Mr Beckley or by the claimant.

14. The claimant's evidence is that Mr Beckley said words to the effect that the *"you're golden – you can do whatever you want"* or *"you're free to go"* Mr Beckley agrees that the former is a turn of phrase he uses, but does not recall doing so on this occasion and says that did not say the latter and that he had no intention of ending the claimant's employment immediately, which is why she did not get other than a normal month's pay at the end of March. He does agree that there was no conceivable circumstance in which the claimant would be asked to work for the respondent again.

15. The contract provides both for garden leave and for a payment in lieu of notice.

16. The respondent asserts that no redundancy payment is due by reason of S140(1)(a): because on 24 April 2018 (the day before the notice expired) they summarily and fairly dismissed the claimant for gross misconduct.

17. The substance of that assertion is this: there was discussion between the claimant and Mr Beckley of a new job for the claimant. There were several in the offing. The claimant took a job with Impex Ltd. This is a company which imports and exports. It is a different sort of business to that of the respondent, but there is some overlap in that they sell motor parts. There is some overlap of customers.

18. 09 April 2018 the claimant send an email from elaine@impexparts.net. It was headed *"Wanted Ford obsolete stock".* It said:

> *"Good morning, thank you for all your messages of support and good wishes from my last day at Foray. I'm pleased to say that I now working at Impex parts and still looking for unwanted new genuine Ford parts to continue the NCC (now rebranded the International Clearance Centre). if you have a file you would like an offer on please send it to me, finis and quantity is all I need, and I will do my best to come back with one you cannot refuse. Collection is still free so the offer will be the same amount on the cheque, no hidden costs. Below is a bit about Inpex… (and there was cut and pasted a few paragraphs about Impex Ltd)"*

19. A copy was sent to the respondent by at least one of the respondent's customers. The respondent took a dim view of this. The NCC had not yet shut down. They viewed this as a breach of confidentiality, a breach of the duty of fidelity, and a breach of garden leave terms by working for another company, a competitor.

20. On Friday 20 April 2018 the respondent emailed the claimant telling her of a disciplinary meeting on Monday 23 April 2018. The claimant replied saying that it was too short notice and she was available on Friday 27 April 2018 (which would have been after her notice period ended). On Monday 23 April 2018 the claimant emailed the respondent. She said that she would not attend as her employment ended on 16 March 2018. She had never been on garden leave. She was free to do what she wished, as Mr Beckley had said so.

21. The respondent replied to this to say that Luke Munday would now take the disciplinary hearing instead of Mr Beckley, and it would be held on 24 April 2018 (the last day before the notice period expired) whether she attended or not. On 24 April 2018 the Respondent held the meeting in the absence of the claimant and wrote a letter to her dismissing her for those reasons with immediate effect. It was emailed to the claimant on 24 April 2018 at 14:19, so she knew of it that day.

22. The respondent agrees that the only information it had was the email of 09 April 2018. It knew what Mr Beckley had to say about matters also. It points to the following:

    - *"Thank you for all your messages of support"* indicates a likelihood that this was targeted at people the claimant knew, and since it was to try to get them to sell her parts it is likely to be to customers of the respondent with whom the claimant had worked in the past.

    - *"my last day at Foray"* was not true whatever the situation was.

- *"I am now working at Impex Parts…"* is what she said, and it could not be unreasonable of the respondent to believe what she put.

- The claimant said that she was to *"continue the NCC (now rebranded the International Clearance Centre)"* which was not true. It gave the impression that this was in effect the claimant transferring with the NCC business to Impex Ltd – that they had acquired it - and this was not so.

23. On 16 March 2018 the claimant knew that the NCC was winding down, but had not stopped (in fact it stopped in July as Ford then insisted, but before that the respondent had intended to carry it on in a small way as long as it was profitable).

24. The claimant says that she well knew that she was being shown the door on 16 March 2018. She thought her money for the period to 25 April 2018 would be pay in lieu of notice, and would be paid as already arranged with her redundancy payment, which she did not expect to be brought forward.

25. If I were to decide that she was still employed by the respondent until 25 April 2018 the claimant says that she was not in breach as what she did was just preparatory to starting work for them on 30 April 2018.

26. The claimant's evidence to me was that she had a verbal offer of employment from Impex Ltd on 15 March 2018 , and they set her up ready to work. The claimant also provided a copy of a letter dated 19 March 2018 offering her the job on a three-month trial basis commencing that date. She was to be *"manager of the International Clearance Centre".* This is effectively doing the same work she was doing for the respondent's *"National Clearance Centre"*.

27. The claimant says that it was in this context that she sent out an email on 09 April 2018, and that she did not start work for them until 30 April 2018. She provided her payslip for May showing one month's pay and pay for year-to-date of the same amount.

28. The claimant's contract of employment contained no restrictive covenant, and so if her employment ended on 16 March 2018 she is in breach of no obligation, express or implied.

29. Therefore the first question is when the employment of the claimant ended. The notice given was to expire on 25 April 2018. The claimant was told on 16 March 2018 that this was her last day. She was out of the business. Her car phone and computer were taken from her. Mr Beckley had worked with the claimant for many years (since 2000). He had refrained from objecting to the claimant's refusal to show anyone how she ran the NCC business. He did not want her employment of 27 years to end on a sour note. He is to be commended for that.

30. An employee may think he or she is dismissed, but that is not the test: an employer cannot accidentally dismiss an employee because of an employee's perception of what is said (which could amount to constructive

dismissal, but that is not the case here). Here the claimant had already been given notice to terminate her employment. She was being dismissed. The claimant says this was only to bring forward her last day. The respondent denies this saying that it was garden leave, and points to the claimant's initial response, which was not to say that she had already left by 09 April 2018, but to ask for a delay (to a date after the expiry of her notice, which would have the similar effect of meaning that she could not be dismissed as her notice would by then have expired. The subsequent email of 23 April 2018 said that she had left on 16 March 2018, and was expressly after legal advice, so that the respondent submits that this is an *ex post facto* assertion to get round the claimant's difficulty.

31. Both these arguments have force, and different Employment Judges may well come to divergent conclusions. It is a finely balanced decision. But as I indicated to the parties during the hearing this judgment on this point has to be a binary one.

32. Ultimately, I conclude that the claimant's end date was brought forward to 16 April 2018. My reasons for this are these:

- The question of when the claimant's employment actually ended was not of great importance to her at the time, as it would have no financial consequences for her one way or the other. It is not unreasonable for her to form her conclusion retrospectively.

- Mr Beckley wanted the claimant out of the business permanently. He wanted to bring forward her connection with it so that her 27 years did not end on a sour note.

- While Mr Beckley denies use of the exact words attributed to him by the claimant, I find as a fact that he said words clearly conveying to the claimant that this was the end of the road. I deliberately use a vernacular phrase, as I have no doubt but that no legal phraseology was used. This was a conversation between long standing colleagues, not between lawyers.

- There was no minute of the conversation, and there was no internal memorandum of advice or email exchange between Mr Beckley and Mr Scrivens about garden leave.

- There was no letter to the claimant putting her on garden leave (and nor was there one bringing forward an end date). It is management who manage, and upon whom the obligation lies to make matters clear: if there is any benefit of the doubt, in the absence of a paper / email trail it is to be resolved against the employer.

- Mr Beckley (whose evidence was plainly totally honest) did not refer to garden leave during his discussion with the claimant on 16 March 2018. What he did say was that he did not want relationships soured and ruined after 27 years. It was put to Mr Scrivens that he did not want this to happen *"as she was going out the door".* He agreed, very sensibly forming the view that in the scheme of things this was *"a petty problem".* She was *"going out the door"* on 16 March 2018 instead of 25 April 2018.

33. For these reasons, I conclude that the claimant's leaving date was, for sensible reasons, brought forward to 16 March 2018.

34. This means that matters occurring subsequent to that date cannot mean that the claimant is not entitled to her redundancy payment.

35. The respondent says that the holiday pay claim is arithmetically about right, but is a bit less than pay due for the April 2018. It says that the claimant was employed by Impex Ltd and not by them from, at latest, 09 April 2018, as the email says so, and so it should not have paid her until 25 April 2018, so that the one offsets the other. The claimant does not dispute the arithmetic. I find it to be so.

36. On this point I find for the respondent. The claimant did not start paid employment with the respondent until 30 April 2018, but her email of 09 April 2018 is categoric in stating that she now worked for Impex Ltd. She is to be taken at her word. Her email (and doubtless other things were done – she said that they *"set her up"* for work before 30 April 2018) shows that she was intending to work for them from 19 March 2018 at the latest, when she got the letter offering her the job, and was actually doing so by 09 April 2018. That the start date was 30 April 2018 is not to the point. She was working for them before her formal start date.

37. For completeness, I add that had I decided the end date / garden leave point for the respondent, I would have found the dismissal to be fair. There was no other evidence that was relevant save the email, and the conclusions drawn by the respondent about it were entirely rational. They knew they had given her a memory stick with all her contacts on it, and the conclusions they drew from the email were entirely reasonable. They had genuine belief of gross misconduct, on reasonable grounds after proper investigation, and the claimant had the opportunity to present what she had to say. Accordingly if I had decided that the claimant was on garden leave, her claims would all have failed.

38. Given my finding on end date I decide that the claimant succeeds in her claim for a redundancy payment. Her claim for unfair dismissal was in the alternative, so is dismissed. The claim for holiday pay is dismissed for the reasons given above.

39. The only other question is the amount of the redundancy payment. The 16 March 2018 was before the increase on 01 April 2018. On which weekly cap should the payment be calculated?

40. For two reasons I decide on the post April figure. First S86 of the Employment Rights Act provides for statutory notice of one week per year of employment, and there is a notional extension for calculation of length of employment for calculation of whether two years' service has accrued. It would be odd if it were different for calculation of a redundancy payment. Secondly, the consultation document stated *"If EC decides to leave early she will forfeit her right to the balance of her notice period. Explained that the redundancy money will not be forfeited."* The figure had been set out as the post April figure. This is a clear statement that the amount would be the figure given whenever the claimant left.

Employment Judge Housego

Date 15 January 2019