Appeal No. UKEAT/0113/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 13 September 2019
Judgment handed down on 29 October 2019

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

EAST LONDON NHS FOUNDATION TRUST — APPELLANT

MR DAVID O'CONNOR — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MS NICOLA NEWBEGIN (of Counsel) Instructed by: Hempsons Solicitors 100 Wood Street London EC2V 7AN
For the Respondent	MS KATE ANNAND (of Counsel) Instructed by: Thompsons Solicitors LLP Condor House 5 -10 St Pauls Churchyard London EC4M 8AL

SUMMARY

REDUNDANCY – Trial Period

In March 2017 the Claimant in the Employment Tribunal was informed that, as a result of a reorganisation, his current role of PSI Worker was to be deleted with effect on 3 July 2017, and he was at risk of redundancy. He began a trial of a different role of Care Coordinator on 3 July 2017. The parties disagreed as to whether it was suitable alternative employment. The Claimant pursued a grievance, which was unsuccessful. The Respondent again offered the Claimant the Care Coordinator position, which he declined. It then dismissed him, in December 2017.

The Employment Tribunal decided, as a preliminary issue, that the Claimant had not actually been dismissed prior to starting the trial in the new role on 3 July 2017, and therefore that was not the start of a statutory trial period. He had only first been dismissed in December 2017.

The Respondent's appeal against that decision failed. The principal ground of appeal was that the Tribunal erred by not treating the notification of the deletion of the PSI Worker role, on an identified date, as a dismissal for the purposes of section 136(1)(a) **Employment Rights Act 1996**, having regard to the fact that the Claimant was employed specifically in that role. However, there is no rule of law that notification of the deletion of the post in which the employee is employed must inevitably amount to notice of dismissal. It depends on all the facts and circumstances of the case. In this case, the content of the relevant communications, and all the circumstances, were properly considered by the Tribunal to point to the conclusion that the Claimant had not been dismissed as of 3 July 2017, and therefore that the trial which he began on 3 July 2017 was not the start of a statutory trial period. Other grounds of appeal also failed.

HIS HONOUR JUDGE AUERBACH

Introduction and History of the Employment Tribunal Litigation

1. This claim is proceeding in the East London Employment Tribunal ("ET"). I shall refer to the parties as they are in the ET, as Claimant and Respondent. This is the Respondent's appeal.

2. The Claimant's sole claim in the ET is for a declaration that he is entitled to a statutory redundancy payment. The Respondent disputes that. However, if he is entitled to such a payment, the amount is not in dispute. It is also the Claimant's case (also disputed) that he has a good civil claim, but the ET was not concerned with that, and nor is this appeal.

3. The relevant statutory provisions are contained in Part XI, Chapters I and II **Employment Rights Act 1996** ("ERA"). They are notoriously tortuous and have generated a substantial body of authority. The sections relevant to this appeal are 135, 136, 138, 139, 141 and 145. Section 139 describes the circumstances in which, for the purposes of the **ERA**, a dismissed employee shall be taken to be dismissed by reason of redundancy. For the purposes of the present appeal I do not need to set it out. I will set out the other relevant provisions.

> **"135 The right.**
>
> **(1) An employer shall pay a redundancy payment to any employee of his if the employee—**
>
> > **(a) is dismissed by the employer by reason of redundancy, or**
> >
> > **(b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.**
>
> **(2) Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144, 149 to 152, 155 to 161 and 164).**
>
> **Right on dismissal by reason of redundancy**
>
> ***Dismissal by reason of redundancy***
>
> **136 Circumstances in which an employee is dismissed.**
>
> **(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if)—**
>
> > **(a) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice),**

(b) he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(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.

[… …]

(5) Where in accordance with any enactment or rule of law—

(a) an act on the part of an employer, or

(b) an event affecting an employer (including, in the case of an individual, his death),

operates to terminate a contract under which an employee is employed by him, the act or event shall be taken for the purposes of this Part to be a termination of the contract by the employer.

……

138 No dismissal in cases of renewal of contract or re-engagement.

(1) Where—

(a) an employee's contract of employment is renewed, or he is re-engaged under a new contract of employment in pursuance of an offer (whether in writing or not) made before the end of his employment under the previous contract, and

(b) the renewal or re-engagement takes effect either immediately on, or after an interval of not more than four weeks after, the end of that employment,

the employee shall not be regarded for the purposes of this Part as dismissed by his employer by reason of the ending of his employment under the previous contract.

(2) Subsection (1) does not apply if—

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

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

(ii) the other terms and conditions of his employment,

differ (wholly or in part) from the corresponding provisions of the previous contract, and

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

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

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

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

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

(b) ending with—

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

(ii) such longer period as may be agreed in accordance with subsection (6) for the purpose of retraining the employee for employment under that contract;

and is in this Part referred to as the "trial period".

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

(a) the employee shall be regarded as dismissed on the date on which his employment under the previous contract (or, if there has been more than one trial period, the original contract) ended, and

(b) the reason for the dismissal shall be taken to be the reason for which the employee was then dismissed, or would have been dismissed had the offer (or original offer) of renewed or new employment not been made, or the reason which resulted in that offer being made.

(5) Subsection (2) does not apply if the employee's contract of employment is again renewed, or he is again re-engaged under a new contract of employment, in circumstances such that subsection (1) again applies.

(6) For the purposes of subsection (3)(b)(ii) a period of retraining is agreed in accordance with this subsection only if the agreement—

(a) is made between the employer and the employee or his representative before the employee starts work under the contract as renewed, or the new contract,

(b) is in writing,

(c) specifies the date on which the period of retraining ends, and

(d) specifies the terms and conditions of employment which will apply in the employee's case after the end of that period.

…..

141 Renewal of contract or re-engagement.

(1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment—

(a) to renew his contract of employment, or

(b) to re-engage him 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 his employment.

(2). Where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.

(3). This subsection is satisfied where—

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

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

(ii) the other terms and conditions of his employment,

would not differ from the corresponding provisions of the previous contract, or

(b) those provisions of the contract as renewed, or of the new contract, would differ from the corresponding provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee.

(4) The employee is not entitled to a redundancy payment if—

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

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

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

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

…..

145 The relevant date.

(1) For the purposes of the provisions of this Act relating to redundancy payments "the relevant date" in relation to the dismissal of an employee has the meaning given by this section.

(2) Subject to the following provisions of this section, "the relevant date"—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

(3). Where the employee is taken to be dismissed by virtue of section 136(3) the "relevant date" means the date on which the employee's notice to terminate his contract of employment expires.

(4) Where the employee is regarded by virtue of section 138(4) as having been dismissed on the date on which his employment under an earlier contract ended, "the relevant date" means—

(a) for the purposes of section 164(1), the date which is the relevant date as defined by subsection (2) in relation to the renewed or new contract or, where there has been more than one trial period, the last such contract, and

(b) for the purposes of any other provision, the date which is the relevant date as defined by subsection (2) in relation to the previous contract or, where there has been more than one such trial period, the original contract.

(5) Where—

(a) the contract of employment is terminated by the employer, and

(b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the relevant date (as defined by the previous provisions of this section),

for the purposes of sections 155, 162(1) and 227(3) the later date is the relevant date.

(6) In subsection (5)(b) "the material date" means—

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer."

4. The matter has not had a smooth procedural history in the ET. However, Ms Annand and Ms Newbegin of counsel, who appeared before me respectively for the Claimant and Respondent, also appeared at the key Hearings in the ET; and they were together able to clarify some of the aspects that were unclear from a cold reading of the documents.

5. I need to start, however, with the original pleadings.

6. The claim form was presented by solicitors on the Claimant's behalf on 18 April 2018. It gave the Claimant's dates of employment as 1 February 1998 to 22 December 2017.

7. The Grounds of Complaint attached gave, in summary, the following account. The Claimant was employed as a Band 6 Psycho-Social Intervention ("PSI") Worker. In February 2017 he was informed that his post was at risk of redundancy. On 7 April 2017 he received confirmation that his role was to be deleted. He was subsequently offered a trial period in the role of Care Coordinator in another team. It commenced on 3 July 2017. At the end of the trial, the parties disagreed as to whether the role was suitable, and the Claimant asked the Respondent to find him another role. The Respondent proposed to extend the trial period by four weeks. The Claimant then went off sick and subsequently tabled a grievance.

8. On 13 September 2017 the Respondent wrote that, having taken advice, it considered that the Claimant's employment had ended when the original trial period ended on 9 August 2017. The Care Coordinator role had been suitable alternative employment ("SAE") and he was not entitled to a redundancy payment. However, he had remained in employment. Following further developments, on 20 December 2017 he was given twelve weeks' notice. Other roles had been offered but none was suitable. Then, on 22 December, his employment was terminated with immediate effect and he was paid 12 weeks' pay in lieu of notice.

9. The Grounds of Complaint asserted that at the time of the offer of the Care Coordinator role the Claimant had not been given notice of termination, so it did not amount to an offer within section 141(1) of the **ERA**. In any event it was not SAE and/or the Claimant reasonably rejected it. He was dismissed by reason of redundancy, and so entitled to a redundancy payment.

10. Solicitors for the Respondent entered a response defending the claim. The Grounds of Resistance agreed that the Claimant's employment began on 1 February 1998. They stated that he started in his role as a Band 6 PSI Worker on 9 February 2009 and that his employment with the Respondent was terminated on the grounds of redundancy on 15 March 2018. After a lengthy narrative of events earlier in 2017 they asserted that the Claimant commenced a trial period in the Care Coordinator role on 3 July 2017. At the end, the parties disagreed as to whether the role was suitable. The Respondent extended the trial period to 6 September 2017. As the Claimant was off sick at that point, it was further extended by four weeks. The Respondent subsequently realised that the trial period had, in law, ended on 9 August 2017, but said it would honour his entitlement if his ongoing grievance about the matter was upheld.

11. In November 2017, however, the grievance was rejected. The Respondent then restated its offer of the Care Coordinator post. The Claimant rejected it and other posts that were offered. The Claimant was then given notice. He was told his last working day would be 12 January 2018, but his employment would end on 15 March 2018. He unsuccessfully appealed.

12. The Grounds of Resistance asserted that the Care Coordinator role was suitable alternative employment which was offered several times. His rejection of it was unreasonable. It was "available for acceptance at all times, and therefore it could have taken effect at the end of his employment (or within 4 weeks thereof)." It was denied that the Respondent had failed to make an offer "in accordance with the statutory provisions in respect of trial periods." Alternatively, there had been a common law trial period. The Claimant unreasonably refused an offer of SAE and lost his entitlement in accordance with section 141(2) **ERA**.

13. On 26 and 27 September 2018 there was a Hearing before Employment Judge Tobin. This had been intended to be the substantive hearing of the claim, but it turned into a Preliminary Hearing ("PH"). The minute recorded that there was a dispute as to whether the trial of the Care

A Coordinator role that began on 3 July 2017 was a statutory trial period. It was "crucial to determine the basis of the trial period. If the claimant did not object to the Care Coordinator role during a statutory trial period, then I had no jurisdiction to make an award under s141 **ERA**." The Judge was then told that there were more emails relevant to this question, but the Respondent B was unable to access them overnight. The parties jointly sought a postponement, and the Judge agreed. The Judge directed further disclosure and supplemental witness statements to be produced on the question of the status of the trial period.

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14. The Judge then set out the issues, going forward, as follows.

> **"1 Was the trial period that commenced on 3 July 2017 a statutory trial period within the definition set out in s138 ERA?**
>
> **2 Did the respondent's offer of the Care Coordinator role in the North Hackney Recovery Team** D **comply with s141 ERA namely:**
>
> > **(a). Did the respondent make an offer (whether in writing or not) to the claimant before the end of his employment (a) to renew his contract of employment, or (b) to re-engage him 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 4 weeks after the end of his employment? (the claimant's position is that the offer must be made after notice of dismissal has been given).**
> >
> > **(b). Did the offer constitute suitable alternative employment in relation to the claimant?**
> >
> > **…."**

15. I interpose that these three issues were subsequently referred to as Issues 1, 2 and 3.

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16. Further on, the Judge listed a short telephone PH for 26 November 2018. He relisted the substantive Hearing for 9 – 11 January 2019. He directed that, at that Hearing, Issue 1 would be considered, and decided, first, as, depending on the outcome on Issue 1, the Tribunal might not G need to go on to consider the remaining issues.

17. Both counsel confirmed to me that the point that EJ Tobin had in mind, when he identified Issue 1, was whether the trial period that began on 3 July 2017 amounted to a statutory trial H period, having regard to its *length*. However, by the time of the PH on 26 November 2018, which came before Employment Judge Taylor, a further point of dispute had been identified.

18. This was that it was the Claimant's case that the trial period which started on 3 July 2017 could not be a statutory trial period, because he would have had to have been dismissed (with or without notice) before that date, and then offered a renewal or new contract prior to the end of his previous contract, and accepted it. But it was his case that he had not been dismissed, prior to that date, nor offered and accepted re-engagement. The Respondent's case on this was recorded as being that "[t]he previous contract was terminated. Prior to that the Claimant was offered and accepted" the Care Coordinator role, albeit subject to a statutory trial period, which commenced on 3 July 2017. The allocated hearing time was extended by one day.

19. I interpose that there was, at no stage, any formal amendment of the pleadings. In particular, there was no identification, beyond what is recorded in the minute of the Taylor PH, of how the Respondent put its case, as to when, and by what means, the "previous" contract of employment had, by 3 July 2017, been terminated.

20. I had in my bundle copies of the written skeleton arguments on Issue 1 which both counsel prepared for the January 2019 Hearing. That Hearing came before Employment Judge Prichard. In the event, just on Issue 1, there were three witnesses and oral argument was extensive. Ms Newbegin also tabled a further closing written argument (a copy of which I also had). The Judge decided that there would be insufficient time to go on to consider Issues 2 and 3, and to reserve his decision on Issue 1. The Hearing concluded at the end of the third day.

The Decision of the Employment Tribunal

21. The reserved Judgment and Reasons were sent to the parties on 7 March 2019. The operative part of the Judgment was in these terms:

> **"1. The claimant was dismissed, but not until 22 December 2017.**
>
> **2. The trial period commencing on 3 July 2017 was not a statutory trial period for the purposes of Part XI of the Employment Rights Act 1996."**

22. In its Reasons the Tribunal recorded the various positions held by the Claimant since starting with the Respondent in 1998. In January 2009 he was appointed to the PSI role. This was seen by him as an opportunity to acquire a more specialist qualification, and he accepted a move down in Band (from Band 7 to Band 6) when moving into this position.

23. In 2017 a restructuring was announced. At a meeting on 24 March 2017 the Claimant was informed that his PSI role within the Hackney Rehabilitation and Recovery Service was to be deleted with effect on 3 July 2017. By a letter of 6 June the Claimant was invited to a meeting to discuss SAE. The Tribunal quoted from the letter including the following:

> ***"…..***
>
> ***I must advise you that the outcome of this meeting is likely [sic] to be that you will be issued with formal notice of your dismissal on grounds of redundancy. You will have an opportunity to present your views and ask any questions you wish. We will continue to search for suitable alternative employment for you throughout your notice period; this will be both within the Trust and you will be registered on the NHS London 'at risk register' for as long as you are employed by us.***
>
> ***At the meeting we will also discuss the number of roles which had been forwarded to you by the Redeployment Officer and the reasons for your refusal. I must inform you that should you fail to take what the Trust regards as suitable alternative employment, you will forfeit your right to a redundancy payment.***
>
> ***…."***

24. At the meeting on 13 June 2017, with Ms Robertson and Ms Baker of HR, various roles were discussed, but the discussion came down to the Band 6 vacancy for a Care Coordinator in North Hackney Recovery Team.

25. The Reasons then interposed four paragraphs concerning the scope of the Judge's decision, as follows:

> **"14. It has been previously agreed that this judgment will deal only with the question of whether the claimant was dismissed for the purposes of Sections 136 of the Employment Rights Act, 136(1).**
>
> **15. There are 3 questions that must be answered if the claimant is to be entitled to a redundancy payment.**
>
> > **(1). Was the Claimant dismissed within the meaning of Section 136(1) when his PSI practitioner role ceased?**

(2). Was the Care Coordinator role Band 6 in the North Hackney Recovery Team suitable alternative employment within the meaning of section 141(3)(b) of the Employment Rights Act?

(3). Did the claimant unreasonably terminate his contract during the trial period within the meaning of Section 141(4)(d) of the ERA?

16. At this part of the hearing I was only asked to resolve Issue (1). If the claimant was not dismissed at the end of his PSI practitioner role that is the end of the claim for redundancy payment. In the event I have decided, in the claimant's favour, that he was not dismissed until the end of his employment with the respondent.

17. I have also needed to decide whether this was a statutory trial period within the meaning of section 138(3)(b)(i)."

26. I myself interpose here that question 1 at paragraph 15 referred to the further issue identified at the Taylor PH, and the question at paragraph 17 corresponded to the original question 1 formulated at the Tobin PH. These two questions were, respectively, answered by paragraphs 1 and 2 of EJ Prichard's Judgment.

27. Returning to the Judge's Reasons, they take up the narrative with a letter from Ms Robertson to the Claimant of 19 June 2017. The Tribunal commented: "What is remarkable about the letter of 19 June is that it does not contain the words 'dismissed', 'formal notice', 'termination', or any such thing. It is solely focussed on the question of suitable alternative employment and the claimant's eligibility for a redundancy payment."

28. I note that, in that letter, Ms Robertson wrote in part: "At this meeting, I explained to you that you were formally placed at risk of redundancy following the deletion of your post of PSI Worker – AfC Band 6 and since this date, we have been exploring a number of suitable posts for redeployment purposes with you." She then referred to the discussion of the Care Coordinator post. The Tribunal cited the following passage.

"…. You explained that you have a set of skills that will be very hard to replace. You stated you are really invested in your career academically. You feel like you have been forced to take this post and would prefer to be paid redundancy. If not, you would consider going to an Employment Tribunal to claim Constructive Dismissal. We apologised that you felt this way and Lisa explained that all redeployment posts are subject to a 4-week trial period to assess your suitability of the post.

Lisa explained that she would explore the option as to whether the option of redundancy would be possible for you. This has been explored further and I can now confirm that unfortunately this would not be an option as the Trust's Management of Staff Affected by Change Policy is clear that

the Trust will consider all reasonable practicable steps to avoid compulsory redundancies. We also feel that we have found suitable alternative post for you to be slotted into.

....."

29. The Tribunal observed: "The indication in the invitation letter about the claimant being '…likely to be issued with a formal notice of your dismissal on the grounds of redundancy' did not materialise in the outcome letter of 19 June, not at all."

30. The Tribunal continued: "The claimant knew that he would have to go through the trial period. If he rejected the trial out of hand, he considered that he would definitely lose his right to a redundancy payment." But, the Tribunal continued, whether it was a trial period for the purposes of section 138(1)(b) and 138(3)(b)(i) of the **ERA** was "debatable. What is remarkable is that a trial period under the **ERA** is 4 weeks. There is no power or right for either party to extend such trial period for longer than 4 weeks", save under section 138(6), for the purposes of training. There was no suggestion that the parties had complied with that provision.

31. The Tribunal went on to refer to the fact that the Claimant already had some booked leave. Someone advised Ms Baker of HR that he could have a trial period of four *working* weeks, advice later acknowledged to be wrong. The Tribunal accepted that, if the Claimant had been told that the leave period would still count towards the four weeks, he would not have taken the leave, because he did not want to jeopardise his right to a redundancy payment.

32. The Claimant accepted that his PSI role was deleted from 3 July 2017 on which date he started working in the new role under what he believed to be a statutory trial period. On 28 June 2017 he wrote to Ms Baker regarding the impending "one month" trial period starting on 3 July, and restating his concerns that the post was unsuitable. On 12 July Ms Robertson, his manager in the PSI role, responded. She stated:

"Following your confirmation that your trial period for the post of Care Co-ordinator – AfC Band 6 in the North Recovery Team commenced on 3rd July 2017, I can confirm the following changes to your terms and conditions."

33. Further on, she wrote:

> ***"As this post constitutes suitable alternative employment, you are entitled to a trial period. This trial period will last for four weeks.***
>
> ***If you choose to work beyond the end of the four-week trial period, any redundancy entitlement will be lost and you will be deemed to have accepted the new employment. In the event that the Trust wish to end the new contract within the trial period for a reason connected with the new job, you will preserve the right to a redundancy payment."***

34. The Tribunal commented: "Nowhere in this letter is there any statement that the claimant has been dismissed or is under formal notice of dismissal or termination for redundancy, notwithstanding that the Claimant's previous role had been deleted and no longer existed for him or anyone else to carry out."

35. The Tribunal continued, at paragraphs 30 and 31.

> **"30. The Claimant has not been through a restructure before in his professional life. He therefore did not know what to expect. It would be wholly unrealistic for him to have been expected to understand the arcane mechanics of redundancy, suitable alternative employment, and the mysterious concept of disappearing dismissal under section 138 ERA.**
>
> **31. I consider the only safe and sensible approach in a case like this is to base my judgment of the contractual reality on the correspondence between the parties rather than an oral discussions or notifications. The contractual reality of the situation has to be judged objectively."**

36. On 2 August 2017 Ms Baker wrote to the Claimant informing him that, taking account of his eight days of leave, his trial period would end on 9 August 2017. The Tribunal commented that it was apparently not uncommon for the Respondent to purport to do this, but it was only after this occasion that they realised that what they had been doing for years was "without statutory authority and unlawful."

37. The manager to whom the Claimant had been reporting in the Care Coordinator role, Mr Miller, emailed him on 7 August 2017 that he had no concerns with his continuing in that role and that he would continue to be an asset to the team. On 8 August the Claimant emailed Ms Baker that, having tried it out, he did not consider the Care Coordinator role to be suitable.

38. Apparently before she saw that email Ms Baker wrote to the Claimant on 9 August 2017. The Tribunal cited passages from this letter, including its informing the Claimant that the trial had been successful and that "this suitable alternative employment post will now be a permanent change to your terms and conditions of employment …. As such please note that refusal of this suitable alternative post will mean that you will forfeit your redundancy payment". The letter also stated: "All other terms and conditions of your employment remain unchanged and this constitutes an amendment to your terms and conditions of employment...". The Claimant was asked to countersign to "signify your acceptance of these changes." If he did not agree, he had the right to raise a grievance.

39. Having seen his email of 8 August, Ms Baker emailed the Claimant that if he submitted a grievance he would not lose his right to a redundancy payment pending its outcome. The Claimant's union representative, Ms Hydon, asked for that to be formalised, and on 11 August 2017 Ms Baker wrote extending his trial period to 6 September in view of his grievance.

40. The Claimant then tabled his grievance on 17 August which "predictably" took more than four weeks to resolve. Ms Hydon then asked that, as of 6 September, the Claimant be placed on special leave.

41. On 13 September 2017 Mr Henderson "eventually shared the discovery" that the Respondent had no power to extend the four-week trial period. He wrote to the Claimant that the legal advice was that his trial period in the Care Coordinator role ended after the first four weeks "on 9 August 2017" and that the Respondent now took the view "that you have objected what the Trust views as suitable alternative employment and you have forfeited your right to redundancy pay. However, we wish to hear your grievance first." The Tribunal observed that even this letter still mis-stated the end date as being 9 August, for which there was "never any warrant".

42. The Claimant remained off sick. There was a grievance hearing on 9 November 2017. On 22 November a decision was issued rejecting the grievance. HR then wrote asking him whether, in view of that, he would now accept the role of Care Coordinator. He sent a response that he still refused it, on what he considered to be reasonable grounds.

43. On 6 December 2017 Mr Henderson wrote to the Claimant, inviting him to a "final redundancy consultation meeting" on 13 December. I note that the letter included the statement: "If no way forward can be found at the meeting, you will be formally dismissed by reason of redundancy. However, as stated in our previous correspondence, you would not be entitled to a redundancy payment as the Trust feels that it has found suitable alternative employment for you, and that you have unreasonably refused this." A Band 6 role in Newham was also mentioned.

44. The Tribunal then referred to a letter which it stated was of 20 December, but it was clearly referring to one (also in my bundle) of 21 December 2017. Again, I quote more extensively than did the Tribunal. This referred to a meeting on 20 December and a letter of 13 December (I did not have this) which stated that it was "likely" that the Claimant would be issued with notice at that meeting. The letter referred to it having been decided that the PSI post would be deleted. "We had discussed the process whereby we would seek suitable alternative employment for you however we have now moved onto the next stage and regrettably, this means that I must formally give you **12 weeks'** notice that your employment with ELFT will come to an end on **15th March 2018** by reason of redundancy." (Bold type in original).

45. The letter continued that the Claimant would have until 12 January 2018 to accept any of three alternative posts. His last working day would be that day, and thereafter he would be paid nine weeks in lieu. He would not be entitled to a redundancy payment under Agenda for Change due to his unreasonable refusal to accept the SAE of the Care Coordinator role. **ERA** section 141 was also invoked.

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46. Mr Henderson wrote again the next day (22 December) stating that the Claimant had indicated that he did not accept any of the posts. Therefore, he did not need to work on, his last day would be 22 December 2017 and he would be paid 12 weeks' pay in lieu of notice.

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47. The Tribunal observed (paragraphs 47 and 48) that the Claimant contended that 22 December 2017 was his date of termination, the Respondent that it was the date of deletion of his PSI role "on 31 July 2017". The Respondent argued that that dismissal might have disappeared under section 138, had he accepted that Care Coordinator role, but he had not. He had never been paid in lieu of notice and so it was right that he be paid that "at this later stage". The Respondent argued that the dismissal on 22 December was not from the PSI role but from the new role of Care Coordinator which was "emphatically not redundant", and therefore the Claimant was not entitled to a redundancy payment. The Tribunal commented: "It is a deeply unattractive argument they are committed to running, in that they made the mistake, and misled the claimant, not realising that the statutory trial period could not have been extended. He had automatically forfeited the right to refuse the role by working in it after 31 July."

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48. The next section of the Tribunal's decision is headed "legal analysis and conclusions." The Judge set out **ERA** sections 136, 138 and 141. He had been referred to "an enormous amount of case law" and suggested cases himself.

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49. The Judge stated that termination of employment "must be communicated in some way so that the employee may know it has been terminated." He said there was a line of cases under section 97 **ERA** regarding the effective date of termination and time limits. He referred to **Gisda Cyf v Barratt** [2010] IRLR 1073. Another line of authority considered contractual principles. He referred to **Geys v Societe Generale London Branch** [2013] ICR 117, commenting that "of particular relevance to this case" was the judgment of Baroness Hale.

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50. Of the case law under the redundancy legislation, the Judge thought the closest to the present facts was **Meek v J Allen Rubber Co Ltd** [1980] IRLR 21. The Tribunal set out how, after his job ceased to exist, Mr Meek was given a trial period in another role of six months. However, because he did not reject the new role within the four-week statutory period, he lost his right to a statutory redundancy payment. The EAT described this as an unhappy result, but the correct one. The Tribunal observed that a point of distinction from the present case, however, was that Mr Meek was told at the point of termination that he was entitled to redundancy pay.

51. The Tribunal noted that **Optical Express Limited v Williams** [2007] IRLR 936 also confirmed that the statutory trial period is a strict four-week period. A common law "trial period" had been discussed in cases such as **Air Canada v Lee** [1978] ICR 1202. The Tribunal commented: "This concept has arisen in constructive dismissal cases."

52. I now need to set out fully, what the Judge said in the remainder of his Decision.

> **"145 Unless there is a formal statutory trial period under Part XI of the Employment Rights Act, there is no right to a statutory redundancy payment. That is what this case and these tribunal proceedings are about. (Interestingly the *Optical Express* case also had in the background a contractual enhanced redundancy payment, as the present one may also have.)**
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> **146 I was referred to the case of *Francis v Pertemps Recruitment Partnership Ltd UKEATS/0003/13* a decision of Langstaff P and members. It is relied upon heavily by the claimant. Paragraph 21:**
>
> > ***'However, section 138 goes on to set out situations where the statute provides that, despite that definition [i.e. of dismissal], there is actually no dismissal where the contract is terminated: that is where the employee's contract is renewed or he is re-engaged under a new contract. If looked at colloquially, therefore, the question upon which a claim for unfair dismissal is predicated is whether the contract is terminated, whereas the question on which the right to a redundancy payment depends might be put broadly as the employment relationship being terminated.'***
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> **For myself I found that a helpful distinction that acknowledges the rather mysterious concept of a disappearing dismissal.**
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> **147 Another recent case I have found helpful was the case of *Sandle v Adecco UK Ltd* [2016] IRLR 941 EAT, judgment of HHJ Eady. This reviews several of the cases concerning the need to communicate dismissal by words or actions. Dismissal has to be on a date certain. The case of *Hogg v Dover College* was cited. This was the historic authority where the tribunal held that it was possible to bring an unfair dismissal case from within employment. Mr Hogg's old contract was replaced by a new contract with half the hours and half the salary. The difference was so substantially great that it could not be portrayed as anything but a dismissal and re-engagement on a different contract. There is no such great difference between the contracts in the present case.**
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> **148 The Hogg case was followed *Alcan Extrusions v Yates* [1996] IRLR 327 EAT, which also involved 'radically different' new terms. I cannot find the Care Co-ordinator contract role in any way raises a *Hogg v Dover College* kind of issue where a dismissal simply happens. The**

claimant's grade, status and salary would remain identical after the change. It was broadly to do with psychiatric nursing and recovery. I do not consider the respondent would wish to argue that. If it was 'radically different' then the role could hardly have been suitable alternative employment.

149 As stated earlier I must base my objective assessment of the contractual reality on the correspondence. The parties' recollections of meetings inevitably differed. When two sides are so strongly in disagreement, memories can become selective and tendentious. In the *Sandle* case at paragraph 26:

> ***'Where the question of termination is to be determined in the light of language used by an employer that is ambiguous, the test is not the intention of the speaker but rather how the words would have been understood by a reasonable listener in the light of all the surrounding circumstances.'***

That approach aligns with the contract law cases. That seems to be an accurate statement of the test I have to apply. That means the approach in *Geys v Soc Gen* is a more useful guide than the Section 97 ERA ("EDT") cases.

150 'Reasonable listener' is another way of saying objective. The reasonable listener is also disinterested. I have reviewed the correspondence in detail throughout the course of this long hearing on a single issue. My initial doubts remain. The letter of 6 June stated the claimant was likely to be issued with formal notice of dismissal. This never materialised in the correspondence.

151 The correspondence does not seem to reflect dismissal followed by disappearance of the dismissal. That was the shape of the legislation which the Respondent needed to follow. The lack of any 'formal' notification of dismissal, in a process characterised by formality at every turn is, I consider, fatal to the respondent's contention that the claimant was dismissed.

152 The claimant's belief is that he had a subsisting contract with the Trust which underlies the various changes in role which he has had throughout the whole of the term of his employment with the respondent. In light of the correspondence the claimant received. I would that as an objectively reasonable interpretation of what was being communicated to the claimant.

153 It follows in my view from the reading of the sections that if the claimant was not dismissed, the trial period in the new Care Coordinator role cannot have been a statutory trial period under the Part of XI of the Employment Rights Act 1996. It could only be a statutory trial period if it started immediately on an actual dismissal (as per s138(1)(a) & (b)). It therefore follows that the trial period was not in fact a statutory trial period.

154 It is not necessary for me at this stage to say what other kind of trial period it was. Maybe, as Ruth Hydon suggested, it was a 'contractual' trial period, and they were sensible and fair in allowing the claimant time for annual leave and also extra time for his grievance to be dealt with. But this is a strict statutory regime which needs to be followed to the letter, in order for the claimant to qualify for a statutory redundancy payment.

155 I consider therefore that the claimant was not dismissed until 22 December 2017 and therefore the remaining issues for decision will have to be considered now, with the addition of the question, now introduced by the respondent's counsel, namely was the claimant's final dismissal a dismissal form the PSI worker role which was redundant or from the Care Coordinator role which was not."

The Grounds of Appeal and Respondent's Arguments

53. There were eight numbered Grounds of Appeal set out in eleven numbered paragraphs. When I considered the Notice of Appeal on paper I observed that there was an element of overlap and repetition. The Respondent's Answer ran to 49 paragraphs. Ms Newbegin's skeleton was 80 paragraphs long, Ms Annand's 98. There were 22 authorities in my bundle. I heard a full day

of oral argument. I will certainly not refer to every last detail of the arguments in this decision; but will attempt, myself, to focus on the points which seemed to me to be most significant.

54. I will first describe the nub of each of the eight grounds, and summarise the main arguments advanced by Ms Newbegin.

55. Ground 1 was to the effect that the Tribunal erred in finding that there had been no dismissal as at 3 July 2017 for the purposes of section 136(1)(a). The section was concerned with whether the specific contract of employment had been terminated, not necessarily the employment relationship. The ET failed to address whether the contract to work in the PSI Worker role had been terminated. It failed to address the impact of the deletion of that role.

56. In her written skeleton Ms Newbegin wrote that the Respondent's position was that the Claimant's contract of employment as a PSI Worker terminated on 3 July 2017 with the deletion of his PSI Worker role. In order to terminate the contract of employment, the notification from the employer must either specify the date of termination or contain material from which it is positively ascertainable: **Morton Sundour Fabrics Ltd v Shaw** [1967] ITR 54. In **Meek v J Allen Rubber Co Ltd** [1980] IRLR 21 a letter stating "Because the shuttle run to Whitecroft on which you are employed to drive has come to an end you are now dismissed for redundancy" was a dismissal within the statutory scheme. A termination can be effected by actions, as well as by words. In **Sandle v Adecco UK Ltd** [2016] IRLR 941 at paragraph 40 the EAT gave examples of cases in which a dismissal was communicated by conduct that was inconsistent with the continuation of the employment contract. In **McMaster & Ors v Perth & Kinross Council** [2008] UKEAT/0026/08, the appointment to new posts involved the introduction of new contracts.

57. In this case, submitted Ms Newbegin, the Claimant was employed as a PSI Worker. There was no dispute that he was told that this role would cease to exist on 3 July 2017, and that it in fact did. Applying **Shaw** and **Meek** (above) the ET should have found that, in particular the letters to that effect of 6 and/or 19 June 2017, constituted notice terminating his contract of employment with effect on that date. The ET misapplied the obiter comments of the EAT (Langstaff P and members) in **Francis v Pertemps Recruitment Partnership Limited** UKEATS/0003/13. It erred by looking at the relationship as a whole, rather than whether the particular contract for employment as a PSI Worker had terminated. **Martin v Glynwed Distribution Ltd** [1983] ICR 511 was not authority for the proposition that whether or not there has been a dismissal is always a question of fact. In this case the ET erred in law.

58. Ground 2, overlapping with Ground 1, was to the effect that the ET erred, in taking the approach that a dismissal must be by express words, and by focussing on the lack, in the correspondence, of words such as "dismissal", "formal notice of dismissal" or "termination". It erred in its attempts to distinguish **Meek** (above). The mention, or not, of entitlement to a redundancy payment, was not a relevant point of distinction from that case. **Geys v Societe Generale** [2013] ICR 117 was irrelevant to this case. Ground 3 also overlapped with Ground 1, reiterating that the ET erred by departing from the "long-established" authority of **Shaw** (above).

59. Ground 4 argued that, in considering the "contractual reality", the ET omitted to consider the significance of the Claimant having been told that his PSI Worker role would be deleted with effect on 3 July 2017, that he would forfeit a redundancy payment if he refused SAE, his own description of the 19 June 2017 letter as "formal notification" of redundancy, the acceptance of the new role, which the Respondent, on 12 July 2017, referred to as being under a new contract, and the fact that all concerned considered at the time that there was a statutory trial period. The documents had to be considered within the relevant factual context (**Investors Compensation**

Scheme Ltd v West Bromwich Building Society (No 1) [1998] 1 WLR 896) which was the deletion of the PSI Worker role. The Claimant having been formally notified of the end of his employment as a PSI Worker, there was no need for any further formal notice of dismissal. Further, some of the Respondent's own documentation treated being placed formally at risk as synonymous with being given formal notice of redundancy.

60. Ground 5 argued that the ET erred in finding that there was an underlying contract that subsisted through the Claimant's various changes in role. He did not claim to have had a generic and role-flexible contract. There was none. In this respect the present case was analogous with the facts of **Francis** (above). The ET should have objectively interpreted the Claimant's contract (applying **Arnold v Britton** [2015] AC 1619). The only correct objective interpretation was that, under his contract, he was specifically employed as a PSI Worker.

61. Ground 6 was that the ET erred by various specific mis-directions or mis-statements, to which I will give letters: (a) in considering (at paragraph 42) whether there was a dismissal as at 31 July 2017 – the wrong date; (b) in mis-stating the Respondent's case at paragraph 47; (c) in referring, at paragraph 47 to notice pay, despite section 136(1)(a) referring to dismissal with or without notice; (d) in mis-stating the agreed list of issues at paragraph 15; (e) in stating at paragraph 145 that without a statutory trial period there is no right to a statutory redundancy payment; and (f) in referring to a one-week trial period at paragraph 23.

62. Ground 7 was that the ET erred in failing to consider the Respondent's alternative argument (advanced in Ms Newbegin's skeleton to the ET and orally), by reference to section 136(5) **ERA**, that the Claimant's employment had come to an end, with the deletion of the PSI Worker role by "dismissal, mutual agreement, frustration or otherwise". Specifically, that deletion amounted to a frustration, ending the contract: **Sharp v McMillan** [1998] IRLR 362. Section 138(3) merely required the contract to have ended, not necessarily by dismissal.

63. Ground 8 argued that the Tribunal erred by failing to consider, and find, what *did* happen to the PSI Worker contract, if it had not been terminated as at 3 July 2017. Without making such a positive finding, the ET could not properly conclude that it had not been terminated.

Answer and Claimant's Submissions

64. The principal contentions advanced in the Answer, and in Ms Annand's submissions, in relation to each of the Grounds, may be summarised as follows.

65. As to Ground 1, the Tribunal had correctly addressed the question of whether the Claimant had been dismissed prior to 3 July 2017, as sections 136 and 138 required it to do. **Martin** (above) indicated that this was a question of fact. The fact that the role that an employee is performing ceases to exist does not necessarily mean that they are thereby automatically dismissed. The ET did not misapply **Francis** (above).

66. As to Ground 2 the Tribunal did not assume that a dismissal could only be effected by express words. It expressly cited (at paragraph 147) the relevant passage from **Sandle** (above). However, the Claimant was specifically told in the 6 June 2017 letter that he would likely receive "formal notice of dismissal" following the next meeting; but the Tribunal correctly found that no such formal notice was issued. The ET properly looked to see whether the 19 June 2017 letter contained any such formal notice, and correctly found that it did not.

67. It *was* a relevant point of distinction from **Meek** (above) that Mr Meek was told that he was entitled to a redundancy payment, which was a clear indication of dismissal. The citation from **Geys** (above) was specifically from the speech of Lady Hale, and concerned with what is required in order to give an effective notice of termination.

68. In respect of Ground 3, as the Judge noted, he was referred to a large number of authorities. It was not an error for him not to cite them all in his decision. **Shaw** (above) was

before him. It was authority for the fact that, for there to be a dismissal, the employer's communication must identify the date, or enable it to be ascertained. It was not authority for the proposition that nothing more was required to effect a dismissal. While the Claimant knew that the PSI Worker role would end on 3 July 2017, he was told that he would likely receive formal notice of dismissal, but received none before 3 July, nor until 21 (and 22) December 2017.

69. In respect of Ground 4 the documentation was very extensive. It was not an error for the Tribunal not specifically to refer to all of it in its Reasons. There was no dispute that the Claimant was aware of the restructuring, the deletion of the PSI Worker post on 3 July 2017, and the *risk* of his being made redundant. No-one involved at the time had a clear grasp of the law relating to statutory trial periods. Whether the Claimant thought he was working a statutory trial period at the time was irrelevant to whether he was, in law, dismissed.

70. As to Ground 5, the Tribunal did not find that the Claimant had a flexible contract. It also properly referred to the fact that none of the Respondent's correspondence was consistent with the Respondent understanding that he had been dismissed with effect on 3 July 2017.

71. As to Ground 6 (using my above lettering): (a) was plainly a typo. The Judge plainly understood that he needed to consider whether the Claimant was dismissed when the PSI Worker role ceased on 3 July 2017; (b) the Judge was clearly aware that, if the trial of the Care Coordinator role was a statutory trial period, the Claimant would lose the right to a redundancy payment by working on after 31 July 2017; (c) paragraph 47 was summarising the Respondent's position in relation to notice pay, and why this was paid in December. In any event, when the Claimant was formally dismissed and paid notice pay was plainly relevant; (d) the issues to be decided at this point were not mis-stated; (e) the Judge's point was that he was only concerned with whether the Claimant was entitled to a statutory redundancy payment, not any contractual right; once again, in any event, the key issue was whether he was dismissed with effect on 3 July

2017, which the Judge determined without error; (f) the Tribunal was clearly aware that the statutory trial period is four weeks, to which it referred at numerous points in its Reasons.

72. As to Ground 7, the Respondent's central argument was that the Claimant was dismissed with effect on 3 July 2017. As to frustration, the Respondent's argument was brief and undeveloped. It was not an error not to refer to every single point raised in argument. In any case the frustration argument was unsustainable and bound to be rejected.

73. As to Ground 8, the Tribunal had addressed the question it was required to address, namely whether the Claimant was dismissed on 3 July 2017, without error.

Discussion and Conclusions

74. I agree with Ms Annand's submission that the Judge correctly identified that the key dispute in this case was as to whether the effect of the Claimant being notified that his PSI Worker role was being deleted with effect on 3 July 2017, was that he was dismissed with effect on that date, for the purposes of sections 135, 136(1), 138 and/or 141. These sections work in harness together, and must be construed holistically. By section 135(2), section 135(1) expressly has effect subject to the provisions that follow, including those particularly identified there, including section 141. Section 136(1) is expressly subject to section 138.

75. The starting point is that section 135(1) refers to a "dismissal" by reason of redundancy. Consistently with those (and though I am mindful that these are headings only) the headings of Chapter II, sections 136 to 139, and section 136 itself, all refer to "dismissal" or "dismissed". The operative part of section 136(1) states that (subject as therein provided) an employee is dismissed if and only if (a), (b) or (c) apply.

76. Both counsel correctly acknowledged and agreed that the wording of these three sub-paragraphs mirrors that of the sub-paragraphs of **ERA** section 97(1) – the definition of a dismissal

for the purposes of the right to claim unfair dismissal. (Section 136(1)(a) includes the words "by the employer" not found in section 98(1)(a), but it was agreed that that is not a material difference for the purposes of the point addressed below.) The remaining provisions of section 136 add modifications which may apply to a redundancy payment claim, for which there is no counterpart in section 97. However, sections 136(2) – (4) have no application in this case. Nor do sections 136(1)(b) and (c).

77. For these purposes, both counsel – correctly – agreed in argument, the meaning of dismissal within section 136(1)(a) is the same as the meaning within section 97(1)(a).

78. Further, in my judgment, the references, in section 138(1)(a) to "the end of his employment under the previous contract", and in section 141(1) to "the end of his employment" must be to the date of the dismissal which occurs (or would occur were it not to disappear by operation of section 138) by virtue of section 136. They are not stand-alone provisions. They operate by way of qualification and exception to the definition of dismissal in section 136. They cannot have been intended to introduce a distinct conceptual apparatus. The provisions of section 145 concerning the fixing of the "relevant date" (which must be ascertained, among other things, in order to calculate a redundancy payment) are also consistent with that holistic approach (although, perhaps by oversight, or because it was thought unnecessary, they omit to cater for a case falling within section 136(5)).

79. I shall return to Ms Newbegin's argument by reference to section 136(5). However, I will for the present focus on what, as I have said, was the main issue for the Tribunal, namely whether there was a dismissal, with effect on 3 July 2017, within the mearing of section 136(1)(a); and on whether the Judge erred in law in concluding that there was no such dismissal.

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80. I agree with Ms Newbegin that whether, in a given case, there has been a dismissal is not necessarily always a pure question of fact. Of course, in a given case the dispute may be purely one of fact, with the parties being agreed, or it being clear, what the legal consequence will be if certain facts are found. **Martin v Glynwed Distribution Limited** [1983] ICR 511 is simply an example of a case where the key dispute the Tribunal had to resolve *in that case*, as to which of the employer and employee had really terminated the employment, was properly characterised as one of fact, not law. But there can be no doubt that whether, on a given set of facts, a dismissal has occurred, *may* also, in some cases, give rise to an issue of law.

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81. The authorities establish that, for there to be a dismissal within the meaning of section 97(1)(a) and/or section 136(1)(a), the employer must communicate to the employee that it is terminating the contract under which the employee is employed, and must communicate that it is doing so with effect on a date which is either expressly stated or unambiguously ascertainable from the communication. **Morton Sundour Fabrics Ltd v Shaw** [1967] ITR 84 confirms that there cannot be a dismissal *unless* the employer communicates a stated, or unambiguously ascertainable, date, but does not assist on what, apart from that requirement, amounts to the communication of a dismissal, as such.

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82. The communication may be by express words (whether oral or written) or it may be by words or deeds which convey that the employer is dismissing, on an identified, or uniquely identifiable, date. But, if it is other than by express words, and in particular if it is by some other form of conduct, the nature of the conduct must be such as to unambiguously convey that the employment is being terminated – it must be conduct which is not consistent with any other meaning or interpretation.

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83. In oral argument Ms Newbegin confirmed that the Respondent did not seek to maintain on appeal that the Tribunal should have concluded that this was a **Hogg v Dover College** [1990]

ICR 39 type case. Her argument was that the communication(s) to the Claimant that his employment in the PSI Worker role was ending on 3 July 2017 amounted to communication(s) that he was being dismissed with effect on that date, in particular because he was, under his contract as it stood in 2017, employed specifically and only to undertake that role.

84. There was no dispute that the Claimant was notified, and knew (and, before me, that the Tribunal correctly so found) that the PSI Worker role was being deleted with effect on 3 July 2017. Given the contents of the correspondence, that was plainly right.

85. I also do not think there was actually any dispute before me that, as of 2017, the Claimant was specifically employed in the role of PSI Worker, rather than under a more flexible or generic type of contract (whether as a generic Band 6 worker or otherwise) enabling him to be unilaterally moved to a different role. In all events Ms Newbegin was, in fact and law, right about that; but I cannot find any sign or suggestion that the Tribunal thought, or assumed, anything else.

86. The next question (approaching Ms Newbegin's case at its highest, I think) is whether it *necessarily* follows as a matter of law from the fact that (a) the Claimant was employed specifically in the PSI Worker role; and (b) he was notified that that role would be ending on 3 July 2017, that he was therefore, in the requisite sense, dismissed, with effect on that date.

87. I agree with Ms Annand that there is no rule of law to that effect. The requirement under section 136(1)(a) is that the employee be notified (by some form of communication or conduct) that the *contract under which* he is employed is being terminated. That is not necessarily the same as a notification that the *role in which* he is currently employed under that contract is coming to an end. Similarly, and consistently, the references elsewhere are to the "end of the employee's employment under the previous contract" (section 138(3)(a)) and "the end of his employment"

(section 141(1)), not to the end of the role or the job in which the employee is currently employed under that contract.

88. In such a case, whether the communication that the current role is to end amounts to a communication that the contract is being terminated on that date, must be determined by the Tribunal in light of the wider context, and *all* the facts of the particular case. The cases cited by Ms Newbegin, **Kinmond v Rushton Connections Ltd** EAT/799/97 and **Meek v J Allen Rubber Company Ltd** [1980] IRLR 21, are examples of cases where, on their facts, the particular communication should have been, or was properly, construed as a dismissal. They do not establish any wider rule of law. In **Meek** the letter informing Mr Meek that his job had ceased because of the closure of a department at Whitecroft, continued: "You are therefore entitled to redundancy pay." The EAT considered that conveyed the message of a dismissal for redundancy. That is perhaps unsurprising, given the reference to Mr Meek being entitled to redundancy pay.

89. **Sandle v Adecco UK Ltd** [2016] IRLR 941 is one of a number of authorities which discusses the possibility of a dismissal being communicated by actions, rather than words. Ms Newbegin cited in particular paragraph 40 of the decision:

> **"40. Did the ET thereby err? We can see the argument that an ET might get overly fixated on the issue of communication - failing to remind itself as to the language of section 95(1)(a), which requires merely that the employee's contract "is terminated by the employer (whether with or without notice)". Whilst we can see why an ET might look for express language before finding a dismissal under section 95(1)(a) - the employer's decision to terminate the contract should be unequivocal - and we can see a real danger from lack of certainty, we accept that certainty is not the only relevant criterion. A dismissal may be by word or deed, and the words or deeds in question may not always be entirely unambiguous; the test will be how they would be understood by the objective observer. Further, as the case law shows, an employer's termination of a contract of employment need not take the form of a direct, express communication. It may be implied by the failure to pay the employee (*Kirklees*), by the issuing of the P45 (*Kelly*) or by the ending of the employee's present job and offer of a new position (*Hogg*). In each of those cases, however, there was a form of communication; the employee was made aware of the conduct in question, conduct that was inconsistent with the continuation of the employment contract and in circumstances where there were no other contraindications. The question is: given the facts found by the ET, given what was known to the employee and to the relevant circumstances of the case, what is the conclusion to be drawn? Has the employer communicated its unequivocal intention to terminate the contract?"**

90. However, this passage needs to be read with care. The main points are (a) that termination can be communicated by conduct as well as words; and (b) whether a termination has been communicated is to be judged by how the words or conduct would be understood by the objective observer. The statement that the words or deeds "may not always be entirely unambiguous" comes in that context. The point is that, though the parties may, subjectively, interpret the words differently, what matters is how, objectively, they should be read. Elsewhere in this passage the EAT notes that the employer's decision "should be unequivocal" and that in each of the cases concerning conduct which it there cites, the conduct of which the employee was made aware was "inconsistent with the continuation of the employment contract" and "there were no other contra-indications." The ultimate question, it concludes, is whether the employer has "communicated its unequivocal intention to terminate the contract."

91. So, whilst a dismissal may be effected by conduct, and the test is what the reasonable observer would understand by it, there can be no dismissal unless they would understand that the contract of employment has been unequivocally terminated. It appears to me that the Judge correctly understood this. Further, although he referred (paragraph 140) to **Geys** (above) discussing (which it did) the automatic and elective theories of termination, I see no sign that he thought *that* aspect was an issue in this case. His reference to the speech of Baroness Hale being of "particular relevance to this case", and the later mention of this authority again at paragraph 149, rather suggest that perhaps what he took from it was the importance of the employee being "notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate." (*Per* Baroness Hale at para. 55) Be that as it may, I cannot see that the citation of this authority led the Judge into any error in this case.

92. In any event, Ms Newbegin, as noted, did not maintain that the Tribunal should have found this to be a **Hogg** (above) type of case; and in reality, it seems to me, she was not relying

on conduct that did not involve words, such as stopping pay or sending a P45, but on the Claimant having been informed, by words, at a meeting and then in writing, that his PSI Worker role was to terminate on 3 July 2017.

93. Ms Newbegin herself submitted – correctly – that the words used in a communication of this sort must be construed objectively and in its wider context. The Tribunal, it seems to me, also concluded that that was the general approach it should take – see paragraphs 149 and 150.

94. Ms Newbegin, however, argued that the context was the communication of the ending of the PSI Worker role – but that by itself takes us no further. The Tribunal plainly regarded as significant context, the fact that the letters referred to the fact that the Claimant may, at a certain future point, be given formal notice of termination. Ms Newbegin said that was an error, because the Tribunal was assuming that some express words were necessarily required, as a matter of law. However, I do not think it made that assumption. Its citation from **Sandle** refers specifically to the possibility of a dismissal by "words or actions" (paragraph 147).

95. Rather, the Tribunal was simply saying that it considered that the references to the possibility of the Claimant receiving "formal notice of your dismissal on the grounds of redundancy" provided significant context in this particular case. I agree with Ms Annand that the Tribunal was fully entitled to attach significance to that. Such communications would make no sense, if the information that the PSI Worker role was ending had been intended to serve as notification of dismissal in itself; and they provided a context in which it was proper then to look for something coming afterwards conveying dismissal, in some formal way over and above, and as distinct act from, the fact already communicated of the abolition of that post.

96. In some cases, an employee may enter into an entirely new contract of employment when they start a new role, and the old one ends. In others, the new contract is varied. **McMaster**

(above), another case relied on by Ms Newbegin, appears to have been an example of the former occurring, but the decision establishes no rule of law that it has to be that way.

97. Ms Annand also fairly submitted that part of the wider context in this case was the various indications from the Respondent that it was, as part of the process, seeking to explore opportunities for SAE, so as to avoid the Claimant's employment having to be terminated. Further, documents before the Tribunal showed that when he had changed roles in the past, the matter had generally been handled by way of exchanges identifying and agreeing amendments to his contract, not by terminating his existing contract and entering an entirely new one. Further, when he was told that his present role was to be deleted, and he was at risk of redundancy, he was told that he would be placed on the "at-risk register"; and when he began trialling the Care Coordinator role, he was again notified of proposed *amendments* to his terms, and invited to sign agreement to them. Ms Newbegin was right that one of the letters (of 12 July 2017) did talk about the possibility of ending "the new contract" within the trial period; but this very letter had referred to changes in terms and conditions, and other terms and conditions remaining unchanged. It cannot therefore be said that the Tribunal erred by not construing the use of the phrase "new contract" in that letter as signifying that the Claimant's old contract had been entirely terminated.

98. All of this material was, rather, consistent with a context in which the objective observer would *not* infer merely from the notification of the ending of the PSI Worker role, that the contract of employment itself, under which he was currently employed in that role was, as a whole, being terminated. In my judgment, this was not a case where the ET was bound to conclude that the fact that the Claimant was currently specifically employed in the PSI Worker role, coupled with the notification that that role was to end on an identified date, unequivocally conveyed the termination of his contract of employment, nor that this was a case in which there were no other contra-indications, so that these facts were consistent with no other possible conclusion.

99. I also consider that the Tribunal was fully entitled to take into account, as context, its judgment that it would be wholly unrealistic for the Claimant to have been expected to understand the "arcane mechanics" of this area of the law; and entitled to focus on written communications, given the disputes about what was said at certain meetings, and the formal strictures of the legal framework (paragraphs 30, 31 and 149). Given all of that, and also its findings about various misapprehensions about the law on the part of members of the Respondent's team, and the objective test, the Tribunal was not obliged to attach more weight to what either the Claimant, or some members of that team, perceived or believed to be the position at various points.

100. Nor can I see that the Tribunal erred in its reference to **Francis v Pertemps Recruitment Partnership Ltd** UKEATS/0003/13. Were one to read, in isolation, the last sentence of paragraph 21 of that decision, the point being made there might be misunderstood. As the paragraph as a whole, and the wider passage in which it appears make clear, the EAT was not suggesting that the general tests of dismissal in section 136(1)(a) and section 95(1)(a) are different. On the contrary, it identified that the words are virtually identical. Rather, this passage is focussed on the significance, where the claim is for a redundancy payment, of section 138.

101. Nor do I see that the Employment Judge misapplied this dictum. Indeed, he seems to have correctly understood that it referred specifically to the impact of section 138, in his reference, using a term often used by commentators, to the concept of a "disappearing dismissal." Nor can I see that consideration of this passage led him to an erroneous approach to, or conclusion on, the question of whether there was a dismissal as of 3 July 2017.

102. Ms Newbegin, in a separate strand of argument, referred to various documentation before the Tribunal suggesting that the Respondent's materials sometimes referred to placing an employee "at risk" of redundancy to describe the point at which notice is actually given. However, the natural meaning of being placed on risk of redundancy is that actual notice of

redundancy is yet to come; and these documents are themselves not easy to understand. The Respondent's Change Policy and Procedure states at paragraph 16.2 that "[t]he identification of being at risk of redundancy is not a notice of redundancy" but at 16.7 that "[s]taffs that are not selected for a post in the new structure will be formally declared at risk of redundancy and given notice of redundancy in accordance with the contract of employment. They will continue to be listed on the Trust's at-risk register."

103. It may be that part of the answer is in that last sentence, namely that, even after the point has been reached of giving the employee formal notice, he is still considered, during the notice period, to be "at risk", in the sense he can remain on the at-risk register during the notice period, and another job may yet be found before the last day of employment comes. But, however that may be, I do not think it can be said that these materials show that the ET erred in not concluding that the notification of the abolition of the PSI role amounted to an actual dismissal.

104. Further, and in any event, the Tribunal rightly focused on the specific communications with the Claimant, by way of the chain of meetings and correspondence about the process in his actual case. These were, throughout the period up to 3 July, to the effect that he was at risk, *and* that the formal notice of dismissal on grounds of redundancy was yet to come.

105. Nor did the Tribunal err by referring (in paragraph 152) to the Claimant's belief that he had a subsisting contract which underlay the various changes in role. The Tribunal stated that it considered his belief to be objectively reasonable. I am not sure that the Tribunal meant that the Claimant believed that there was a flexibility clause under which he could be unilaterally redeployed. Indeed, it would be surprising had the Tribunal thought he thought that, when it referred, for example, to correspondence in which he complained that he was being forced into agreeing to move into the Care Coordinator role by threat of forfeiture of a redundancy payment.

106. Further, the Tribunal did not say that the test it was itself applying, was by reference to his belief, nor that it found itself that he had a flexible contract, still less that this was an essential part of its reasoning. That was not argued before it, and, as was pointed out to me, had that been the case, the Respondent would not have needed to go through the process that it did at all: it could just have redeployed the Claimant, invoking the flexibility clause. I do not think that the Tribunal would have set out all the analysis it did, in the way that it did, had it thought that this was the case, or even a possibility. Further, as Ms Annand pointed out, the Tribunal had all the paperwork before it relating to terms and conditions, including the various correspondence referring to amendments and inviting the Claimant's agreement. I do not think it can be inferred from paragraph 152 that it must have misunderstood the picture on this.

107. Ms Newbegin cited various authorities to the effect that (save in the case of a training extension under section 138(6)) the statutory trial period is a strict and inflexible four weeks, which cannot be extended, even by mutual agreement; and the employee who does not reject the new post within that period will lose his right to a statutory redundancy payment (including: **Benton v Sanderson Kayser** [1989] IRLR 19 CA; and **Optical Express Ltd v Williams** [2008] ICR 1); also that a trial undertaken reluctantly, or with reservations, is still a trial. But this points to no error of law in the ET's decision. The Judge himself pointed out that the Respondent got this aspect wrong; and the Judge correctly concluded that if (as he found) the Claimant had not been dismissed by 3 July 2017, then the trial which began on that day was not a statutory trial period at all.

108. Pausing there, in light of the foregoing discussion, Ground 1 fails. It was neither wrong, nor perverse, for the Tribunal to fail to conclude that there was a dismissal within the meaning of section 136(1)(a), from the fact that the Claimant was told that his role as a PSI Worker would end on 3 July 2017. Ground 2 fails, because the Tribunal did not assume that such a dismissal

A could only be by express words. Ground 3 fails because the Tribunal's decision was not contrary to **Shaw** (above). Ground 4 fails because the Tribunal did not take an erroneous approach to what it called the contractual reality, but a permissible one. Ground 5 fails because the Tribunal did not make the finding that the Ground imputes to it.

B

109. In light of the foregoing, in my Judgment, Ground 8 must also fail. The Tribunal found that the contract under which the Claimant was employed by the Respondent was not terminated with effect on 3 July 2017. It did find that it was terminated with effect on 22 December 2017. In light of the unambiguous and express terms of the letters of 21 and 22 December 2017, it was not wrong to do so. The Tribunal did not need to make any other findings, for the purposes of deciding the issues considered in this particular Decision, about what became of that contract.

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110. I turn to Ground 6. The Judge stated correctly, in paragraph 47, that the Respondent's case was that the date of dismissal was the "date of deletion of his PSI role". The Judge plainly knew, and correctly stated elsewhere in the Reasons, that that date was 3 July 2017. But he also plainly knew that, if there was a four-week statutory trial period, then it ended on 31 July 2017. I think it is therefore clear that the reference to the deletion of the PSI role, in paragraph 47, as having been on 31 July 2017, must either by a typo, or a mixing up of the date, and nothing more.

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111. It is also clear, from his citation of section 138, and his discussion of the concept of a disappearing dismissal, that the Judge understood the mechanism of that section. I think I can be confident that, in paraphrasing the Respondent's argument in paragraph 47, he simply wrote "accepted" when he meant "refused." The reference to notice pay was plainly also a reference to the Respondent's case about why the Claimant was paid notice money in December. Once (as I have earlier in this decision) one traces through the renumbering, revising and reordering of the issues, I do not think that paragraph 15 misunderstands or mis-states them. Paragraph 145 contains, unfortunately, another bit of garbled text. But I am confident from reading the Decision

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as a whole that the Judge's point was that it is only where there is a trial period meeting the *statutory* requirements, that the employee will not (necessarily), by undertaking that trial, lose their right to a *statutory* redundancy payment. Finally, the reference to a one-week trial period in paragraph 23 is plainly just a mistake.

112. These Reasons are not, it has to be said, as polished as they might have been. It is unfortunate that the Reasons contained these errors and mis-speakings. I have noticed at least one other (I think): a mis-rendering of the second sentence of paragraph 16. There is also a disconcerting leap in the paragraph numbering at one point. But, having considered them all, in the context of the Reasons as a whole, I do not think that any of them bespeak an error of law on the part of the Tribunal, or undermine the essential thread, and soundness, of its reasoning.

113. I turn to Ground 7. Although the wording of the ground refers to the Tribunal having failed to consider, whether the Claimant's contract had "come to an end with the deletion of his role", apart from by dismissal, by "mutual agreement, frustration or otherwise", and Ms Newbegin steadfastly recited that formula in submissions, the only specific argument advanced before the Tribunal, apart from the deletion of the PSI Worker role amounting to a dismissal within section 136(1)(a), was that it amounted to a frustrating event, in turn amounting to a termination within section 136(5). This Ground contended that the Tribunal erred by failing to address that argument in its decision.

114. Ms Newbegin drew attention to the fact that this argument was raised in her written submission to the Tribunal. **G F Sharp & Co Ltd v McMillan** [1998] IRLR 632, on which she relied, was also in its authorities bundle. She said she also referred to the argument in the course of her oral submissions. Ms Annand did not recall that but, properly, did not dispute it.

115. This Ground faces a number of difficulties.

116. First, as I have noted, the original Grounds of Complaint asserted that the Claimant had not been given notice of termination by 3 July 2017, so that the offer to try the Care Coordinator role from that date did not amount to the offer of a statutory trial period. The Grounds of Resistance maintained that section 141 applied, but did not specifically engage with this argument. They did not assert that the effect of the deletion of the PSI Worker role was that the Claimant's contract of employment had been frustrated as of 3 July 2017 and that this meant that it was deemed terminated by the Respondent by virtue of section 136(5).

117. Even after this aspect of the Claimant's case was highlighted between the two PHs, the Respondent's line of argument based upon frustration and section 136(5) was not specifically identified in the minute of the Taylor PH, and, as I have noted, the pleadings were never amended. I regard this as not irrelevant to the question of whether the Judge erred by not specifically picking up on, and addressing, this argument in his decision.

118. A second difficulty is that it is not clear to me that an event which amounted in law to a frustrating event would, necessarily, be within scope of section 136(5), given the particular wording of that sub-section. **Sharp** (above) does not so decide. It decided that, in that case, a hand injury, which permanently incapacitated someone employed as a joiner, from working as a joiner, was properly regarded by the Tribunal as a frustrating event. But the remainder of the appeal was concerned with other questions to do with what happened after, and whether or not the Claimant in that case was entitled to a notice payment. In fact the decision records that an earlier application to the Tribunal for a redundancy payment was refused.

119. I did not in fact hear any specific argument as to whether an event that is properly regarded as in law a frustrating event, could be regarded as within scope of section 136(5). For that reason, and because I do not think I need to decide this point, I prefer to leave it for another day.

120. I do not need to decide that point because, in any event, I consider this Ground to be fundamentally flawed for a different reason. That is because the deletion by the Respondent of the PSI role could not properly, in law, have been regarded as a frustrating event. It was not something that occurred outside of the control of the Claimant and Respondent. It was conduct by the Respondent. Ms Newbegin, perhaps alive to this point, suggested in oral argument that the reorganisation which led to the deletion of this role had been forced on the Respondent by decisions or requirements emanating from elsewhere in the NHS. But she was not suggesting that some other body deleted the role. It was the Respondent that decided to do that.

121. Accordingly, had the Respondent actually pleaded this argument, in terms, it seems to me that it would have been bound to fail. Certainly, the Tribunal would have been at least entitled to strike it out as having no reasonable prospect of success, and/or to refuse to permit it to be added by amendment. In all those circumstances, I do not think that the Tribunal's failure to address it in its decision provides a sufficient proper basis to allow this appeal.

Outcome

122. For all the foregoing reasons all the Grounds of Appeal fail. The Judge did not err in law in concluding that the Claimant was not, in the requisite sense, dismissed, on or before 3 July 2017, and that the trial of the Care Coordinator job that began on that date was not a statutory trial period. He did not err in finding that the Claimant *was* dismissed, but in December 2017.

123. This appeal is therefore dismissed.

124. The matter therefore must now return to the Tribunal, on that basis, to address the remaining issues that need to be resolved in order to determine whether the Claimant is entitled to a statutory redundancy payment. I should note, however, a point that I raised with both counsel. This is that, if there is now a live dispute as to the reason for the dismissal in December

2017, then the Tribunal will need to consider whether, in the words of section 135(1)(a), that dismissal was "by reason of redundancy". I drew to counsel's attention that helpful guidance on how to approach, for those purposes, the definition of redundancy in section 139, may be thought to be found in **Murray v Foyle Meats Limited** [1999] ICR 827. I am unclear as to how the question raised by the Respondent, referred to in paragraph 155 of the Reasons, may be said, as there framed, to bear on that issue. However, it does not fall to me, for the purposes of this appeal, to determine any dispute about the reason for dismissal, but to the Tribunal; and no doubt it will receive submissions from both sides on the point.