THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr D Forster	**AND**	**Philips Golf Discount (North East) Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **13 February 2017**

Before: **Employment Judge Hargrove**

Appearances

For the Claimant: **Mr Winthrop, Solicitor**
For the Respondent: **Mrs A Carlaw**

JUDGMENT

The decision of the Tribunal is as follows:-

1 Pursuant to section 163 of the Employment Rights Act 1996 the claimant is entitled to a redundancy payment of £3,744.

2 The respondent is ordered to pay to the claimant the Tribunal fees of £390.

REASONS

1 An employee who has been employed for at least two years and who is dismissed for redundancy is entitled to a redundancy payment under section 163 of the Act calculated in accordance with section 162 – one week's pay for each year of employment between the ages of 21 and 41 and thereafter for each year after the age of 41 one and a half week's pay. Redundancy occurs where the requirements of the business for employees to carry out work of a particular kind

has ceased or diminished or are expected to cease or diminish – see section 139(1)(b) of the Act. That there was a reduction of the requirements of the business for salesmen/instructors at least by **15 September 2016** is not in dispute. That is the date upon which the business actually closed. What is in dispute is whether the claimant was dismissed or resigned before he was dismissed having found another job on **31 August 2016**. The burden lies on the claimant on the balance of probabilities to prove that he was dismissed. It is not for the respondent to prove that the claimant resigned. It is also important to note that the mere notification that a business is to close is not of itself a dismissal if the date of the closure is never identified. If in those circumstances having been notified that a business is to close the employee elects to go off and find another job and leaves before the business actually closes or before the date of closure is actually identified thereby loses his entitlement to a redundancy payment. The authority for that proposition is **Morton Sundower Fabrics Limited v Shaw [1967] ITR page 84**.

2 The facts I find are as follows:-

The claimant had been employed by the respondent at least since **June 2007**. He was one of two in sales force, I am not including in that however Mr Philip Carlaw who together with his wife were the two Directors of the company. He too was engaged in sales amongst other things.

At the **beginning of 2016** the Carlaws planned to retire and close the business. Initially their intention was to try to sell it to someone else including the claimant but that was unsuccessful. The claimant was aware of the position. By sometime in the late Spring they had decided that they would not be able to sell it and therefore decided to close. Sometime in **May 2016** Mr Carlaw had been in contact with somebody from the Whickham Golf Club and it was apparent that there might have been or may have been a vacancy for the claimant to do some work there. I accept that in **early June** he had a preliminary meeting with someone from the Golf Club and there was a possibility of employment at that stage if and when his employment with the respondent came to an end.

I have decided that by **July** they had in fact decided definitely that they were to close. I find that, on **31 July 2016** the respondent gave written notice to their landlord of an intention to close the business on **31 August 2016**. I also find ,having accepted the claimant's evidence' that he was notified by Mrs Carlaw also of that date. I do not accept that there was any intention at that stage, at the time that notice was given, that the shop should remain open beyond **31 August**. I conclude that an arrangement was subsequently made with the landlord that the respondent would hold over after 31 August, it having become apparent that there would be unsold stock, and the landlord having no one else to take over the lease. Acting on that basis the claimant made arrangements to start alternative employment as from 1 September. He had been dismissed, I find at that stage, on notice which was due to expire on **31 August**. It would have been open to the respondent to have produced clear evidence that there was never any intention expressed in the letter of notice of **31 July** to close on **31 August**.

The claimant's solicitor wrote to the respondent in **January 2017** requiring them to give details of their communications with the landlord. The Notice of Hearing notifies all parties that they are expected to bring relevant documents to the Tribunal. I find that the respondent has ignored the request from the solicitor and ignored the advice given by the Tribunal in the Notice of Hearing and the documents provided to the parties before the Notice of Hearing. In those circumstances I find that there was a dismissal which in fact took effect on **31 August**.

It is apparent that there is some confusion in the minds of the respondents, Mr and Mrs Carlaw, as to the circumstances in which their liability to pay a redundancy payment arises.. This is exemplified by what happened to their son who did continue to work and I do find that the business was open for about a fortnight **after 31 August** until about **mid September**. He continued to work there until **15 September**. The respondents appear to have been under the understanding that they were nonetheless not required to pay their son a redundancy payment because he too had found another job but not to begin until **October**. The respondents are under the misapprehension that merely because an employee has another job to go to that there is no obligation to pay a redundancy payment. That is not the law provided that the employee is in fact dismissed and given a notice date. In this case I find as a fact that they did give a notice date of **31 August** and naturally the claimant made efforts to start his employment, which did not actually continue with the Whickham Golf Club, from **1 September**, the day after the notice expired.

If the claimant had been told at some stage in **August** that the shop was to remain open it was too late and in any event I do not accept that he was. If he had been told that the shop was to remain open after **31 August** I suppose it would have been open to him to have gone to the Whickham Golf Club and said can you delay my starting until whatever the date was. But that did not happen and I do not accept on the balance of probabilities that the claimant was ever given a date other than **31 August** for the date on which his employment was to end.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 15 February 2017

JUDGMENT SENT TO THE PARTIES ON

22 February 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL