EMPLOYMENT TRIBUNALS

Claimant: **Mr K Beeney**

Respondent: **Financial Ombudsman Service Limited**

Heard at: **East London Hearing Centre**

On: **Thursday 28 November 2019**

Before: **Employment Judge John Crosfill**

Representation

Claimant: In person

Respondent: Mr I Maccabe (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's claim for breach of contract brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 succeeds.**

2. **The Respondent is ordered to pay the Claimant the sum of £15,921.35.**

REASONS

1 The Claimant worked for the Respondent as an adjudicator from 18 September 2003 until the termination of his employment on 28 February 2019 in circumstances where he had applied for voluntary redundancy. The dispute between the parties is as to the amount that ought to have been paid by way of a redundancy payment. The Claimant says that he accepted an offer made by the Respondent to pay him £39,803.37 as a redundancy payment and that this gave rise to a binding contract. The Respondent acknowledges that the Claimant was told that he would receive a redundancy payment of

£39,803.37 that says that that did not give rise to a binding contract or if it did then the contract should not be enforced because it is vitiated by a mistake.

Procedural matters and the issues

2 Upon receipt of the Claimant's ET1 the Employment Tribunal had issued a notice of hearing having treated the matter as a simple claim for a failure to make a redundancy payment and/or breach of contract a listing of one-hour had been given. The parties agreed that one-hour was inadequate and the hearing was adjourned with a time estimate of one day.

3 The Claimant had in effect provided a witness statement attached to his ET1 in a document entitled "submissions to Employment Tribunal" to which he had attached relevant documentation. The Respondent had prepared a witness statement for Julia Kruse an HR and Organisational Development Partner for the Respondent. The Respondent had also prepared a originating bundle of documents running to 277 pages which included the Claimant's documents.

4 At the outset of the hearing I explained the process that the Tribunal intended to follow to the Claimant and then I explored the issues between the parties. The following positions emerged:

4.1 the Parties agreed that the claim was understood by the both of them as being a claim for breach of contract brought under the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994;

4.2 the Respondent's primary position was that there was no binding contract to pay the Claimant the sum he claimed; but

4.3 if there was a binding contract it should be set aside because of a mistake made by the Respondent but known to the Claimant.

5 The parties helpfully identified the key documents in the bundle. After pre-reading the witness statements and documents identified I heard from the Claimant and Julia Kruse who were both cross-examined. I then heard submissions from the parties neither party had prepared any written submissions but Mr McCabe referred to two authorities having provided copies to the Claimant.

Findings of fact

6 In this case there were very few facts in dispute. I have limited my findings to matters which are necessary to determine the proceedings and shall not refer in any detail to the grievance process that was followed once the dispute between the parties arose.

7 The Claimant had been employed by the Respondent from 18 September 2003. His role was that of an adjudicator. In the main he had dealt with investment cases. He had initially worked full-time but from 30 May 2011 his contractual hours reduced to 21 hours per week and his salary was adjusted pro rata.

8 The Respondent has a statutory responsibility for adjudicating on certain disputes arising from the financial services sector. In 2016 the Respondent began a reorganisation opening a new department which was called Investigation which was intended to replace other casework divisions. Existing employees were allowed to apply for roles within that department. Two older casework divisions the 'Mass Claim's area' and Temporary Transition Support Area, were retained on a temporary basis. The Claimant worked within the Temporary Transition Support Area.

9 In June 2018 the Respondent, in the course of consultations with its staff, discussed the introduction of a voluntary redundancy programme. At this stage it was thought likely that the Temporary Transition work would end in March 2019. It was proposed that at that stage all remaining members of that department would move to Mass Claims or Investigation. A consultation document was prepared in June 2018 which set out the proposed process for consideration of voluntary redundancies. Within that document was a description of the proposed voluntary redundancy scheme. That read as follows;

- *if you are an ombudsman (grade 1, 2) or an adjudicator (grades 1, 2, 3) who was in a legacy casework role handling general casework complaint before the moves to mass claims that happened between December 2016 and February 2017 you can make a request to be considered for voluntary redundancy.*
- *The period to request to be considered for voluntary redundancy opens for 3 weeks (from 14 June to 9 July 2018).*
- *We're not able to provide an exact number about how many requests we'll be able to accept at this stage-it will depend on the consultation, our ability to meet our commitments to our customers whose complaints we need to resolve and the number of people who want to go.*
- *In considering request for voluntary redundancy, we reserve the right to retain a balanced workforce with the right mix of skills and experience. This means we might use our right to refuse volunteers. If we are not able to accept your request, we'll let you know in writing as soon as possible.*
- *If too many people volunteer, we will apply selection criteria to decide requests are accepted. This may include (and will be subject consultation) appraisals, attendance record, disciplinary record, qualifications and work experience, relevant skills and knowledge, and the ability to take on additional or new job duties/responsibilities.*
- *We propose to apply our current redundancy terms, as outlined in our redundancy policy. To find out more about our terms and voluntary redundancy process, please read the supporting documents titled 'voluntary redundancy process' and 'Q & A'.*
- *We will be carrying out collective consultation with the ICC about the monthly redundancy scheme.*

10 The reference to the redundancy policy in the penultimate bullet point above was a hyperlink which enabled the reader to link to a document held on the Respondent's Internet. That is a short document which is a part of the employee handbook. When the Claimant was cross-examined by Mr McCabe it was put to him that that part of the

employee handbook contained non-contractual policies. The Claimant was unable to say. I accept that the policy is in a part of the handbook said to be non-contractual. The fact that the employee handbook is divided in that way is supported by the Claimant's contract of employment which suggest that there are contractual and non-contractual sections to the employee handbook. The wording of the policy is in many respects aspirational and, other than the calculation method, does not have the sort of precision expect in a contractual document. The Policy sets out a desire to avoid redundancies but then explains how selection, consultation and redeployment would take place in the event of a redundancy situation. Under a heading what kind of redundancy payment will I get there is an explanation of how redundancy payments are calculated. The scheme mirrors the statutory redundancy payment scheme except that the amounts paid are double the number of weeks used in the statutory scheme and there is no statutory cap on the amount of a week's pay. The first sentence of that section reads as follows;

> *'If you are being made redundant you may be eligible to receive a redundancy payment from us.'*

11 The voluntary redundancy process document referred to in the general consultation document set out a number of stages in the process. In the main they repeated the bullet points in the consultation document but amongst the additional matters set out in that document are the following points:

> *'…..*
>
> *3. The redundancy estimator tool is available from 14 June on people portal*
>
> *4 A formal illustration of your potential redundancy payment can be requested from HR by emailing……*
>
> *5. If you would like to discuss your redundancy illustration in further detail, you can also book a meeting with HR before deciding whether to submit a request for voluntary redundancy by emailing….*
>
> *……*
>
> *8. If your request is accepted, HR will confirm this to you in writing, and you will be invited to a meeting with a senior manager and HR to discuss the details*
>
> *…..*
>
> *11. If your request for voluntary redundancy has been accepted you will receive a letter confirming this, your notice period and your leaving date.'*

12 The 'estimator tool' was intended to be available on the Internet and was an Excel spreadsheet that required the employee to enter their annual salary in a box which had a note '(Annual salary) FTE'. Underneath was a box for the number of hours worked each week. It was also necessary to enter a date of birth the redundancy date and the date of joining. With that information the amount of redundancy payment could be calculated. It seems that that tool was only made available to employees in August 2018 although it was to members of the HR team earlier than that. In any event I am satisfied that the Claimant did not access that tool.

13 In the document entitled HR questions and answers the first section deals with the calculation of redundancy payments and sets out scheme I have referred to above, there is no definition given of one week's pay. In the body of the document there is no reference to people who do not work full-time. However, in what appears to be an addendum there is the following question and answer set out:

> ***I've recently changed a part-time contract. Will my redundancy pay be based on my part-time salary?***
>
> *Your redundancy payment is calculated on your salary at the date notices issued rather than the salary you have had previously.*

14 During the grievance process it was acknowledged that the addendum making express reference to the position of part timers had not been drawn up until after the Claimant says a binding agreement was reached in respect of his voluntary redundancy.

15 The Claimant did not apply for voluntary redundancy in June or July 2018. He told me, and I accept, that at the time he intended to stay on and continue working if at all possible. He explained that he had had a change of heart when his brother unfortunately died which she says gave him a sense of his own mortality and changed his thinking about wishing to continue working.

16 On 24 April 2018, Tim Archer, the Lead Ombudsman and Director of Casework, one of the Claimant's managers, sent an email to the temporary transition support area, (the Claimant's team) in which she updated them on the changes in the business. In his email he explained that the opportunity for voluntary redundancy remained open and he informed the staff that if they were interested in leaving before the end of the financial year they should contact him for further information.

17 The Claimant then met with Tim Archer in order to discuss the situation. The Claimant was left feeling a little uncertain about the future of the Transition Team and asked what would happen if he applied for voluntary redundancy to leave at the end of February 2019. He told me, and I accept, that he was told that that was likely to be approved but that once he had accepted the offer of voluntary redundancy he will be unable to change his mind. Tim Archer did not give evidence before me to contradict what the Claimant said however, that is not the only reason for accepting the Claimant's evidence. As a matter of common sense in order to allow sensible planning an employer would need employees to give a firm and binding commitment to a proposal to accept voluntary redundancy as their decision may impact upon other employees all the requirements of the business.

18 Following that meeting the Claimant then applied for voluntary redundancy. Shortly after he did so Tim Archer circulated an email informing the team that the window to request voluntary redundancy had closed stating that he provisionally reviewed the request that had been received and subject to one-to-one meetings will take place they had all been accepted. On 21 November 2018 the Claimant received an email enclosing a letter provisionally accepting his offer. The Claimant was then sent a letter dated 23 November 2018 from an employee in the HR department Jane Robinson. That letter was in the following terms:

'We're pleased to confirm that the Financial Ombudsman Service has provisionally accepted your request for voluntary redundancy. This letter therefore advises you that your employment with the Financial Ombudsman Service will end because of your voluntary request for redundancy.

We appreciate that it's likely you will have a number of questions regarding the process for leaving the Service, including when we'll be in a position to let you go and when you will receive your redundancy payment. So we'd like now to arrange a meeting with you to discuss these details. Your redundancy terms will be in line with those agreed under the consultation that concluded on 31 July 2018.

You are invited to a meeting to confirm the details of your planned departure. An Outlook invite will also be sent to you, confirming the location of this meeting. You may be accompanied at this meeting to discuss your living arrangements by a colleague, ICC or trade union representative…..

... After the meeting, we will send you a letter which will give you your termination notice, confirm your leave date and leave arrangements. It's important that you understand that after you receive this letter you cannot change your mind about taking voluntary redundancy. Therefore, if you have any doubts about your request, is important that you raise in the meeting that we are organising.'

19 The Claimant had a meeting with Jane Robinson on 29 November 2018. No other person was present at this meeting and the only contemporaneous note involve the population of a pro forma document which took the form of a checklist. There is no clear record of what was discussed. One entry under the heading redundancy package has got a note added: *'Version 2 been calculated-slight error on FTE salary'*.

20 The Claimant's account of what happened at the meeting is set out in his submissions to the Employment Tribunal which he adopted as his evidence and which mirror almost exactly what he said during the grievance process. For the reasons I set out below I accept his account of that meeting. He said:

"*I attended a redundancy consultation meeting with Jane Robinson (HR and OD Partner) on, 29 November 2018.*

We discussed my current three-day week working pattern and Jane also explained the process.

Jane then presented me with a redundancy calculation (V1 enclosed) that show that the total to be paid was £40,322.60.

This was not what I had calculated so I said to her; "are you sure that is right?"

She said she would check.

She looked down at a list she had and from this correctly confirm back to me current salary of £27,597 and then said she would re-do the calculation, which she blended with a calculator.

As she carried out this calculation, she explained the steps she was going through as follows:

> *"We use your three-day salary and multiply up to what it would be if you worked the full five-day week and then we base the calculation on that amount, so you get three weeks money each year (15) - so 3 times 15"*
>
> *this calculation resulted in a figure of £39,803.37 and Jane apologise that the original redundancy calculation (V1) of £40,322.60 was slightly incorrect. Jane's new calculations are written in her own hand on the V1 document.*
>
> *I said "really". Jane replied "yes it is a very generous package"*
>
> *Jane then confirmed that I will be sent email with formal redundancy offer and calculation and explained that if I was all okay with this, I should use the voting buttons in the email to confirm my acceptance-but once I done so, I could not then change my mind.*"

21 In his cross-examination the Claimant accepted that the reason that he had expressed surprise at the calculation presented to him is that he was aware of the multiplier that would apply, that having been set out in the consultation document, and had anticipated that his actual salary would be used to calculate his redundancy payment.

22 On the same day as the meeting, 29 November 2018, Jane Robinson sent the Claimant an email in which she said:

> *"Thank you for meeting with me today, I do apologise the salary error on your redundancy quote, I have updated the quote and its attached here.*
>
> *As I explained I'm now sending through your documents and would be grateful if you use the voting buttons to confirm receipt….."*
>
> The quotation that was attached was for a revised figure of £39,803.37.

23 Jane Robinson's email of 29 November 2018 attached a copy of the pro forma completed by Jane Robinson. That document was entitled "confirmation of accepted request for voluntary redundancy meeting". It is intended as a record of the meeting it includes checking with the individual they are still happy to take voluntary redundancy and have not changed their mind. There is provision within the document for it to be signed electronically by pressing what is described as a voting button. Having read that document the Claimant pressed the 'voting button'.

24 In a further attachment to the same email the Claimant was sent a letter from Jane Robinson. The material parts of that letter are as follows:

> '***voluntary redundancy consultation - notice of redundancy date***
>
> *I can confirm that your request for voluntary redundancy was accepted and your leaving arrangements are explained below.*
>
> *This letter gives you formal notice that your contract of employment as an adjudicator will end because of redundancy. You will be working on notice and*

your last day of employment with the service will be Thursday, 28 February 2019……..'

Right of appeal

Although you have made the decision to take voluntary redundancy, you can still appeal against this decision. If you wish to appeal please do so by outlining the reasons for the appeal in writing to ……..

We'd like to thank you again for your hard work in helping our customers during your time with us over the last 15 years and take the opportunity to give you our best wishes for the future.'

25 On 5 December 2018 Jane Robinson wrote to the Claimant in the following terms:

'An error has been found on your original redundancy calculation process at 35 working hours instead 21.

I have attached the correct quote and a voting button.

Can you ring me as soon as you are able please.

I do apologise for the human error.'

The amended redundancy payment that was attached was calculated using the Claimant's actual salary.

26 Within the agreed bundle there were a number of similar emails from Jane Robinson to other part-time employees. In some instances it was the employees who corrected the error and in some instances, it was Jane Robinson. It appears that in each instance the employee accepted that a mistake had been made and did not press for payment of the original figure proposed.

27 The Claimant was not so sanguine. He sent an email to Jane Robinson on 11 December 2018 and asked to have a meeting with his union representative in attendance. On 19 December 2018 the Claimant was sent an email from Zoe Kearns which thanked him for getting in touch about his redundancy payment but stated that Jane had explained that she had made an error and had given an amended figure. The Claimant was offered the option of not accepting the revised figure and continuing to work for the Respondent.

28 The Claimant met with Zoe Kearns in January 2019. She followed up that meeting with a letter. The material parts of that letter are as follows:

'Thanks for meeting with me last week - as we agreed I summarised what has happened and what you wanted as an outcome. Apologies for the delay in sending this, unfortunately I've been out of the office for a bit.

You had your first consultation meeting on 29 November and were given the redundancy quote of £40,322.60 (version 1). You queried this, asking whether we were sure it was correct. You explained that you were told that we used your full-time equivalent salary not your 21 hour salary to calculate your redundancy - that we grossed up the full-time equivalent and that's the figure that was used so your redundancy quote is correct it was "a very generous package".

You were then sent an email which contain your notice of redundancy and a second redundancy quotation (version 2) of £39,803.37. You were told that you needed to use the voting buttons to accept quote and you did so in good faith felt it was binding on both you and your employer.

Then on five December received an email and voicemail which explained that there had been an error in calculating redundancy (your full-time equivalent salary had been used in your 21 hours salary). The email attached the quote of £23,882.02 you are asked to use the voting button to accept it.

You explain your position to me - that he felt the agreement you entered into originally (with versions 1 and 2) was binding on both you and the employer should therefore be honoured.

I explained that our policy on redundancy set out the terms on how it would be calculated and that was on your current salary (version 3). I could not deviate from that policy in terms of calculating your redundancy.'

The letter continued essentially setting out Zoe Kearns' view that she could not depart from the ordinary policy.

29 The Claimant responded under cover of an email sent on 25 January 2019. He was unsure of the status of the letter that he had been sent as he thought it might simply be a minute of the meeting rather than an outcome decision. He attached a document setting out his position, the opening paragraphs of which have been repeated in his ET1 in the form of his submissions to the Tribunal.

30 I note that there is no inconsistency between what the Claimant said to Zoe Kearns and what he has said subsequently. At this stage Jane Robinson was still working for the Respondent. That is clear because during the late grievance process there is reference to an employee Simon Louth holding a meeting with Jane Robinson in February 2019. I note that Zoe Kearns, who actively recorded the Claimant's account of the meeting of 29 November 2018, did not challenge his version of events in any way.

31 The Claimant was dissatisfied with the response that he got from Zoe Kearns and brought a formal grievance. Role of hearing that grievance was delegated to Sunil Mirchandani. The hearing was ultimately fixed for 26 February 2019 shortly before the Claimant's employment ended. I was provided with notes of that meeting. Sunil Mirchandani appears to have taken a passive approach stating that he was there to hear the Claimant's grievance and simply listening to his account of events and complaints. There is no passage in the notes where Sunil Mirchandani challenges the Claimant's account of events. After a break in the meeting Sunil Mirchandani says that a mistake has been made but states that there has been no loss as the Claimant was only ever entitled

to the lower figure. That gave rise to a legal debate. The outcome letter was sent to the Claimant on 20 March 2019. Sunil Mirchandani rejected the grievance on the basis that the third version of the calculation represented the Claimant's actual entitlement under the relevant policy and that he had suffered no financial loss. The Claimant was offered the opportunity to appeal that decision and did so.

32 The Claimant set out the basis for his appeal in a document dated 7 March 2019. He took issue with Sunil Mirchandani's analysis that there had been no loss. He argued that if there had been a mistake that was insufficient to displace the contract. He incorporated in that document his account of the meeting of 29 November 2018.

33 An appeal hearing took place on 3 April 2019. The appeal was heard by Michael Ingram the Ombudsman leader. I was provided with minutes taken at that meeting and the Claimant did not dispute that they were broadly accurate. Michael Ingram took the Claimant through his version of the meeting of 29 November 2018. The Claimant was asked why he had questioned the initial figure given to him and answered that he had looked in the employee handbook in order to work out the relevant multiplier. He set out the same account of the meeting as he had given previously. I note once again that he was not challenged on his version of events.

34 Michael Ingham sent the Claimant a letter on 16 May 2019 which included his decision not to uphold the grievance. I note that he did not dispute the Claimant's version of events on 29 November 2018. He sets out the fact that the Claimant was directed towards the redundancy policy and the scheme for calculating a redundancy payment. He acknowledges that this was described as a guide only and that the document makes it clear that the full details will be provided during the redundancy consultation. He goes on to say: '*Nevertheless I don't believe it's the policy of the financial ombudsman service to calculate redundancy payments without regard to the number of hours and individual employees contract to work'*. He notes that in December 2018 the question and answer document referred to above was published including specific reference to calculation of payment for a part-time employee. No explanation was given as to why that was thought necessary but it seems likely that the Claimant's complaint was a trigger.

35 Michael Ingham disputed that effect of the Claimant purporting to accept the higher figure that was given to him gave rise to a binding contract. He makes recommendations including noting that it would have been helpful had the service provided a tool to enable staff to calculate the redundancy entitlement based on its own policies rather than the very different statutory entitlement. He further notes policy published on the Internet could include specific information to staff who work part-time.

36 Both during the grievance procedure, and before me, the Claimant had accepted that he went in to the meeting of 29 November 2018 having assumed that any redundancy payment would be pro rata the FTE salary for his role. That was a significant concession and not one that he was driven to make. The Claimant's account of the meeting of 29 November 2018 has been clear and consistent. He has given me no reason to dispute his integrity and I note that the Respondent did not do so even when it must have been able to ask Jane Robinson for her account of events. For these reasons I find it more likely than not that the Claimant has given an accurate account of that meeting.

37 After his grievance process concluded the Claimant brought the present proceedings.

The Parties' Submissions

38 The Claimant¶ adopted the part of his ET1 which set out his legal contentions. What he said was that an offer of voluntary redundancy had been made to him and that by submitting his acceptance electronically a binding contract had been reached. He argued that Jane Robinson had ostensible, if not actual authority, to making the offer that she had.

39 The Claimant said that if there was a mistake that was not any basis for setting aside or not enforcing the contract that had been reached. He alluded briefly to the law concerning unilateral mistake but did not go into any detail. He invited me to accept that, at the time he purported to accept the higher redundancy payment he did not have any knowledge that a mistake had been made. In his ET1 he had referred to the case of ***Statoil ASA v Lois Drefus Energy Services Ltd*** **[2008] EWHC 2257**. Mr McCabe had kindly supplied copies for the Tribunal. The Claimant argued that where a mistake was the result of the Claimant's own carelessness, it would not be just and equitable to rescind the contract.

40 Mr McCabe argued that there was a distinction between what he described as commercial or mercantile contracts and contract of employment. He submitted that mistakes made in the context of the employment contracts were of a very different nature. He said that up and down the land errors were made in wages on a daily basis. He argued that nobody would ever suggest that those errors could not simply be corrected without the breach of contract.

41 He went on to argue that the Claimant had suffered any detriment. I understood him to be adopting the stance that was taken on the Claimant's Grievance appeal. He suggested that there could be no consideration given for making a redundancy payment because the consideration was the past service of the employee. In short, past consideration is no consideration at all.

42 He finally dealt with the question of mistake. He said there was no meeting of minds and therefore there could be no contract upon which the Claimant could sue. He argued that there had been no contractual intention on the part of the Respondent agreed to pay anything other than the sum ordinarily calculated in accordance with the relevant policy. Then alluding to the law of unilateral mistake he argued that the Claimant knew or ought to have known of the mistake made by Jane Robinson and that the Claimant having stood by could not now enforce the agreement in terms which he knew to be incorrect. I asked whether the proper test was constructive knowledge and Mr McCabe stated that in his view it was and invited me to make findings of fact as to constructive knowledge if I was satisfied that there was not any actual knowledge.

43 Mr McCabe had provided a copy of ***Hartog v Colin & Shields*** **[1939] All ER 566**. I indicated that I had read that case and the other cases on unilateral mistake in Chitty on Contracts. Mr McCabe did not seek to rely upon any particular point arising from that authority. I asked whether any party would object to me referring to or having regards to cases referred to in Chitty on Contract, neither party raised any objection.

Law, Discussions and Conclusions

44 I shall set out the applicable law within my discussions below.

45 There was no dispute that if I found that there was a contract between the parties the Tribunal had jurisdiction to entertain the claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

46 A binding agreement (contract) requires an offer and matching acceptance in circumstances where the parties intend to enter into legal relations and where that agreement is supported by valuable consideration. Agreement will not be reached where one party mistakenly includes a term on the agreement and that mistake is known to the other (a unilateral mistake). An apparent agreement might be set aside where there is a common mistake made by both parties.

Was there an apparent agreement?

47 I shall deal with the question of whether there was an apparent agreement first putting to one side the issue of whether the agreement was vitiated by any mistake. I shall then deal with the issue of unilateral mistake and finally deal with the question of common mistake.

48 I must ask whether one or other party made an offer in circumstances where they intended, if that offer was accepted, to enter into legal relations. I find that by simply inviting applications for voluntary redundancy the Respondent was not making an offer. The terms of the consultation document produced in June and later updated make it clear that the Respondent would not automatically agree to any request to take voluntary redundancy. Each request was considered on its merits. I would further accept that the provisional decision to accept any request for voluntary redundancy did not give rise to a formal offer. It is clear from the policy that the Respondent sensibly insisted on a meeting at which the ramifications of accepting redundancy would be made clear. As envisaged by the policy it was at the meeting of 29 November 2018 that the Claimant is asked whether his position had changed. It is clear to me that no offer had been made before that meeting. At the meeting the amount of the severance payment was discussed. As anticipated by the policy the next step was for the Claimant to say yes or no. The only departure from the policy was that the sum offered to the Claimant was amended.

49 I have accepted the entirety of the Claimant's account of the meeting of 29 November 2018. I have therefore found that he was told that using the voting button on the pro-forma record of the meeting would signify his acceptance of the terms proposed. The Respondent's own policy and simple common sense would indicate that at some stage the employees would have to signify their consent. The letter from Jane Robinson, which is consistent with the policy, says:

> *"After the meeting, we will send you a letter which will give you your termination notice confirm your leave date and leave arrangements. It's important that you understand that after you receive this letter you cannot change your mind about taking voluntary redundancy. Therefore, if you have any doubts about your request, it is important that you raise in the meeting that we are organising"*.

50 I find that ordinarily the employee would be expected to signify consent to the terms proposed in the meeting. The pro-forma provided a record that the employee had so consented.

51 In the present case it is clear that Jane Robinson was under the impression that the

Claimant would agree to the revised terms that had been discussed. She sent him a record of those terms together with the pro-forma. When she received the response, she issued a letter terminating the Claimant's employment.

52 I find that when Jane Robinson sent the Claimant the revised calculations and pro-forma she was making the Claimant an offer. That offer was accepted when the Claimant signed the pro-forma. If I am wrong about that then the Claimant, in signing and returning the pro-forma, made the Respondent an offer that he would accept redundancy, in accordance with the terms proposed. That offer being accepted when the Respondent issued its letter of dismissal on 29 November 2018. The Respondent's policy made it clear that once notice of dismissal was given it could not be unilaterally revoked by the employee. I find that in the present case there was an offer and acceptance apparently (if not actually) as to the same terms upon which the Claimant's contract of employment would be terminated.

53 Given the nature of the relationship between employer and employee I have no difficulty concluding that parties to an agreement as to the terms upon which the agreement would be terminated intended to form legal relations. The Claimant was giving up his job in return for a large sum of money. It is fantastic to suggest that he would have left work merely on the hope that he would eventually be paid the sum proposed.

54 As I understood it Mr McCabe at one stage suggested that there could never be a binding agreement where a contract is terminated upon voluntary redundancy terms. That is what I understood him to be saying from his reference to past consideration.

55 If an employer offers a voluntary redundancy scheme offering attractive terms, and that offer is accepted by an employee, then that would usually be a contract capable of enforcement in a court or tribunal. Mr McCabe is mistaken in believing that the only consideration in such circumstances is past consideration. The consideration that the employee gives is the agreement to leave his or her employment. The benefit to the Employer is generally that it avoids the need to select between employees or to seek alternative work for anybody displaced by the redundancy exercise. Whilst some such agreements are dismissals on agreed terms, others may be mutual agreements to terminate the contract. In either case they take effect as agreements.

56 I do not accept that in the present case there was no consideration supporting the agreement. The consideration is quite clear. It was Mr Beeney putting himself forward for dismissal when he was not obliged to do so. There was a clear benefit for the Respondent in seeking volunteers as it would avoid compulsory redundancies or consideration of offering alternative employment.

57 Mr McCabe submitted that the true intention of the Parties was to contract on the ordinary terms of the Respondent's policy. By that he meant that the terms of the redundancy policy, in what on his case, was the non-contractual section of the employee handbook. As such he argues 'a week's pay' should be given its ordinary meaning and mean an actual week's pay. In order for me to reach that conclusion I would have to find that the redundancy proposal made by the employer could be disregarded if it was shown to be inconsistent with the non-contractual policy.

58 I would agree that the ordinary meaning of 'a week's pay' in the policy would be actual pay. The difficulty for this argument is that Jane Robinson set out an alternative basis for calculating a week's pay and made a proposal to the Claimant based on that

calculation. As such she evinced an objective intention to agree to her own interpretation of the policy. I have found that the Claimant shared that intention. I cannot accept that the true agreement was simply that the Claimant agreed to accept whatever sum was later shown to be correct.

Was there no true agreement – unilateral mistake

59 As a general rule the intentions of a party to a contract are assessed objectively. The Court is not generally concerned with the terms the parties thought they were agreeing to but looks at what was objectively agreed. One exception to that is often referred to as unilateral mistake as to terms at common law. Whilst ***Hartog v Colin & Shields*** provides authority for that proposition, the principles and rational for them were neatly summed up by Mr Justice Aikens in ***Statoil ASA v Lois Drefus Energy Services Ltd*** at paragraph 87 where he said:

> *'The general rule at common law is that if one party has made a mistake as to the terms of the contract and that mistake is known to the other party, then the contract is not binding. The reasoning is that although the parties appear, objectively, to have agreed terms, it is clear that they are not in agreement. Therefore the normal rule of looking only at the objective agreement of the parties is displaced and the court admits evidence to show what each side subjectively intended to agree by way of terms. If it is clear from such evidence that there was not consensus, then there can be no contract, because the parties have not truly agreed on the terms. Some of the cases talk of such a contract being "void", but I think it is clearer to say that there was never a contract at all.'*

60 Mr McCabe argued that it would be sufficient to displace a finding that there had been an offer mirrored by an acceptance where the party to whom the offer had constructive notice of the error made by the other party. He did not cite any authority for that proposition. Chitty on Contract (Online Ed) contains the following passage at paragraph 3-023:

> "*It is not clear whether for the mistake to be operative it must actually be known to the other party, or whether it is enough that it ought to have been apparent to any reasonable person in the position of the other party. In Canada there are suggestions that the latter suffices but the Singapore Court of Appeal has held that the common law doctrine of mistake applies only when the non-mistaken party had actual knowledge of the other's mistake. In England there is no clear authority, but two cases suggest that if the other party ought to have known of the mistake, he will not be able to hold the mistaken party to the literal meaning of his offer. In Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd the Court of Appeal appeared to consider that the plaintiff might be able to negate any binding agreement by showing that the defendant ought to have known that the plaintiff's offer contained an error; and in O.T. Africa Line Ltd v Vickers Plc Mance J. said that the objective principle would be displaced if a party knew or ought to have known of the mistake. The latter situation would include cases in which the party refrained from making enquiries or failed to make enquiries when these were reasonably called for, but first there must be a real reason to suspect a mistake.*"

61 I have looked at the two cases referred to in that passage. In neither is the proposition that constructive knowledge of a mistake is sufficient to displace an objective meeting of minds part of the reasoning of the case. That said, in each case the court has

appeared to proceed on the basis that constructive knowledge would be sufficient. I have concerns that in the field of employment law knowledge of the law and facts are most commonly in the hands of the more powerful employer. As noted in ***Autoclenz v Belcher & Ors*** **[2011] UKSC 41** the respective bargaining power is often unequal. However, despite this I am persuaded that constructive knowledge of a mistake would be sufficient. My concerns about inequality and knowledge can be allayed by the fact that constructive knowledge is only equated to actual knowledge when a person ought reasonably to have known of some matter. The position of the individual can be taken into account at that stage.

62 Applying those legal principles to the facts of the present case I have reached the following conclusions. Where necessary my conclusions are supplemented by further findings of fact but where I take that course I shall indicate clearly that I have done so.

63 I accept that Jane Robinson made a mistake when she told the Claimant that his termination payment would be calculated by reference to the FTE salary for his role. Her initial calculation was on that basis (although there was a minor error in the salary). When the Claimant questioned her, it is significant that she referred to grossing up the part time salary to arrive at the figure to be used. Having accepted this evidence I cannot agree with the suggestion made that she had simply failed to enter the Claimant's hours into the excel spreadsheet calculator. She did the reverse calculation manually in front of the Claimant. It is clear that she believed at the time that her calculation was correct.

64 I accept as a matter of fact that the Respondent did not intend to make payments to part time employees without pro-rating their salary. The issue for me is therefore whether at the time the contract was apparently concluded the Claimant did or ought to have known of the mistake. A significant fact that supports the Respondent's position is that the Claimant went in to the meeting assuming that he would be paid a sum that reflected his actual salary. Furthermore, the reference in the redundancy policy was to 'a week's pay'. Ordinarily that would mean actual pay and not some hypothetical pay based on the salary of a FTE employee. I note that the Claimant was a sophisticated employee used to investigating financial disputes. Finally, the Respondent had at some point made the redundancy estimator tool available to employees.

65 On the other hand, I accept the Claimant's point that he had limited experience in being made redundant. I accept that he did, and could reasonably, have regarded Jane Robinson as an expert. When presented with a figure that exceeded his expectations he questioned it. That speaks to his integrity. It does not smack of an opportunistic employee prepared to stand by when an error was made. It is significant that on the Claimant's account, which I have accepted, Jane Robinson did a calculation working back from the Claimant's actual pay to reach the revised figure. As I have said above, she clearly believed that this was necessary.

66 It is not so obvious that Jane Robinson had to be wrong. Redundancy pay is calculated taking into account past service. For some of his service the Claimant had been a full-time employee. Had an employee recently changed from full-time to part-time work they might reasonably have thought that it was unfair to base a payment on their part-time service. Where the service was mixed there is less obvious unfairness but some sense of unfairness remains. Whilst the Part Time Workers (Less Favourable Treatment) Regulations 2000 prohibit less favourable treatment they do not prohibit more favourable treatment. As such, I do not consider that it was glaringly obvious that regardless of the surrounding facts there could only have been an intention to pay a pro-rated sum.

67 I have considered the extent to which the Claimant should have persisted in questioning Jane Robinson. He quite properly did raise the matter but was then told that the scheme was 'generous'. Ought he then have pressed harder? Ought he then have insisted that he check himself against the estimator tool? I have come to the conclusion that the Claimant, faced with an assurance from an HR advisor, having raised a question over the calculations, having been assured they were correct, and a methodology explained, was not put to any further enquiry.

68 I am satisfied that at the time the contract was formed the Claimant neither knew nor ought he have known of Jane Robinson's mistake. I therefore conclude that there is no basis to conclude that there was no true agreement as to the terms of the contract.

69 Mr McCabe sought valiantly to persuade me that in an employment context mistakes do not give rise to any liability. I cannot accept that that is the case. I was not referred to any authority that supports that proposition. Whilst I accept that many mistakes are rectified without legal proceedings that does not mean that the general law of contract does not apply in the field of employment relations.

Common Mistake

70 A second situation where a contract may be considered void for mistake is where both parties have entered the contract on a common misunderstanding of fact or law see ***Bell v. Lever Brothers Ltd.*** **[1932] A.C. 161**. For this doctrine to apply both parties must have a positive but mistaken belief in some matter fundamental to the contract. A contract will not be void for common mistake where the party seeking to avoid the contract could have ascertained the true position. In ***Associated Japanese Bank (International) Ltd v Credit du Nord SA*** **[1989] 1 W.L.R. 255** Mr Justice Steyn (as he then was) held that common mistake would not avail a party where there were no reasonable grounds for any mistaken belief.

71 Neither party made any submissions in respect of this alternative and I will deal with it only briefly. Jane Robinson's belief was that 'a week's pay' used as the basis for calculating the severance payment was the FTE salary. She made representations which induced the Claimant to accept that position. Quite clearly, she could, by seeking advice of her colleagues, have ascertained the true position. She had access to all of the information and I conclude that she had no reasonable grounds for her belief.

72 As such there is no basis for setting aside the contract at common law.

73 The Claimant addressed me on the alternative basis that the contract should not be set aside in equity. He relied upon the reasoning in ***Statoil*** to say that equity should not intervene when the party seeking to set aside the contract had been negligent in making the mistake. I note that Aitkins J's primary position was that there was no equitable jurisdiction to set aside a contract for unilateral mistake relying upon ***Great Peace Shipping v Tsavliris International*** **[2003] QB 679**. That position is now understood as being correct and there is no remedy for mistake in equity in circumstances where the common law does not provide relief. I have found above that the common law provides no relief for the Respondent in this case.

74 A final point made in the outcome letter to the Claimant's grievance appeal is that the Claimant has suffered no loss or damage. That is incorrect. Loss and damage is assessed having regard to the breach of contract not to whether the innocent party is

better or worse off than if the contract had not been entered into. Had the contract been performed according to its terms the Claimant would have been paid more. That loss is recoverable as a debt or damages. Both are available as remedies under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

75 It may be thought that the Claimant has received a windfall. That may be true. I must apply legal principles and in so far as they contradict moral arguments then it is the law that must prevail. The Claimant is entitled to the difference between the sum he was contractually entitled to being £39,803.37 and the sum he was paid being £23,882.02, that is £15,921.35.

Employment Judge John Crosfill
Date: 15 January 2020