EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

BETWEEN: **MRS J SOLANKE** **CLAIMANT**

AND

SPECIALIST WASTE RECYCLING LIMITED **RESPONDENT**

ON: **11th December 2017**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr. M Curtis, counsel**

REASONS

These written reasons for the Judgment signed on 12th December 2017 and sent to the parties on 22nd January 2018 are given at the request of both parties.

1. This was a claim of unfair dismissal and breach of contract. Earlier claims for disability discrimination, a redundancy payment and unpaid holiday and wages had been withdrawn.

2. It was agreed that the Claimant was dismissed for redundancy and that this was a genuine reason as the Respondent had closed its office in Waterloo, where the Claimant worked.

3. I heard evidence from Mr. Butler, the Chief Executive Officer of the Respondent, from Ms Cook, an independent consultant who heard the Claimant's appeal and from the Claimant herself. I had a bundle of documents.

The relevant facts.

4. The Claimant worked for the Respondent as Contracts and Mobilisation Manager, managing the roll-out of new contracts with clients of the Respondent and managing the team.

5. In 2015 the Respondent operated from sites in Waterloo and Alton. Following the acquisition of larger offices in Alton the Respondent had been considering closing the Waterloo site. At that time 12 individuals worked from the Waterloo office. Following informal indications from 5 of those staff that they wished to transfer to Alton the Respondent decided that it would close the Waterloo office. That decision was taken on 5th January and the Respondent commenced a consultation process the next day.

6. This was not a question of the roles disappearing, rather it was a question of the location changing. This was a redundancy situation within the meaning set out in section 139(1)(a)(ii) of the Employment Rights Act 1996 namely that the employer intended to cease to carry out business in the place where the Claimant was employed. Anyone who worked in Waterloo could transfer to work in the same job in Alton. However those staff that were not able to transfer would be made redundant.

7. On 6th January 2016 Mr. Butler and Ms Pottle of HR met with the Claimant to explain that the Waterloo office would shut with effect from the end of February 2016, that her post was at risk of redundancy and that an individual consultation meeting was scheduled for 8th January in Waterloo at which she could be accompanied. She was also told that the Respondent was aiming to bring the consultation to a conclusion by the end of the week beginning 18th January 2016. A letter confirming the proposed closure of the London office was sent the same day.

8. The Claimant lived in Borehamwood, Hertfordshire and a move to Alton would necessarily entail a much lengthier journey to work. The Respondent was aware that the move would be difficult for her but nonetheless they were very keen to retain her, at least for an interim period.

9. The Claimant attended her first consultation meeting with Mr. Butler and Ms Pottle on 8th January. The Claimant was a well-respected member of staff and the Respondent was keen that she should move to Alton. Nonetheless they were aware that she lived a significant distance away and had previously indicated that she would not be able to move. From a commercial perspective, nonetheless, the Respondent hoped to be able to persuade Claimant to stay for a period of time following the closure of the Waterloo office to assist with a handover and to oversee a new large contract which the Respondent had recently won.

10. At the first consultation meeting the Claimant was told that her role was available for her in Alton if she felt she could manage the additional journey time. However if she felt she could not relocate permanently then, in order to persuade her to stay for the rollout of the new contract, the

Respondent offered a further option. This was that the Claimant could stay within her role working from Alton 2 days a week and from home 3 days a week until 31st May. If she did that she would be paid an enhanced redundancy package around £7,500 (being statutory redundancy +1 months' pay) plus an additional £2000 bonus for completing a handover to her successor. The Claimant asked whether she would be able to work from home on a permanent basis and was told that she could not. She also asked if she could leave when the others left (i.e. at the end of February) but was told that she "was needed for longer".

11. At that meeting the Claimant was shown a piece of paper setting out a proposed package of £7,725 being made up of a statutory redundancy of £4896 and an additional one month payment of £2298.62. (210) The additional payment was said to be "proposed by the SWR directors and is to be confirmed as part of this process." The paper also stated that "please be aware that this data has been prepared on a proposed and estimated basis". The Claimant signed the document but was not given a copy. The statutory redundancy payment had been miscalculated in that the Respondent had failed to apply the £475 weekly cap on pay in their calculation.

12. The Claimant was not sent a copy of the notes of the meeting or a letter summarising the content of the discussion.

13. A 2nd consultation meeting took place on 14th January 2016. Mr. Butler summarised the options for the Claimant as either moving with her role to Alton permanently or taking a redundancy option at the end of May. "This redundancy would be enhanced with a tax-free element and accompanied with a settlement agreement. A bonus payment at the end of May would be subject to the completion of specific objectives." The Claimant was asked to give her decision by 18th May

14. Later that day the Claimant sought clarification from Mr. Butler of the options (218). She summarised her understanding as follows:
    a. my current role as mobilisation and contracts manager will be made redundant effective 31st May 2016;
    b. until 31st May I'm required to commute to Alton twice a week with travel paid
    c. I will be required to complete handover/training with Mark prior to leaving at the end of May and will be paid a 2K bonus on top of my redundancy package

    or to stay permanently working in Alton 5 days a week with travel paid for 12 months.

15. Ms Pottle clarified a couple of points that the Claimant had set out but did not correct the statement that she understood she would be "made redundant effective 31st May 2016".

16. The Claimant had been asked to respond by 18th January but the Claimant said that she wished to get legal advice and the deadline was extended

until 5 pm on 19th January. She saw the CAB on 18th January but the advisor wanted to speak to someone more senior and a new appointment was made for the 25th. On 19th January the Claimant again asked for a further extension in order to take legal advice. The Respondent further extended the deadline until the end of the day on t25th January.

17. Between 19th and 22nd January there were further negotiations between the Claimant and the Respondent by email. The Claimant initially proposed that she worked four days a week in Alton to be trialed for 6 months plus the lease of a car for travelling. Ms Pottle responded that although she could not have a 6 month trial period they would agree a leave date in 6 months' time, but if her proposal of working 4 days a week in Alton worked the redundancy would be revoked. She did not however respond to the Claimant's suggestion that there should be a car leased for her.

18. The Claimant asked for clarification that "travel would be paid in full for 12 months, lease of car. Ms Pottle responded that "in terms of travel it would seem sensible if that was available to you for the same six-month period and reviewed at the same time as the above." Unsurprisingly the Claimant responded that she wanted clarity on travel before making her decision. Mr. Butler then responded that they would not provide a lease car but would pay an additional amount of £24 per day gross for each day the Claimant came to Alton and that the Claimant should provide her own transport. The position as to travel was now clear.

19. The Claimant was on annual leave on 25th January and attended an at the CAB to discuss her position (224). In a letter if the same day the CAB summarised the Claimant's options as either (i) taking redundancy at the end of February when Waterloo closes or (ii) travelling to Alton for a further 3 months. If she left at the end of February she would receive statutory redundancy but if she stayed she would receive an enhanced payment and she would need to decide if this was worth the inconvenience of travelling to Alton.

20. The deadline expired at the close of business on 25th January and the Claimant had not responded. At 8:25 a.m. on 26th January she wrote to the Respondent again with a further question about whether, if she purchased her own car she would be able to claim a personal mileage allowance and petrol. (In fact the Claimant had already bought a car to use for commuting but she did not inform the Respondent of this fact).

21. Mr. Butler responded to that email at 12.12 to the effect that the deadline for a response had expired and that, not having heard from her, it appeared that they would not be able to reach an agreement. She would be made redundant and her employment would terminate on 8th March 2016 at the expiry of her 6 weeks' notice period. She would work her notice from Waterloo till the office closed and then from home. The Claimant responded that "I had already decided that I would trial the 6 month period by purchasing my own car as this would have been the best

option. I just needed to ensure I was covering my travel costs by asking the question this morning." Mr. Butler responded that the Claimant had never indicated that she would accept the role on Alton.

22. The Claimant appealed by letter dated 1st February (240). The main ground of her appeal was that she had never been told that she would be made redundant when the office closed at the end of February. She also considered that consultation period was too short and that in any event she could manage her ream remotely working from home.

23. As Mr. Butler, the CEO had been involved in the Claimant's dismissal the appeal was heard by an external HR consultant Ms Cook and was unsuccessful. Ms Cook took the view that the Claimant had been made aware that the role was at risk of redundancy if terms could not be agreed for her relocation to Alton and that the consultation period was of a reasonable length.

The relevant law

24. Section 139(1)(b)(ii) of the ERA provides that:-

"An employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to … the fact that the requirements of the business for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished or are expected to cease or diminish."

25. By virtue of section 98 of the ERA, it is for the Respondent to show the reason for the dismissal and that it is a potentially fair reason for dismissal within the terms of section 98(1)(b). A dismissal for redundancy is a potentially fair reason for dismissal within the terms of that section.

26. Once an employer has shown a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason "… depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case." (Section 98(4) of the ERA). That question must be considered by the objective standards of the hypothetical reasonable employer, rather than by reference to the Tribunal's own subjective views. The question is not whether the tribunal thinks that the dismissal was fair but whether the decision to dismiss the Claimant was reasonable in all the circumstances

27. In cases of redundancy, it is well-established law that an employer will not normally be deemed to have acted reasonably unless he warns and consults any employees affected, adopts objective criteria on which to

select for redundancy which are fairly applied and takes such steps as may be reasonable to minimise the effect of redundancy by redeployment within his own organisation. An employer is required to enter into a fair consultation process and this involves ensuring that the person consulted has a fair opportunity to understand fully the matters about which she is being consulted and to express their views

28. In Mugford -v- Midland Bank [1997] IRLR 208, the Employment Appeal Tribunal stated that it would be "…a question of fact and degree for the employment tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of determination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of

Submissions

29. The Claimant submitted that the Respondent never consulted her about a termination date of 8th March. All the conversations that she had with the Respondent were predicated on a leaving date of 31st May. Further the consultation period was too short and she should not have been asked to respond to the offer on a day on which she was on annual leave. She was also led to believe that she would receive an enhanced redundancy payment and she had signed a document (210) showing a package of just over £7,700.

30. For the Respondent Mr. Curtis submitted that there was a genuine redundancy situation. The issue was whether it was fair to withdraw the offers which had been made to the Claimant on 25th January. He submitted that it was fair, as the deadline had already been extended twice. He also submitted that the Claimant was aware that if she could not agree terms with the Respondent she would be made redundant when the office closed and that any proposal to extend her employment to continue beyond the end of February was necessarily contingent on her agreement.

Conclusions

31. The Claimant accepted that that there was a genuine redundancy situation given the plans to close the Waterloo office. She also accepts that the principal reason for her dismissal was redundancy. All the employees who worked at the Waterloo office were potentially redundant if they were not able to relocate and there was no question of selection.

32. The Claimant's challenge to the fairness of her dismissal for redundancy is essentially twofold. First she says that it was unfair to terminate the discussions that had been taking place on 25th January. She was on leave that day and had responded early on the 26th. Secondly she says that she had never been consulted about a leaving date of 8th March. All the

discussions suggested that she would be made redundant on 31st May or thereafter. She says there was therefore a failure to consult her on that score.

33. There is no doubt that this process was not perfect. I would criticise the Respondent for failing to give the Claimant copies of the notes of the meetings, for failing to follow up their offers in writing, for not making clear to the Claimant the basis upon which she was entitled to the additional payment and for miscalculating the statutory redundancy amount set out in the original note of the 8th of January. Nonetheless the issue for me is not whether the process was perfect but whether it was in all the circumstances reasonable.

34. This is factually unusual case in that the difficulties arose because the Respondent really wanted to keep the Claimant for as long as possible. She was a respected and highly valued employee. Nonetheless her position in London would be redundant on the closure of the Waterloo office. It would have been apparent to everyone that the Claimant could only continue if she was willing to work in Alton at least part of the week.

35. As to the first issue, that it was unreasonable for the Respondent to withdraw the various offers on 25th January I have considerable sympathy for the Claimant. This would be a big change for her and she needed to sort out the various ramifications. Nonetheless the offer had been made to her on 8th January, and the deadline for acceptance had been extended twice. The Respondent had responded to her various queries. Until there was an agreement that the Claimant was prepared to travel to Alton and on what terms, the employer was not contractually bound.

36. While it would clearly have been better for Mr. Butler to have made it absolutely plain to the Claimant that there would be no further extension after the 25th January deadline, at the end of the day I do not consider that his actions fell outside the range of reasonable responses in failing to extend the deadline for acceptance further. By the 26th January there was still no clear acceptance by the Claimant that she would work in Alton on the terms being offered by the Respondent. I might have taken a different view if the Claimant had been clear on 26 January 2016 that she would accept what was on offer, but even the email which she sent after she had been told that the offer was withdrawn (26 January at 12.30) suggested that she was still seeking an additional payment to that which had been offered. As such the parties had failed to reach an agreement about a variation to her contract and an extension of the redundancy period.

37. The Claimant also says that she was not aware that the redundancy would take effect on the 8th March. At the 8th January meeting the Claimant was told that the Respondent was very keen to retain her services and that she was needed longer to the end of May 2016. The discussions centred around a redundancy at the end of May. The Claimant was told that she was required to remain in her role until the end of May 2016 and that the discussions centred around whether she could relocate permanently or

work from Alton 2 days a week until the end of May. Mr. Butler was candid in his evidence when he said that the Claimant had asked if she could go when everyone else went and they told her that they wanted her to work longer.

38. I have thought carefully about this because that answer was not wholly clear. The Respondent had no right to require her to work in Alton and therefore unless agreement could be reached she would redundant from the end of February. The Respondent was not clear with the Claimant during the consultation period about the options and the fact that her role in London was redundant from the end of February. As the Claimant says, all the discussions focused on a redundancy at the end of May and the terms of her employment in the interim.

39. However, having heard all the evidence I do not accept that the Claimant misunderstood the position. The advice that she received from the CAB (who would have got their understanding from her) set out the position clearly and identifies that the Claimant would be redundant at the end of February; and that she had the option of taking redundancy "at the end of February when Waterloo closes" or travelling to train her replacement for a further 3 months.

40. All the discussions with the Claimant were predicated on the basis that the Claimant had a choice not to come to Alton at all (even for an interim period) and also that working from home was not an option. In evidence the Claimant accepted that she understood that she could say no and that, had she done so, she would be redundant when the Waterloo office closed. Unfortunately the effect of her having not accepted the offer of an extension by the revised deadline was the same as if she had said no.

41. I am satisfied that the Claimant did understand that if she did not accept either proposal she would be made redundant when the Waterloo office closed. As such I find that the consultations which took place were reasonable in all the circumstances.

42. The Claimant also says that the dismissal was unfair as she should have been offered alternative employment. In particular the Claimant says that she should have been offered a vacant accounts manager role and the Respondent did not make reasonable efforts to find alternative employment. However all roles were in Alton and the Claimant had made it clear that she could not permanently relocate to Alton. If she wished to do that her own role remained available to her. Offering her a lower paid and different role in such circumstances would have been futile.

43. Breach of contract. It is the Claimant's case that she was contractually entitled to a further £2298.62 which had been promised to her at the first consultation meeting. The Claimant understood that the additional payment was conditional on her working in Alton for an additional 3 months. That is clearly set out both in her witness statement and in the letter from the CAB.

44. As the Claimant did not accept their offer to work additional 3 months on terms satisfactory to both parties that offer lapsed. Accordingly there was never any fixed agreement to pay the Claimant this additional amount. The Claimant says it was unfair as the other employees were given this additional payment but what I have to focus on was whether the payment was promised to her in terms that amount to a contractual commitment. It was not –it was conditional only- and the breach of contract claim is not made out.

45. As I say I have I not found this case easy. The Claimant undoubtedly was a committed employee who found herself in a difficult situation. However, the Respondent was not required to do more than offer her the chance to wok permanently in Alton and the negotiations which took place were about seeking to continue to employ the Claimant on new terms. As such the Respondent was entitled to require the Claimant to accept that offer within a fixed period and to revoke that offer when she did not do so.

46. The claim is dismissed.

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Employment Judge F Spencer
20TH February 2018