

Case Number: 2302817/2017
2302815/2017
2302813/2017
2302814/2017
2302811/2017



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

and

Respondent

Paul McCann (1)
Esther Otoo (2)
Mildred Panda-Noah (3)
Gaylord Sam Jonah (4)
Elwira Lukaszewicz (5)

Nightingale Hammerson
Trust Company

Held at: Watford

On: 25-26 April 2018

Before: Employment Judge Smail

Appearances

Claimants: Mr M Stephens (Counsel)
Respondent: Mr M. Williams (Counsel)

JUDGMENT

Each Claimant is entitled to a redundancy payment which must be paid within 21 days. Liberty to apply for calculation of the amounts.

REASONS

1. By these claim forms the Claimants claim redundancy payments. The Respondent accepts each Claimant was dismissed for redundancy but avers that in each case suitable employment was offered before the end of the employment, which suitable employment was unreasonably refused

by each Claimant, thereby disentitling each from receiving a redundancy payment.

The Law

2. Section 141 of the 1996 Act provides:

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.
3. The Respondent bears the burden of proving both the suitability of the employment for the particular employee and that the particular employee acted unreasonably in refusing it.
4. Pill LJ in Devon PCT v Readman [2013] IRLR 878 (CA) confirmed that the correct approach to assessing the reasonableness or otherwise of the refusal depends on factors personal to the employee and is

assessed subjectively from the employee's point of view at the time of the refusal.

5. He went on to observe that a person's desire, if possible, to take advantage of redundancy rights does not necessarily defeat her claim. An employee may be conscious of the benefits of a redundancy payment but still give adequate consideration to a job offer.
6. Keith J in Bird v Stoke-on-Trent Primary Care Trust UKEAT/0074/11/DM (July 2011) cited with approval a passage in Harvey on Industrial Relations which stated –

‘The question is not whether a reasonable employee would have accepted the employers offer, but whether that particular employee, taking into account his personal circumstances, was being reasonable in refusing the offer: did he have sound and justifiable reasons for turning down the offer?’

The question whether the employee had sound and justifiable reasons for refusing the offer has to be judged from the employee's point of view, on the basis of the facts as they appeared, or ought to have appeared, to the employee at the time the offer was refused.

7. Keith J also cited with approval dicta of Judge Haque QC in Cambridge and District Co-op v Ruse [1993 IRLR 1993 (EAT) where he said that as a matter of law, it is possible for the employee reasonably to refuse an objectively suitable offer on the ground of his personal perception of the employment offered. Indeed, that could be so even if other people think that the personal perception of the employee might be wholly unreasonable. An employee's refusal of an otherwise suitable offer can still be said to be reasonable when he thinks that the post he is being offered, for example, involved a loss of status, even if that view might be groundless in the eyes of others, provided that it is not groundless from his point of view.

FINDINGS OF FACT

8. The claimants were each employed by the respondent at a care home, Hammerson House, in Bishops Avenue, Hampstead, London N2. For the purposes of the hearing the claimants were ordered in a way different from the sequence of claim form numbers and I have respected that in this judgement, hence the claim form number disorder in the header. The first claimant was a driver who had worked for the respondent at that location for 17 years. The remaining claimants were care workers. The second claimant had worked there for 28 years; the third 25 years; the fourth 19 years; and the fifth six years. They worked 40 hours a week although from February 2017 the fifth claimant reduced hours to 27

hours a week to take a second job with the Royal Free Hospital in Hampstead. His was known to the Respondent as they provided a reference.

9. The claimants were told in January 2016 that their workplace would be closing at some point from January to December 2017. The closure was for refurbishment that would take many months. The claimants spent a period of more than 14 months under notice of redundancy. It was on 24 May 2017, some 16 months after receiving notification of their potential redundancy, that the respondent first offered to employ the claimants at its residential home, Nightingale House in Clapham. They were offered a trial period lasting 12, as opposed to the usual four, weeks. Each claimant indicated that they did not wish to work at Nightingale House. The respondent has refused to make redundancy payments, claiming the offers of employment to be suitable and unreasonably refused by the claimants.
10. The employment offered was the same jobs that the claimants had done at Hammerson House, on the same terms and conditions save as to location. I find that all the offers of employment were suitable. I reject Counsel for the Claimant's attempts to weave into the issue of suitability some of the reasons given by the Claimants for not accepting. Those reasons are to be considered under the issue of reasonable/unreasonable refusal.
11. All the Claimants have passages in their witness statements stating that they lost trust in the Respondent around:
 - 1) the fact that applications for voluntary redundancy were asked for but not granted;
 - 2) the process took an extended amount of time;
 - 3) the Respondent explored the possibility of secondment work at a company called Jewish Care, which was not an associated company and so could not amount to suitable alternative employment for redundancy purposes;
 - 4) offered a trial period of 12 not 4 weeks.
12. The Claimants' position on these matters was not reasonable even viewed subjectively. The invitation to apply for voluntary redundancy made it clear that voluntary redundancies would only be made if needed. In the event, the Respondent kept enough residents to require the same level of staff across its business. Although all the Claimants mention the issue, 3 Claimants applied for voluntary redundancy: Otoo, Panda-Noah and Jonah. Whilst undoubtedly disappointing not to get voluntary redundancy, that of itself does not generate a good reason for rejecting a

Case Number: 2302817/2017
2302815/2017
2302813/2017
2302814/2017
2302811/2017

job offer, even viewed subjectively. I reject the suggestion that anyone was promised voluntary redundancy. That does not sit with the paperwork and interview notes.

13. Complaint cannot fairly be made about the length of the process; the Respondent gave ample warning of the problem. The Respondent did try to keep all staff in employment, and so it is not justifiable to criticize exploring jobs at Jewish Care. Similarly, I accept that the offer of a 12 week trial period was designed to give the employees an extended opportunity at keeping employment. It was not reasonable to think that this was a negative idea.
14. It is necessary, then, to examine what other reasons were put forward by each claimant for refusing the offer of employment., and to ascertain what were the essential or principal reasons for refusal, overall.

Paul McCann

15. Mr McCann's objection was that he wanted to stay working in North London. From his home in North London to Hammerson House it took 15 minutes to cycle to work. When he had driven to Nightingale House in the course of his employment, it had taken usually 90 minutes with him leaving early and arriving home late. Sometimes it could take longer. He did the journey frequently: once a week or once a fortnight, certainly not every day. Nightingale was approximately 19 miles from Hammerson, it meant crossing London daytime traffic with attendant delays. I accept from him that he would never have applied for a job in Clapham. There were sufficient driving opportunities in North London.
16. Public transport would not solve the problem. It could take up to two hours in the morning. The quickest time suggested by Transport for London search engines suggested 1 hour 12 minutes one way if all went well. A 3 hour return commute would therefore seem likely. The point is duration not cost; the Respondent offered to pay the extra travel costs.
17. Mr McCann's essential reasons, however, for refusing the job were the distance away from his area of North London and the length of the commute which he regarded as onerous. In my judgment, Mr McCann's essential reasons for refusing the otherwise suitable offer of employment were sound and justifiable from his perspective. A 3 hour return commute is very different from 15 minutes each way.
18. He is, accordingly, entitled to a redundancy payment.

Elwira Lukaszewicz

19. Ms Lukaszewicz lives at the same address in North London as Mr McCann so I consider her position now. Whilst it seems she did not cycle the distance to Hammerson House, the journey was 3 miles which she would cover by a short walk and a bus, or a bus and a hopper bus which stops outside the House. The public transport commute to Nightingale, the same as Mr McCann's, was too far and would take too long, she claimed. Further, Ms Lukaszewicz had a further part-time job at the Royal Free in Hampstead. This was a zero-hours bank job. She had started that in February 2017. The Respondent knew this as they had supplied a reference. It was convenient for that job for her to remain in North London.
20. The Respondent has adduced evidence that the Claimant's non-cycling journey to Hammerson would take 50 minutes and submits that the increase to a maximum of 1 hour 30 minutes each way to Nightingale was not a sufficient increase to make it reasonable to object to the commute. I disagree. The additional 40 minutes each way is a substantial difference, almost doubling the commute time.
21. As with Mr McCann, her essential reasons for refusing the otherwise suitable offer of employment were based on the distance away from home and the length of the commute. These were sound and justifiable from her perspective.
22. She is, accordingly, entitled to a redundancy payment.

Esther Otoo

23. Mrs Otoo had worked at Hammerson House for 28 years. She was 59 years of age when it closed. She would drive to Hammerson House, which was 30 minutes from her home in Haringey. In evidence she explained that she would have to take the underground to get to Nightingale House which she did not want to do as she had a phobia of crowds on the underground. She avoided travelling on the underground in general. She has not travelled on it for 20 years. The duration of the commute would likely double in time. There were so many care homes in North London where she could find work, as necessary.
24. In Mrs Otoo's case there were also deep family complications. At the time of a consultation meeting on 4 May 2017, Mrs Otoo mentioned that her sister had died in the last 14 months, her elder brother who lives in France was suffering from leukaemia, and her father in Ghana was frail. She wanted to attend to them and did not want permanent work elsewhere. She had been travelling back and forth to France at

weekends to look after her brother. She stayed in the UK for the purposes of this case. She stated that if Hammerson House had stayed open, she would have asked for a year off to attend to her family matters. Indeed, the Respondent indicated that if she transferred to Nightingale, a career break would be available to her.

25. I find that the essential reasons in Mrs Otoo's case for refusing the offer of a job at Nightingale was the combined ones of being unwilling to travel an extended commute on the underground with its crowding of which she was phobic and wanting to be free to look after her family. Viewed from her perspective those reasons were sound and justifiable.

26. Mrs Otoo is entitled to a redundancy payment.

Mildred Panda-Noah

27. At the time Ms Panda-Noah worked at Hammerson House, she lived in Rotherhithe. Clapham was closer than Hampstead and so she has no travel distance or duration point.

28. She had concerns that the Respondent might require her to work the contractual 40 hours over 6 days rather than 5. This was discussed at the consultation meeting on 3 May 2017. The Respondent's position was that whilst the contractual obligation was to work 40 hours and it was for them to arrange shift patterns, if during a trial period, Ms Panda Noah found she had to work her old pattern they could work around that. Shift pattern then did not generate a reason for refusal.

29. Ms Panda Noah also complained that disciplinary matters had been raised with her. The Respondent said that complaints from service users and colleagues had to be raised. Ms Panda Noah did not have fair grounds, subjective or otherwise, for thinking that she would be unfairly treated by the Respondent in management of the work. They had to raise with her points as they arose.

30. Ms Panda Noah had applied for voluntary redundancy. She said in the consultation meeting that once she heard of the proposal to close Hammerson House, where she had worked for 25 years, she discussed with her family the advantages of moving to Kent to find cheaper accommodation and living costs; to move out of London for cost-of-living reasons. This, indeed, is what she did in August 2017. She was dismissed on 11 August 2017. She has moved to Canterbury and has obtained work there. That is plainly a substantial step in her life. I find that this was the principal reason for her not taking a job at Nightingale House: to move out of London to reduce living costs. It was a sound and justifiable one.

31. Ms Panda Noah is entitled to a redundancy payment.

Sam Jonah

32. Mr Jonah lives in SE1 which is significantly closer to Nightingale House than Hammerson. He has no commute point. Mr Jonah was very disappointed not to get voluntary redundancy. In his application by letter dated 17 March 2016 he wrote that having given 18 years of his working life to Hammerson House, he would like to retrain to become a paramedic or a radiographer. He was also contemplating a move out of London. The move had not materialised by the time of the hearing. In the consultation meeting on 27 March 2017 he stated that he was considering becoming a phlebotomist (blood samples) in a hospital.
33. Mr Jonah has put forward some emotive arguments for not transferring to Nightingale. He said that the whole management atmosphere at Hammerson was not as good as it was pre-2012 when the Respondent took the business over. He had, of course, continued working for the 5 intervening years. Further, he had been involved in some disciplinary issues that were dealt with in Nightingale House. A year and a half previously he had been involved in a disciplinary hearing. He had represented a colleague. The fact that those events had happened in Nightingale, could not rationally be used as an argument for not working as a care worker there, whether viewed subjectively or not. His claim that he was scared of the building was unconvincing.
34. Further, he had issues with a number of colleagues at Hammerson who would be transferring over, as he stated in the internal appeal against the refusal to pay redundancy. He had drawn a door on a whiteboard and a colleague had written 'Satan shall rise and I shall send you to hell'. His shoe laces had been taken on another occasion. These incidents happened, apparently in June 2017 by when he had decided he would not transfer across. He did not report them.
35. He also suggested that if he transferred to Nightingale he could be forced to work nights. Working at night had made him ill some years previously at Hammerson. However, it was pointed out to him that he would transfer over on the same terms and conditions as he enjoyed at Hammerson, where he did not latterly work nights.
36. Mr Jonah put forward many emotive and not rationally sustainable arguments, even viewed subjectively.
37. His principal reason, however, was that he wanted to start a new career. His hope was to do so in a medical context. In the event, he is working in security at Citi Bank in Canary Wharf. Viewed from his perspective, the

**Case Number: 2302817/2017
2302815/2017
2302813/2017
2302814/2017
2302811/2017**

decision to change careers after the closure of the place he had worked in for 19 years, was sound and justifiable.

38. Mr Jonah is entitled to a redundancy payment.

CONCLUSIONS

39. I have concluded, then, that each claimant had sound and justifiable reasons for deciding not to transfer to Nightingale and that each is entitled to a redundancy payment.

40. Listening to the evidence in the hearing was like being in separate worlds when the two sides gave evidence. The Respondent's witnesses all emphasised the suitability of the employment offered. Indeed, all offers were suitable and I acknowledge that the Respondent had taken care to make sure that the option of employment was open to their employees. Extensive consultation had taken place and a fair procedure was in place. However, this was not an unfair dismissal case.

41. In contrast, the individual claimants sought to explain why the proposed change did not work for them. There were a variety of reasons. Three claimants had genuine commuting travel mode, time and distance reasons (McCann, Lukaszewicz, Otoo). Three had genuine life situation change reasons (Otoo, Panda-Noah and Jonah). The approach of the legal authorities was on their side, in my Judgment. Viewed from their perspective, they had sound and justifiable reasons for not taking the transfer, at least in terms of their essential and principal reasons. The life change reasons made sense to me also given the length of time the relevant claimants had worked at Hammerson House. It is not surprising after working at a place for so long, that minds turn elsewhere when that place closes.

Employment Judge Smail
Date: 27 July 2018
South East Region

Judgment sent to the parties on

27.07.2018