EMPLOYMENT TRIBUNALS

Claimant: Mr Eghosa Omorodion

Respondent: Firmdale Hotels Plc

Heard at: **London Central (CVP)** **On:** **3-4 February 2022**

Before: **Employment Judge Leonard-Johnston**

Representation
Claimant: In person
Respondent: Ms. A Rokad

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal fails and is dismissed.

2. The Claimant is entitled to a statutory redundancy payment.

REASONS

THE HEARING

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way. The participants were told that it was an offence to record the proceedings.

2. The Claimant was a litigant in person. There were some technical difficulties. At the beginning of the hearing the Claimant was unable to connect to the cloud video platform. The hearing was delayed to allow him to attempt to connect. He used the phone in facility to begin with, and then, on the afternoon of the first day of the hearing, came into the London Central hearing centre where he was set up in a hearing room. The tribunal staff also provided the Claimant with a laptop to access the bundle. Thus, the technical difficulties were resolved and I was satisfied that the Claimant was able to participate satisfactorily in the proceedings.

3. Evidence was heard from the Claimant, the Claimant's manager Mr Phillips and the Respondent's HR manager Ms Baxter. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

INTRODUCTION

4. There was a bundle of documents before the tribunal running to 232 pages. There were witness statements by Mr Phillips, Ms Baxter and the Claimant. Part way through the hearing, the Claimant submitted a new document being an email dated 27 August 2020 and this was not objected to by the Respondent.

5. The Respondent sought leave to amend its response to argue in the alternative that if the reason for the dismissal was not redundancy, it was some other substantial reason under section 98(1)(b) (SOSR). Specifically, the reason was the Claimant refusing to agree to new terms after a business reorganisation. The Respondent explained that the argument would be limited to what was at pages 170-171 of the bundle. The Claimant was given an opportunity to make representations, and I explained to the Claimant what the application was for, and that the Respondent was not adducing new factual evidence but putting forward an alternative potentially fair reason for dismissal. I allowed the Respondent to amend the response on the basis that the balance of hardship fell on the Respondent if I did not allow an amendment, and that no new facts were being alleged.

6. The Claimant was asked at the beginning of the hearing whether he wished to pursue the claim for breach of contract. He replied that he did not. However, after the lunch adjournment on the first day he raised the issue again, stating that he wanted his expenses paid, these being the cost of an security licence (SIA). The Respondent accepted that he was entitled to the reimbursement of the cost of his SIA licence and that if he provided his bank details he would be paid. Upon this admission, the Claimant withdrew his claim for breach of contract. Accordingly, the remaining claims were an unfair dismissal claim and a claim for statutory redundancy pay.

LIST OF ISSUES

7. During the hearing the parties agreed the following list of issues.
   a. What was the reason (or the principal reason if more than one) for the dismissal?
      i) The Respondent relies on redundancy within the meaning of S98(2)(c) and S139(1)(b) Employment Rights Act 1996 (“ERA 1996”)?

      ii) Or, in the alternative, a restructure/reorganisation amounting to some other substantial reason (“SOSR”) within the meaning of S98(1)(b) ERA 1996?

   b. If the dismissal was for a potentially fair reason, did the Respondent act reasonably in all the circumstances of the case, including the size and resources of the Respondent, in dismissing the Claimant for the reason found?

   c. If the reason for the Claimant’s dismissal was redundancy, the Tribunal will consider:
      i) The selection of the pool;
      ii) The consultation process;
      iii) The effort to look for alternative work.

d. The Claimant alleges that it was unfair to offer the alternative role only to him and another colleague, namely Mohammed Jamil, and there was no trial period and/or training that was offered for the new role and, therefore, the alternative role was not suitable.

e. Was the decision to dismiss the Claimant within the range of reasonable responses?

f. If the Claimant was redundant within the meaning of s139(1)(b), was the Claimant nonetheless not entitled to a statutory redundancy payment, under section 141(2) of the Employment Rights Act, because the Claimant unreasonably rejected an offer of suitable employment in relation to him?

g. If the Claimant was entitled to statutory redundancy payment, how much was he entitled to?

h. If the Claimant was unfairly dismissed generally:
   i) Should he be entitled to a compensatory award? And, if so, how much?
   ii) Should a reduction be made on the basis of the failure by the Claimant to mitigate his losses?
   iii) Should a "Polkey" reduction be made? And, if so, how much?

THE LAW

8. The test for unfair dismissal is set out in section 98 Employment Rights Act 1996 (hereinafter referred to as ERA 1996). The burden is on the employer to show the reason for dismissal and that it is a potentially fair reason (section 98(1) ERA 1996). However, it is for the tribunal to determine what the true reason for the dismissal is.

9. Redundancy is one of the fair reasons for dismissal in section 98(2) ERA 1996. Section 135 provides that an employer shall pay a redundancy payment to any employee of his if the employee is dismissed by the employer by reason of redundancy, although this is subject to various provisions including section 141.

10. When considering redundancy dismissals, tribunals are not normally entitled to investigate the commercial reasons behind the redundancy situation. There is a three-stage process for the fact-finding tribunal namely: "(1) Was the employee dismissed? If so, (2) had the requirements of the employer's business for employees to carry out work of a particular kind or of a particular kind in the place of employment, ceased or diminished, or were they expected to cease or diminish? If so, (3) was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage (2)" (*Safeway Stores Plc v Burrell* [1997] I.C.R 523, *Murray v. Foyle Meats* [1999] I.C.R. 827).

11. Section 139 deals with the definition of redundancy and provides that:

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
>
> (a) the fact that his employer has ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) 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.
"

11. Section 141 deals with renewal of contract or re-engagement and provides as follows:

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

(a) to renew his contract of employment, or

(b) to re-engage him under a new contract of employment,

with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.

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

(3) This subsection is satisfied where –

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

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

(ii) the other terms and conditions of his employment, would not differ from the corresponding provisions of the previous contract, or

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

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

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

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

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

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

14. If the reason is a fair reason, the employer must act reasonably in treating it as a sufficient reason for dismissing the employee (section 98(2) ERA 1996). It is not for the Tribunal to substitute its own decision but to consider whether the dismissal was within the range of reasonable responses. The correct test is that set out in *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17 as follows*:*

> "We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by section 98(4) is as follows:
>
> (1) the starting point should always be the words of themselves;
>
> (2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the … tribunal) consider the dismissal to be fair;
>
> (3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
> (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably takes another;
>
> (5) the function of the … tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

15. There is a further consideration that is known as the *Polkey* consideration, in that had a fair procedure been followed by an employer, would the dismissal have occurred in any event, i.e. what were the percentage chances.

16. Under section 141 of the ERA 1996, an employee will lose his or her entitlement to a redundancy payment if he or she refuses an offer of an alternative job if the job was, if not the same as the old one, at least 'suitable

employment in relation to the employee', and if refusal of the offer was unreasonable. The employer must show both that the job offered was suitable and that the employee's refusal of it was unreasonable.

FINDINGS

17. The Claimant was employed as a security officer for Firmdale Hotels plc. Firmdale Hotels is a hospitality business that manages 10 hotels and eight bars and restaurants in London and New York. Like many other hospitality businesses, its operations were disrupted by the Covid-19 pandemic. It was required to close the majority of its sites and it placed many of its staff on furlough from 1 April 2020, including the Claimant. Only one site remained open throughout the relevant period which was Ham Yard Hotel and apartments.

The contract

18. There was a dispute about whether the Claimant's contracted hours were 44 hours per week or 42 hours per week. Whilst the Claimant states it was 44 hours, the documentary evidence including minutes of his appeal meeting on 21 September 2020 and the most recent version of his contract on his HR file from 1 May 2016 both indicate it was 42 hours. Whilst that contract was unsigned, I am nonetheless satisfied on the balance of probabilities that immediately before being placed on furlough the Claimant was contracted to work 42 hours a week.

19. The contract stipulated that the Claimant's normal place of work was the Soho Hotel, although there was a term stipulating that "the needs of the business may require you to work away from your normal location for reasonable temporary periods", to make reasonable variations of the responsibilities and/or "to second you to work of a similar nature, with due notice".

Redundancies contemplated

20. When the Soho Hotel was closed because of lockdown, the Claimant agreed to be placed on furlough, being paid 80% of his wages via the government's furlough scheme. His furlough was originally until 31 May 2020 but was extended to 31 July 2020 and later to 31 October 2020. During June 2020 it became clear that the pandemic would require the Respondent to consider making redundancies and this was communicated to all staff on 24 June 2020.

21. The Claimant was initially told on 26 June 2020 that his job was not at risk, but on 1 July 2020 the business situation changed. The Respondent started a collective consultation and the Claimant was informed that his job *was* at risk, and indeed he engaged in nominating an employee representative for the purposes of those collective consultations. A letter of 1 July 2020 informed the Claimant that the Respondent may need to make redundancies and/or may need to carry out a reorganisation and that it would be likely that employees' terms and conditions would need to be changed. Correspondence relating to the election of employee representatives were sent to the Claimant on 13 July and 15 July 2020.

Request to return to work

22. On 14 July 2020, the Claimant received a phone call from his manager Mr Phillips, telling him that he was being invited to return to work for 18 hours per week under the flexible furlough scheme. This phone call was followed up by an email and letter from Ms Baxter on 19 July 2020 (the 19 July letter) stating that the Claimant was being asked to return to his duties with one week's notice.

23. The 19 July letter stated that the Claimant was being put back on active duties and that from 25 July 2020 his furlough leave would cease. The request to return to work was presented as an invitation to return to work, with a variation of the contractual terms. The Claimant was advised that "*(u)tilising the flexible furlough scheme, we are able to offer terms for your return to work on reduced hours. We are proposing to reduce your working time from its current level to 24 hours each week. The remaining time you shall continue to be on furlough under the previous furlough terms*…" and that "*during the flexible furlough period, hours worked will be paid at your normal rate. Pay for furloughed hours ("furlough pay") shall be reduced to 80% of your normal pay (calculated in the same way as it has been throughout your period of furlough and subject to the maximum of £2,500)…".*

24. The 19 July letter stated that these were "*further changes to your employment contract for your agreement including variations to those changes made in the furlough letter to you from Firmdale dated 3 April 2020*." The letter made it clear that the Claimant would be paid 100% of his wages for the 24 hours worked, and the rest of his pay would be supplemented by the flexible furlough scheme at 80% of his pay. Therefore, the return to work would have meant more take-home pay for the Claimant than he was receiving at that point in time through the original furlough scheme.

The status of the 19 July letter

25. The evidence I heard from both Mr Phillips and Ms Baxter was that both the 14 July phone call and the 19 July letter were intended to be a recall for the Claimant to return to work on the flexible furlough scheme. The Respondent no longer had a role for a security officer at 42 hours a week, but it did have hours for the Claimant at the Ham Yard Hotel, and it offered the Claimant a role at 24 hours a week, topped up through government funding.

26. I find that the intention of Ms Baxter in sending the 19 July letter was to switch the Claimant from full time furlough leave to flexible furlough leave, both of which were temporary variations to the contract. And that was the effect of the letter, by the legalistic reference to the previous variations in the original furlough letter of 3 April 2020 letter. However, it was not clear to the Claimant that that was the effect. The 19 July letter, unlike the 3 April letter, did not specifically state that the variation was temporary, did not limit the variation of hours to the period of furlough leave, and it did not give an expiration date. The 19 July letter relied on the reference to the previous agreements.

27. Because of the lack of clarity on the face of the letter, the Claimant misunderstood the 19 July letter to be a permanent variation to the Claimant's employment contract to reduce his hours from 42 hours to 24 hours. In the context of the ongoing redundancy process it is understandable that upon

receipt of the 19 July letter the Claimant was confused and upset about the lack of consultation. Because of the misunderstanding, the Claimant was of the view that if he signed it he would be accepting a variation to his contract, and he thought that whilst he would temporarily be in a better financial position on flexible furlough leave, in the longer term the variation meant that once furlough ended he would have been contractually reduced to part time hours.

28. The 19 July letter was not a proposal to vary the Claimant's contract permanently to reduce him to part-time hours, it was variation of his furlough leave, due to expire on 31 October 2020, at which point he would have reverted to his original contract. I find that the Claimant misunderstood what was being proposed in the 19 July letter.

Ham Yard Hotel

29. The 19 July letter was accompanied by an email from Ms Baxter stating that the Claimant was being invited to return to work at Ham Yard Hotel, not his normal place of work at the Soho Hotel. I heard evidence from the Claimant, which I accepted, that he had worked at least once before at the Ham Yard Hotel on an ad hoc basis during the first lockdown. I heard evidence from Ms Baxter, which I had no reason to doubt, that the Respondent needed a security officer with an SIA licence to work at the Ham Yard Hotel due to its licensing conditions, and because the Claimant had such a licence, they had work for him. It was therefore important to the business that he return to work at Ham Yard Hotel.

30. The Claimant stated was that deployment to Ham Yard Hotel was not reasonable because the role was not similar to his role at Soho Hotel, nor did he receive appropriate training. It was not in dispute that the Ham Yard Hotel was of a different size and design to the Soho Hotel. However, I accept Mr Phillips' evidence that there were two roles at Ham Yard Hotel, one was office-based, for example checking CCTV, and the other involved more 'floor walking', for example, patrolling and standing outside the front door. The Claimant was being offered the latter. I find that the role being offered to the Claimant was similar in nature to the role he undertook at Soho House, and was within the Claimant's skill set and experience. I did not accept that lack of training was a problem. The Claimant could have asked for site-specific induction, but did not. The contract allowed for the Claimant to be moved to Ham Yard Hotel with reasonable notice. Given the needs of the business at the time, the request for the Claimant to work at Ham Yard Hotel as opposed to the Soho Hotel was a reasonable one. I find that the deployment to Ham Yard Hotel was reasonable in the circumstances, and within the terms of the Claimant's contract.

Claimant's response to the 19 July letter

31. On 21 July 2020, the Claimant wrote an email to Ms Baxter saying that he was interested in the flexible furlough scheme but didn't understand it fully. His concern was to do with what would happen when the furlough scheme ended, and whether he was still being considered for redundancy. Ms Baxter responded on 23 July confirming that this was intended to be a temporary variation of his contract. Ms Baxter did not answer the Claimant's query about whether he was still being considered for redundancy, but referred him to his employee representative. In response to his concern about what would happen

at the end of the furlough scheme, she stated, "*yes we know, at this time, from the government that the flexible furlough scheme will continue until 31 October*."

32. On the same day, 23 July 2020, Ms Baxter sent an email to the General Manager at Ham Yard Hotel and Mr Phillips, in which she said that the Claimant was confused about what flexible furlough is, thinking it's a part time job, and that it was clear that the Claimant was mixing up the recall with the redundancy process. Ms Baxter tried to phone the Claimant the following morning, on 24 July, although he did not answer or return her call. She, therefore, sent him an email asking him to contact her.

33. On 24 July, the Claimant sent an email stating, "*I have spoken to my representative, and after careful consideration I don't think it's in my best interest to agree to this contract*." He refused to return to work and declined to speak to Ms Baxter about his concerns. In his evidence before the Tribunal, the Claimant said that he had spoken to his employee representative who was elected as part of the collective consultation process. She had advised him that if he were to return to work on the flexible furlough scheme, she wasn't sure what would happen after 31 October 2020 when the furlough scheme ended, and that he may lose his statutory redundancy pay. As I have found, this was based on a misunderstanding of the effect of the 19 July letter.

34. The 19 July letter was a proposal to switch from full time furlough leave to flexible furlough leave, and was not a permanent variation to his contract. This was a reasonable direction to return to active duties. The Claimant's failure to return, even though based on an unfortunate misunderstanding, was unreasonable. The Respondent could have treated this as a conduct issue but did not. The Respondent was focussed on getting the Claimant back to work.

Further discussions about flexible furlough

35. On 27 July Ms Baxter emailed the Claimant confirming that because of his refusal to return to work, he would stay on full furlough for the time being. She did again offer the Claimant an opportunity to talk to him about his concerns.

36. On 2 August 2020, the Claimant emailed Ms Baxter saying that "*I can't afford to work reduced hours, and to do it for an indeterminate about of time, unfortunately, is not an option for me. My concerns are around the uncertainty of my immediate future, after 31/10/20*...". It is clear that the Claimant was refusing to return to work because he did not want to be on part time hours at the end of the furlough scheme. Ms Baxter emailed the Claimant on the same day stating '*you seem to be misunderstood with regards to flexible furlough scheme and I would be happy to explain this on the phone to you*.'. The Claimant did not take up that offer.

5 August email

37. On 5 August 2020, the Respondent wrote to the Claimant attempting to clarify the flexible furlough offer. That email confused the redundancy consultations with the request to return to work. The letter stated, "*in your case, due to licensing requirements, your job role is on the re-opening list at Ham Yard and*

the company, as a suitable alternative, has offered to offer you working hours at the Ham Yard which you are aware has now re-opened. In addition to pay in full for your working hours, you will receive top up to 80% of salary through the flexible furlough scheme". At this point, the Respondent was recognising that there was a redundancy situation and was offering the Claimant a suitable alternative role. The suitable alternative role was the flexible furlough offer, that is, 24 hours work at Ham Yard Hotel with the remaining hours being topped up to 80% pay via government furlough, but with no mention of what would happen at the end of furlough. The reference to 'suitable alternative' here indicates that this was not a temporary variation but part of the redundancy discussions. This was the first notice the Claimant had that he was being offered a different role as an alternative to redundancy. The Claimant was notified that if he refused, the hours would be offered to someone else, and subject to consultations, he would be offered a zero-hours contract. The Claimant did not reply.

Redundancy consultations – 13 August offer

38. On 13 August 2020, the Respondent wrote to the Claimant following the collective consultation as part of the redundancy discussions. He was told that his role was a unique role that was required by the business, and that he was therefore not being made redundant, nor being offered zero hours contracts like other employees, but that he was being made an offer of alternative employment.

39. The offer (13 August offer) was for the Claimant to work a minimum of 10% hours in September and 20% in October and thereafter, with the Respondent increasing his working hours as quickly as possible up to his contracted hours, and a review taking place no later than 31 January 2021. The Claimant would remain on furlough until 31 October 2020. Therefore, there was no guarantee of work of more than 20% of his previous hours after 31 October 2020. The Respondent did not explain why it considered this to be an offer of suitable employment. This offer was stated to be temporary, but there was no expiry date, merely a commitment to review working hours by the end of January 2021.

40. The Claimant did not reply to Ms Baxter's letter, but on 17 August the Claimant contacted his line manager Mr Phillips and arranged to come in to the hotel on 21 August 2020to discuss his circumstances.

Consultation meeting – 21 August offer

41. The 21 August 2020 meeting was an individual redundancy consultation meeting. The bundle contained minutes of the 21 August meeting. The Claimant disputed that the minutes of the meeting accurately represented what was said, but I do not accept that they are misrepresentative of the discussion because I was provided no evidence of, or referred to any specifics of, any inaccuracies .

42. At the meeting Mr Phillips read through a 'minimum hours meeting script' provided by the Respondent, at page137-138 of the bundle. The 'minimum hours meeting script' constituted an updated offer. It changed the 13 August offer in respect of the minimum hours being offered. The amended terms offered were a contracted minimum of 16 hours in September, and 32 hours in

October and each subsequent month, with a review no later than 31 January 2021 (the 21 August offer). Thus the claimant was being offered continuing work but not at 42 hours a week. There was an expectation that he would be offered full time hours, but only 32 hours were guaranteed after 31 October. The meeting script said "*the Company views the offer as a suitable alternative to redundancy and, if they refuse, they will lose their statutory redundancy pay*."

43. At the meeting the Claimant refused the updated offer because, in his words, he could not accept anything less than full time hours. According to the minutes the Claimant stated that '*it is not about Ham Yard but the hours and how much is suitable for me to live on'*. Mr Phillips explained that the offer guaranteed minimum hours but that they would very likely have more hours for the Claimant, and that Mr Phillips was confident that his full-time hours would be made up by further work at Soho Hotel by 1 November. It was explained to the Claimant that the Business could not offer him full-time hours, and in his evidence before the Tribunal, the Claimant had accepted that he understood the financial situation of the Respondent, and that they could not pay him without assistance from the furlough scheme. At the meeting on 21 August the Claimant reiterated that he was unwilling to accept any change to his contract.

25 August emails

44. The Claimant sent an email to Ms Baxter on 25 August 2020 stating that he did not think that the company's offer was reasonable, nor the process fair. The Claimant repeated that the offer was not suitable for him or reasonable because he wanted to stick to the terms of the original contract, which was 42 hours per week. He went on to say '*[I]n the event these terms can't be fulfilled by Firmdale due to the pandemic, perhaps serious consideration should be made as to how we can move forward, such as an improved fair, reasonable and sufficient offer, the company's legal obligation towards non fulfilment of the terms of contract (sic)*.' The Claimant wanted the company to offer him a redundancy package. The Respondent did not do so.

45. Ms Baxter replied to this email on 25 August 2020 in the following terms:

> "I *wrote to you on 5th August (email attached) to which you did not respond to, clearly outlining how you have misunderstood the company's offer for you to return to work and the offer of hours in accordance with the flexible furlough scheme.*
> *By not accepting the hours that were offered to you, you are in fact refusing to return to work and it appears from your email to me that you are also considering to refuse our offer of temporary minimum hours to you when I have written to you several times now confirming that we have hours available to you in excess of the minimum hours from the 25th July.*
>
> *Therefore if you do not accept the temporary minimum hours offer that has been made to you, it is you that is making the decision to not return to work and this is not the company's decision.*
>
> *I advise you to consult with Jason again so that you can fully grasp what the company has offered you*."

46. The Respondent was confusing the request to return to work with an offer of suitable employment as an alternative to redundancy.

Consultation meeting – 27 August

47. Mr Phillips emailed the Claimant on 25 August 2020 offering a further redundancy consultation which was scheduled for 27 August. The minutes from the 27 August meeting were in the hearing bundle at pages 143. The Claimant said that he could not accept the minimum hours variation for financial reasons. The Claimant was told at that meeting that he was being offered minimum hours with a commitment to increase hours, for example that they already had 27 hours for him, which was more than the minimum. It was indicated, but not guaranteed, that by 1 November he would be given enough hours to make up to full time hours. The Claimant was told that if he didn't agree it would be treated as an unreasonable refusal, and that he would be entitled to a notice period and untaken holiday but would not be entitled to a statutory redundancy payment.

The dismissal

48. The Claimant was dismissed with notice by letter emailed on 1 September 2020 (dated 31 August 2020). He was paid his notice period under the contract. The dismissal letter stated:

> *"As you are aware, the company has been consulting with employee representatives about possible redundancies and ways to avoid them. As a result of these consultations, employees have been offered temporary minimum hours contracts, zero-hours contracts or reductions in pay. Individuals offered minimum hours contracts have been selected using criteria which the company consulted on with the employee representatives. The Company was pleased to be able to offer you a temporary minimum hours contract, utilising the flexible furlough until 31 October, initially working at least 17 hours in the month of September and 35 working hours in the month of October and each subsequent month, with company (sic) reviewing your temporary variation in hours based on revenue generation and business levels and with a view to increasing your working hours as quickly as possible.*
>
> *You have refused this offer and for this reason the Company is serving 9 weeks' notice to terminate your employment, in accordance with your contract of employment, with effect from 1 September 2020. Your employment will therefore terminate by reason of redundancy on 31 October 2020 and you will be on furlough for the duration of your notice, but will be paid 100% of your pay. You must not carry out any work during your notice period.*
>
> *…*
>
> *The company considers the temporary minimum hours contract a suitable alternative to your redunancy and on this basis no statutory redundancy payment will be paid to you.*
>
> *Whilst you are under notice, the Company will continue to explore ways in which your redunancy could be avoided, including through collective consultation.*
>
> *…"*

The appeal

49. The Claimant appealed this decision on 9 September 2020, stating that he did not think the offer was suitable and that there were procedural improprieties in the redundancy process.

50. An appeal meeting was held on 21 September 2020 and the minutes of that meeting were in the bundle, which I have no reason to doubt are accurate. The Claimant stated that he felt he was being asked to take a pay cut and that he felt the process was unfair, in particular that he had been sent the 19 July letter asking him to sign the flexible furlough agreement without having had his concerns addressed first. At the appeal meeting, the Respondent was still attempting to find a resolution so that the Claimant could return to work.

51. The Claimant was made a further offer, that he would be working a minimum of *35* hours a week, but that extra hours would be offered to him to make it up to full time; again, not guaranteed. He was told that he would be offered full time hours in a contract as soon as possible, and that in fact employees working at Ham Yard Hotel were already working full time hours. However, because of the uncertainty surrounding the furlough scheme and the pandemic, they were not in a position for the contract to be more than minimum hours. The Claimant made it clear again in that meeting that he did not want to agree to any variation in his contract. When asked what outcome he wanted from the appeal he said, "*if you cannot give me my hours just let me go and pay my redundancy*." The Claimant was told that because the company had offered him a suitable alternative, he would not be entitled to statutory redundancy payment.

Government job support scheme

52. On 29 September and 8 October, the Respondent emailed the Claimant about the government job support scheme. He was told that he may be offered an alternative but that it depended on the government scheme. The government Job Support Scheme was announced on 22 October. On 26 October the Respondent emailed the Claimant telling him that they were working to calculate what they could offer him as an alternative. On 28 October, which was within the Claimant's notice period, the Respondent invited the Claimant to participate in the Government's Job Support Scheme (the 28 October offer). He was informed that if he took up the offer his notice of termination would be withdrawn. The offer was to work 37 hours at normal pay, to be topped up by two thirds of the unworked hours. The Claimant rejected the 28 October offer on 30 October, on the basis that it was not a suitable alternative. He requested statutory redundancy pay.

Appeal outcome

53. The dismissal was upheld on 11 November 2020, by Ms Baxter, who was also the dismissing officer. The appeal decision stated:

> *"With regards to the Company's offer to you to return to work, I can confirm that you were offered to return to work on 25 July on flexible furlough to work 27 hours at Ham Yard Hotel and you would receive 80% of your salary, capped at £2,500. You declined the offer to return to work*

on this basis. On 13 August the Company selected you as you had a unique role that was required to re-open the hotel, and offered you temporary minimum hours on the basis that you would work a minimum of 20% of your working hours and return to working to your full contracted hours as quickly as possible. The Company confirmed that the offer of 27 hours (64% of your working hours) was still available for you to work on the flexible furlough scheme. The Company also confirmed that it considered its offer a suitable alternative and you declined the offer to return to work. On 1 September the Company confirmed that as a result of your decision to decline its offer for you to return to work on flexible furlough, that your employment was terminated by reason of redundancy and confirmed that due the reasons above, you did not have an entitlement to a statutory redundancy payment.

During the appeal meeting I listened to your points and I also took the opportunity to ask you whether you had any further alternatives to redundancy that you wished to discuss. You explained that you would only return to work if the Company agreed you could return to work on full contracted hours effective 31 October 2020. In the circumstances, with regional restrictions, a second wave and possibility of a second lockdown this could not be agreed. As you know, the reason for the delay in providing you with this outcome is because the Company was waiting for guidance from the government with regards to the Job Support Scheme. Once this was received, the Company offered you, as an alternative to redundancy, to return to work for a minimum of 20% of your hours and the Company and the government would make additional contributions to ensure that you reached a minimum of 73% of your salary. On 31 October, the government announced the extension of the furlough scheme and therefore if you accepted to return to work, the Company would extend your furlough period also which would ensure 80% of your salary, capped at £2,500. You declined the offer to return to work and therefore, your final pay has been processed for you to receive on 13 November. I was disappointed to receive your reply as the Company's offer to you to withdraw your notice of termination and offer of temporary minimum hours which was in accordance with government schemes and which I believed was in accordance with your wishes. The Company was also prepared for you to continue your employment as it appreciates your length of service and values your contribution to the company. After consideration of the facts and the points you raised at the appeal hearing I believe the decision to terminate your employment was in line with company policies and procedures, your contract of employment and was reasonable in the circumstances. I also believe that the offer that was made for you to continue your employment with Firmdale Hotels was a reasonable alternative to redundancy and, therefore, I uphold the decision."

DISCUSSION AND CONCLUSIONS

The reason for dismissal

54. It is for the Respondent to show a potentially fair reason for dismissal. The Respondent puts forward redundancy as a potentially fair reason, and in the

alternative, some other substantial reason, being the restructure of the company.

55. It is clear that the events that led to the Claimant's dismissal started with the Covid-19 pandemic and the consequential closure of the Soho Hotel in April 2020, when the Claimant was placed on furlough leave. There was a diminution of work due to the pandemic. The role of security officer at 42 hours per week was no longer needed, and from 19 July 2020 the Respondent needed him only for 24 hours per week, although that figure changed throughout the relevant period. At the time of the dismissal the offer was for minimum hours of 16 hours in September, and 32 hours a week from October onwards.

56. The test under section 139(1)(b) ERA 1996 for whether a dismissal will be a redundancy in circumstances such as these is 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 have diminished, even temporarily. In this case, the business requirements for the role of a full-time security officer diminished. I have taken into account the Respondent was at all material times attempting to get the Claimant to resume active duties. There was some work available for him and the Respondent had expectations that the Claimant would be provided at least 42 hours work. But they were not willing to guarantee it. I find that at the time of dismissal the Respondent did not need a security officer for 42 hours per week because that work had diminished.

57. As to the question of whether the dismissal was wholly or mainly attributable to that situation, I find as a matter of fact that it was. The dismissing officer had in mind the Claimant's refusal to accept the offers to return to alternative work, arising from the redundancy situation. The dismissal letter makes it clear that the Claimant's refusal of the offer to return to work on the terms proposed by the Respondent was the primary reason for dismissal. Those refusals were of offers of allegedly suitable employment as an alternative to redundancy within the meaning of section 141 ERA 1996. I am satisfied that the Claimant was redundant within the meaning of section 139(1)(b)(i) and that redundancy was the reason for dismissal. Thus, the Respondent has established a potentially fair reason for dismissal.

Reasonableness

58. I now turn to the question of whether the employer's actions in dismissing the Claimant for redundancy were reasonable, and the consideration of whether a reasonable employer would have dismissed the Claimant in these circumstances.

59. In relation to the procedure followed by the Respondent leading up to the dismissal, I saw no evidence that the Respondent failed to conduct a proper consultation or a fair selection process in the manner required by *Williams v Compare Maxam Ltd* [1982] IRLR 83 and *Polkey v AE Dayton Services Ltd* [1988] AC 344. The Claimant was able to participate in the consultation both through his employee representative and in individual consutlation meetings, and the Respondent made considerable effort to attempt to find alternative employment.

60. There were some shortcomings in communications with the Claimant. The Respondent caused confusion for the Claimant by mixing up the request to return to work with the redundancy process, including by the lack of clarity on the face of the 19 July letter and by the 5 August email. During the consultations the Respondent did not address the Claimant's key concern about the proposed reduction in hours and pay at the end of furlough, and why a reduction pay would be suitable for him. However, I recognise the pressure that the Respondent was under at the time and the context of the pandemic, and the changing situation in relation to the government support schemes. I do not find that on their own these shortcomings in communication reach a level such that they are outside the band of reasonable responses. Accordingly, I find that the dismissal was fair within the meaning of section 98 ERA 1996.

Redundancy payment

61. To refuse a redundancy payment on the grounds that suitable employment was offered, the employer must show both that the job offered was suitable and that the employee's refusal of it was unreasonable (see *Jones and anor v Aston Cabinet Co Ltd 1973 ICR 292)*. In this case, the offer on the date of dismissal was that from 31 October 2020 the Claimant would be guaranteed 35 hours per week, with an expectation of up to 42 hours. However, there was no guarantee that 42 hours would be paid (see *GD Systems Ltd v Woods EAT 470/91).* The Respondent was looking for suitable options for the Claimant right up until the end of his notice period and on 28 October 2008 offered the Claimant a minimum of 37 hours per week. But this was still a reduction in guaranteed pay. The Claimant's evidence was that he could not afford any reduction in his pay, and I accept his evidence on that point. The reduction in pay was significant for him. I have found already that the role at Ham Yard Hotel was suitable for the Claimant. But I find that because of the reduction in contracted hours, and therefore in guaranteed pay, the Respondent has not established that the offer was suitable in relation to the Claimant. It follows that the Claimant was not acting unreasonably in refusing the offer of alternative employment.

62. I have found that the offers made to the Claimant prior to dismissal were not suitable for him as defined by section 141 ERA 1996. This leads me to the conclusion that the Claimant was entitled to a statutory redundancy payment, in addition to the notice period he was paid.

63. The parties are invited to resolve the issues of remedy themselves. In the event that the parties cannot agree on remedy, they can write to the Tribunal to request that a remedy hearing is listed.

Employment Judge Leonard-Johnston

Date 22 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON: 22/03/2022.

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FOR EMPLOYMENT TRIBUNALS