



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Chapman

**Respondent:** G R Pook Engineering Limited

**Heard at:** Southampton (by VHS) **On:** 11 & 12 April 2022

**Before:** Employment Judge Scott

### Representation

Claimant: In Person

Respondent: Mr Pook (Director)

**JUDGMENT** having been sent to the parties on 18 May 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

### REASONS

1. By a claim form presented on 8 September 2021, the Claimant, Mr Chapman, complained of a failure to pay redundancy pay, pay in lieu of notice and holiday pay. He maintained that he was dismissed by reason of redundancy and did not resign.
2. By a response form dated 15 October 2021, the Respondent, Mr Pook of G R Pook Engineering, resisted the claim. His case was that, in essence, he was entitled to change Mr Chapman's duties in line with the employment contract to redeploy Mr Chapman at a time of down turn. That Mr Chapman's subsequent actions were taken to be a resignation.
3. Following the Respondent's letter of 12 July 2021, the Claimant lodged a claim for early conciliation with ACAS on 23 July 2021 and a certificate was issued on 1 September 2021, this Tribunal claim was lodged on 8 September 2021. It was therefore brought within time.
4. This is a claim born of the pandemic, which was an extremely difficult time for all concerned. The Claimant was furloughed for much of his final 18 months in post, with associated financial difficulties. The Respondent weathered a down turn in business with loss of trade across all three areas of his business.

## Issues

5. The issues to be determined by the Tribunal were agreed at the outset of the hearing as follows:
  - i. Could the Claimant show that he was dismissed by the Respondent rather than resigning.
  - ii. If the Claimant was dismissed, was this by reason of redundancy.
  - iii. If the Claimant was dismissed for redundancy, what is the appropriate remedy?
  - iv. If the Claimant was dismissed, what notice pay was he owed?
  - v. Whether the Claimant was owed 5 additional days holiday.
6. In the course of hearing, having heard Mr Pook's evidence relating to holiday pay, Mr Chapman withdrew his claim for holiday pay.

## Evidence

7. I heard evidence from each of the parties in person. Mr Pook provided a bundle of documents including all correspondence between the parties and a copy of the employment contract, together with a witness statement. Mr Chapman provided an email detailing his calculation of the award claimed. I have considered all these documents when reaching my decision.
8. During the hearing, it transpired that Mr Chapman had provided a bundle of documents to the Tribunal that were not before me, however he confirmed that all those documents were included in Mr Pook's bundle.

## Relevant Legal Framework

9. The law relating to dismissal in a redundancy situation is as follows:

**136Circumstances in which an employee is dismissed.**

(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if)—

  - (a) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice),
  - ...
  - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) Subsection (1)(c) does not apply if the employee terminates the contract without notice in circumstances in which he is entitled to do so by reason of a lock-out by the employer.

(3) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the obligatory period of notice the employee gives notice in writing to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire.

(4) .....

(5) Where in accordance with any enactment or rule of law—

(a) an act on the part of an employer, or

(b) an event affecting an employer (including, in the case of an individual, his death),

operates to terminate a contract under which an employee is employed by him, the act or event shall be taken for the purposes of this Part to be a termination of the contract by the employer.

10. There will be no dismissal where the Claimant is re-engaged under a new contract or his contract is renewed, before the end of his employment under a previous contract.

**138 No dismissal in cases of renewal of contract or re-engagement.**

(1) Where—

(a) an employee's contract of employment is renewed, or he is re-engaged under a new contract of employment in pursuance of an offer (whether in writing or not) made before the end of his employment under the previous contract, and

(b) the renewal or re-engagement takes effect either immediately on, or after an interval of not more than four weeks after, the end of that employment,

the employee shall not be regarded for the purposes of this Part as dismissed by his employer by reason of the ending of his employment under the previous contract.

(2) Subsection (1) does not apply if—

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

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

(ii) the other terms and conditions of his employment,

differ (wholly or in part) from the corresponding provisions of the previous contract, and

(b) during the period specified in subsection (3)—

(i) the employee (for whatever reason) terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated, or

(ii) the employer, for a reason connected with or arising out of any difference between the renewed or new contract and the previous contract, terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated.

(3) The period referred to in subsection (2)(b) is the period—

(a) beginning at the end of the employee's employment under the previous contract, and

(b) ending with—

(i) the period of four weeks beginning with the date on which the employee starts work under the renewed or new contract, or

(ii) such longer period as may be agreed in accordance with subsection

and is in this Part referred to as the "trial period".

(4) Where subsection (2) applies, for the purposes of this Part—

(a) the employee shall be regarded as dismissed on the date on which his employment under the previous contract (or, if there has been more than one trial period, the original contract) ended, and

(b) the reason for the dismissal shall be taken to be the reason for which the employee was then dismissed, or would have been dismissed had the offer (or original offer) of renewed or new employment not been made, or the reason which resulted in that offer being made.

.....

11. Where an Employee has been dismissed and is claiming a statutory redundancy payment, there is a presumption he has been dismissed by reason of redundancy unless the counter is proved as per s163 (2) ERA 1996.

**163 references to employment tribunals.**

(1) ....

(2) For the purposes of any such reference, an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.

12. A dismissed employee is only entitled to a redundancy payment if they have been dismissed wholly or mainly 'by reason of redundancy'. Redundancy is defined in the ERA 139 (1). As follows:

**139 Redundancy.**

(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.

.....

(4) Where—

(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and

(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).

.....

13. Caselaw has confirmed that the test for redundancy is based directly on the statutory wording. This test was set out in *Safeway Stores plc v Burrell* 1997 ICR 523 EAT as follows

*(i) was the employee dismissed?*

*(ii) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?*

*(iii) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?*

14. Alternative job offers are relevant in accordance with s138 ERA 1996 and s141 ERA 1996 as follows:

#### **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.
- (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.

**Findings of fact.**

11. The Claimant was employed by G R Pook Engineering as a Fabricator / Welder on 05/09/2016.
12. The Respondent is a small employer and I heard evidence from Mr Pook that all staff are expected to work flexibly and I accept that they do so.
13. In addition to duties as a Fabricator / Welder, Mr Chapman would be called upon to work in other parts of the business, such as the reconditioned engine workshop and the commercial vehicle workshop and I accept that he did this prior to being furloughed and at times during furlough.
14. At the outset of the pandemic the Claimant was furloughed alongside other staff as a result of the downturn in business.
15. On 12/07/2021, Mr Chapman was invited by Mr Pook to a meeting regarding a change in his position at the company. At that meeting Mr Chapman was offered the role of general workshop assistant. The

evidence from both parties is consistent that Mr Chapman did not accept that change at the meeting.

16. On 13/07/2021 (p1 Respondent's bundle "RB") Mr Pook sent a letter to Mr Chapman, regarding the proposed change in job and confirms a position of general workshop assistant was offered with pay of £10.50 per hour, a decrease in Mr Chapman's salary.
17. On 14/07/2021 (p2 RB) Mr Chapman responded to Mr Pook. That response was not immediately received, but Mr Pook accepts he received this letter on 20/07/2021. In that letter, Mr Chapman highlights the reduction in pay and confirms he is not interested in becoming a driver, given his role as a Welder. He confirms he is happy to remain in the role he held prior to furlough, and that if the job as a welder is no longer available, he considered he had been made redundant.
18. On 19/07/2021 (p3 RB) Mr Pook sent a chaser letter to Mr Chapman having not had his response on the 14/07/ 2021, indicating that Mr Chapman's absence was unauthorised.
19. On 23/07/2021 Mr Chapman contacted ACAS for early conciliation.
20. On 25/07/2021 (p4 RB) Mr Chapman responded to Mr Pook's letter, reiterating he is happy to return to his current role as a welder on the same terms and conditions, but if that role no longer exists then he has been made redundant.
21. On 27/07/2021 (p5 RB) Mr Pook responded to the Mr Chapman. In that letter he confirms that the 'offer of the position of General Workshop Assistant' remains available. Further, that they did not wish to make anyone redundant where they have other positions to offer employees. Mr Pook further confirms that he was prepared to increase the hourly wage to £11.00.
22. The letter goes on to set out the duties required of the general assistant and states that they are disappointed Mr Chapman did not wish to trial this new position offered to him, but that if he did not feel the position is for him, then he should send a letter given the necessary notice.
23. On 03/08/2021 (p7 RB) Mr Chapman again responded. He confirmed again, that if his current role as a welder remained open to him, he is happy to return on the same terms and conditions. He states he does not wish to give his formal notice.
24. By correspondence dated 03/08/2021 (p8 RB) (Mr Pook responded, and in this letter states that there is a position for the Claimant at the company and no terms or conditions will have changed. He confirms that he has a right to change duties at any given time, provided they have consulted him.



25. That letter also states that he takes the Claimant's email of 3 August 2021 as formal notice he wishes to leave the company. Again, in this letter the Respondent refers to his disappointment that the Claimant does not wish to trial this new position.
26. On 09/08/2021 (p9 RB) Mr Chapman wrote to the Respondent complaining about his treatment and indicating he felt pushed out of his position and asking for an opportunity to discuss the issue.
27. On 10/08/2021 (p10 RB) Mr Chapman was sent a letter inviting him to a grievance meeting, which was held on 13 August 2021.
28. Sometime prior to 01/09/2021 Mr Chapman attended the Respondent's offices to collect some of his tools that had been left at the premises whilst he was furlough.
29. On 01/09/2021 the ACAS certificate was issued.
30. On 03/09/2021 (p12 RB) Mr Pook sent Mr Chapman a letter regarding the outcome of his grievance. His grievance was not upheld.
31. By a second letter dated 03/09/2021 (p11 RB) Mr Pook informed Mr Chapman that he had taken the closure of the ACAS case to indicate Mr Chapman had resigned, and therefore that his last day of employment was 1/09/2021. That letter was sent to Mr Chapman on 07/09/2021 by email and was received the same day.
32. In evidence, Mr Chapman stated that he had never resigned and it was never his intention to do so. This was not disputed by Mr Pook and there is no evidence in the correspondence that Mr Chapman had sought to resign. In fact, the letter of 03/09/2021 from the Respondent, and the Respondent's witness statement both indicate it was the issuing of the ACAS certificate that led Mr Pook to believe the Claimant had resigned. I find that Mr Chapman did not notify the Respondent either orally or in writing that he resigned his post.
33. On 08/09/2021 Mr Chapman filed his ET1 at the Employment Tribunal.

### **Submissions**

34. At the conclusion of the evidence, each party made an oral submission.
35. Mr Pook submitted that his primary concern during the furlough period was to keep all his employees in employment. He did not wish to make anybody redundant and had therefore offered Mr Chapman a position to carry out similar duties as before.
36. In his view, Mr Chapman was less flexible than other employees and the new position would address Mr Chapman's reluctance to be a full team player. He believed that Mr Chapman aimed to be made redundant, it was

not the company's choice as Mr Pook had wanted Mr Chapman to come back and be part of the G R Engineering team.

37. Mr Chapman submitted that the general workshop assistant role was a clear job and career change. Mr Chapman wished to pursue his career as a welder / fabricator. In contrast, the general assistant role is not a career, and would be a step backwards and is therefore not a suitable alternative role for him.
38. Mr Chapman submitted that his job title was important. He has previously been happy to take on other work as needed outside the fabricator / welder role as set out in the terms and conditions of that role. However, it would hurt his future job prospects to take a general workshop role as he would be unable then to continue to work as a fabricator / welder.

### **Discussion and Conclusions**

39. The first issue I have to decide is whether Mr Chapman resigned from his employment with G R Pook Engineering or whether he was dismissed. It is for the Claimant to prove he was dismissed on the balance of probabilities.
40. It is Mr Chapman's case that he was dismissed by reason of redundancy by the letter dated 3 September 2021 (received on 7 September 2021).
41. The definition for dismissal in these circumstances is given by section 136 (1) (a) of the Employment Rights Act 1996, which states:

***136Circumstances in which an employee is dismissed.***

*(1)Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if)—*

*(a)the contract under which he is employed by the employer is terminated by the employer (whether with or without notice),*

42. The letter dated 3 September 2021 does not state that Mr Chapman is dismissed, however, I am persuaded that this letter did constitute a dismissal by the Respondent having objectively considered all the surrounding circumstances.
43. In the course of the correspondence prior to the letter of 3 September 2021 Mr Chapman had been unwaveringly clear and consistent that he did not wish to resign. I have accepted Mr Chapman's evidence that he did not state that he wished to resign, either orally or in writing.
44. It is significant that the letter of 3 September 2021 is the second occasion that Mr Pook claimed Mr Chapman had resigned and the previous

correspondence is relevant when considering whether that letter was a dismissal.

45. On 3 August 2021, Mr Pook wrote to Mr Chapman stating G R Pook would *'take your email as formal notice that you wish to leave our company'*. In fact, in his email of 3 August 2021, Mr Chapman states that *'if my current role as a welder is still there, I am more than happy to come back...'* and further, *'I would like to reiterate that I have not said in any way shape or form that I wish to hand in my formal notice'*.
46. Mr Chapman then wrote again to his employer expressing his concern he was being pushed out and raising a grievance. These are not the actions of a person wishing to resign. Mr Pook was therefore well aware that this was not Mr Chapman's intention.
47. Mr Pook sent the letter of 3 September 2021, despite Mr Chapman clearly saying on numerous occasions that he did not wish to resign. Mr Chapman had given the Respondent no reason to believe his wishes had changed.
48. In that letter Mr Pook states that they *'acknowledge that you have resigned your position with our company and your last date of employment with be the 01/09/2021'* and refers to sending his P45 to him.
49. Mr Chapman in evidence confirmed he did not respond to this letter to confirm he had not resigned, as he knew that he had never made such a claim. Instead, he initiated his claim in the employment tribunal.
50. Mr Pook contends that two actions of the Claimant indicated that he was resigning from his employment and entitled Mr Pook to infer he had resigned. The first was collecting his tools from the workshop, sometime between 3 August 2021 and 1 September 2021.
51. In his letter of 3 August 2021, Mr Pook had requested that Mr Chapman arrange a time to collect his tools. It is not disputed that the tools belonged to Mr Chapman. In evidence, Mr Chapman stated that his tools are expensive and are his livelihood and he wanted to ensure their safety. I accept this explanation for collection of his tools. I do not accept that Mr Chapman's actions in collecting his tools, following a request to do so from the Respondent, indicated his wish to resign.
52. The second action Mr Pook says shows Mr Chapman resigned, is the closure of the ACAS case and issuing of the certificate. Mr Pook was not able to explain why this action indicated to him that Mr Chapman resigned, there is nothing preventing a claimant from pursuing an Employment Tribunal claim whilst employed. In *Rai v Somerfield stores Ltd [2004] ICR 656* the Employment Appeals Tribunal rejected the proposition that an employee had communicated their resignation simply by presenting a claim for unfair dismissal to the Tribunal. By analogy then, presenting a

claim to ACAS, or the closure of that ACAS case, is not an action which entitled Mr Pook to infer that Mr Chapman had resigned.

53. I have also considered whether Mr Chapman's other actions indicate that the employment was terminated by resignation. The decision in *Zulhayir v JJ Food Service Ltd [2011] 7 WLUK 751* is authority that any purported repudiation of a contract by the employee must be accepted by an employer, such that the contract is terminated by the employer, i.e. that the employee is dismissed.

54. In fact, the situation here appears analogous to that envisioned by Rimer LJ in *Zulhayir v JJ Food Service LTD [2014] ICR D3 CA* where he stated:

*"An employer cannot unilaterally deem an employee to have resigned when he has not; and a removal of the employee from the employer's books by a process of such deeming following a notice to the employee of an intention to do so would arguably amount to a dismissal"*

55. Considering the letter of 3 September and the surrounding circumstances, I conclude that this did constitute a dismissal. In providing a deemed last date of employment and confirming his P45 was to be sent to him, it is clear that G R Pook intended the employment contract to be terminated.

56. Whilst the letter states Mr Chapman had resigned, as set out above, he plainly did not do so and there is no reasonable basis to infer that he did. G R Pook cannot unilaterally deem Mr Chapman to have resigned and accordingly I conclude that this letter constituted a dismissal by the Respondent.

57. Furthermore, I view it as entirely reasonable that Mr Chapman viewed this letter as a dismissal, and that he concluded there was nothing to be gained from further correspondence reiterating he did not wish to resign. He had already so indicated on several occasions.

58. Mr Pook confirms this letter was sent to Mr Chapman on 7 September 2021, and Mr Chapman confirms it was received the same day. I therefore find that the date of termination of Mr Chapman's employment was 7 September 2021.

### **Reason for Dismissal.**

59. In accordance with s163 (2) ERA where an employee is dismissed and is claiming a redundancy payment, there is a presumption that the Claimant was dismissed for reasons of redundancy. Accordingly, it is for Mr Pook to prove that the dismissal was not for reasons of redundancy.

60. Mr Chapman is only entitled to a redundancy payment if his dismissal is wholly or mainly by reason of redundancy. Redundancy is exhaustively defined in the ERA 1996 s139 (1)(set out in full above) as follows:

**139Redundancy.**

*(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).....*

*(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.*

61. In considering whether the statutory test is met, I have applied the test as set out in *Safeway Stores v Burrell* 1997 ICR 523 EAT as follows:

*(i)was the employee dismissed?*

*(ii)if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?*

*(iii)if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?*

62. Taking these questions in turn, I have found above that Mr Chapman was in fact dismissed, so the first limb of the test is satisfied.

63. Turning to the second question, had the requirements of Mr Pook's business for employees to carry out work of a particular kind ceased or diminished?

64. In his witness statement (paragraph 3) Mr Pook confirms that the work dynamic in his business had changed, and in evidence in chief he confirmed there was a downturn in fabrication work such that there was no longer a need for all three workshop staff.

65. Furthermore, he stated that due to the general down turn in business for the company, Mr Pook had already made one staff member redundant.

66. I am satisfied from Mr Pook's evidence that there was less fabrication work available within the business and that this is work of a particular kind. On Mr Pook's evidence I am also satisfied that the requirements for employees to do work of that particular kind (fabrication) had diminished. The second limb of the test is therefore satisfied.

67. Turning to the third limb, I consider whether the dismissal of Mr Chapman was wholly or mainly caused by that cessation or diminution.

68. Mr Pook contends that the dismissal was not as a result of redundancy but instead was a reorganisation. He was amending Mr Chapman's duties in accordance with term 2 of the Employment contract (p14 RB). The contract states that

*"The title of the job which you are employed to do is: Fabricator / Welder*

*The company may amend your duties on either a temporary or permanent basis and you will be notified of any permanent change in writing."*

69. Mr Pook contends that the company sought only to amend Mr Chapman's duties, and that there was no change in his job role. Therefore, that the reason the employment terminated was because Mr Chapman was unwilling to undertake these duties rather than due to redundancy.

70. Mr Pook's explanation is inconsistent with the written correspondence and his evidence before the Tribunal. Unfortunately, the language used in the letters sent by the Respondent was at all stages unclear. In the letter of 12 July 2021, Mr Pook confirms that they are changing Mr Chapman's job, rather than simply changing his duties. The language used by Mr Pook is important. That letter states Mr Chapman is being 'offered' a position as a general workshop assistant. If the meeting was to advise Mr Chapman of a change in his duties under his existing contract, this offer of a different position would not follow.

71. Again, in that letter Mr Pook states that the position would not affect the terms of Mr Chapman's contract of employment, however at the time of this letter, the job title and the rate of pay for this position were different to that set out in Mr Chapman's contract, so clearly the terms and conditions of employment had been affected. Mr Pook was unable to explain this contradiction.

72. The Respondent's letter of 27 July 2021 further undermines his claim that there was no alternative job offered. In this letter, Mr Pook confirms they do not wish to make anyone redundant where there are other positions they can offer employees, and that 'taking this position' would allow Mr Chapman to gain further skills. It is in this letter that Mr Pook agrees that they will continue to pay Mr Chapman at the same wage as in his current job. The wording of this letter in fact supports Mr Chapman's contention, that the 'general workshop assistant' position was alternative employment, as discussed below.

73. It is in the letter of 3 August 2021 that Mr Pook first indicates that he is attempting to change Mr Chapman's duties, rather than offering him an

alternative job. In contrast, Mr Chapman repeatedly reiterates in correspondence that he remains happy to continue in his current role under the same terms and conditions, if Mr Pook is correct and he was simply amending Mr Chapman's duties rather than changing his role or terms and conditions, Mr Pook would simply have confirmed that Mr Chapman would remain employed in his current role, but would be asked to undertake further or different duties. He did not do so.

74. Mr Pook stated the change in duties was to give more flexibility to allow Mr Chapman to undertake work in any area of the company. However, Mr Pook also confirmed that, due to the size of the business, all staff were already required to be flexible in their work, and that all staff regularly took on duties in other parts of the business. It is therefore not clear why this change would be necessary.
75. Mr Pook initially confirmed that Mr Chapman previously had been content to undertake tasks in a range of different areas of the business as needed, including general workshop tasks during the furlough period. Given that Mr Chapman's role already included that flexibility to work where needed and that he had in fact been doing so, Mr Pook's contention that the change was required because the company needed someone to cover general work rather than solely fabricating does not follow.
76. However, Mr Pook then stated in evidence that Mr Chapman was less willing than other staff members to undertake flexible tasks and for this reason, the meeting and change in job role was necessary to encourage Mr Chapman to do more of these tasks. Mr Pook wished to bring Mr Chapman back from furlough to help Mr Chapman's financial situation, but needed him to work more flexibly to do so.
77. In any event, this does not assist the Respondent in rebutting the presumption that the dismissal was due to redundancy. The parties agree that the reason Mr Pook needed Mr Chapman to work more flexibly was because there was less fabrication work, i.e., because of the redundancy situation.
78. If it were the case that the dismissal was due to Mr Chapman's refusal to undertake work required in his contract, then Mr Pook would have first needed to notify Mr Chapman of the change in his duties in writing, and then any failure to undertake that work would have been a conduct issue. The evidence before me does not support this version of events.
79. Despite Mr Pook's contradictory evidence on this point, I accept his explanation in paragraph 76 above as his motivation behind changing the role as it is broadly consistent with Mr Chapman's evidence. However, in light of the language used by Mr Pook in his letter of 27 July 2021 I do not accept that Mr Pook only sought to amend Mr Chapman's duties and that his job remained the same. I accept that Mr Chapman was being offered an alternative position rather than simply having his duties amended.

80. I therefore conclude that the third limb of the test in *Safeway Stores v Burrell* is met, that the dismissal was caused by the diminution of fabrication work.

81. Accordingly, I find that Mr Pook has not rebutted the presumption that dismissal was for Redundancy, and that the dismissal was wholly or mainly due to the diminution in fabrication work.

**Alternative job offer.**

82. Mr Pook argues in the alternative, that Mr Chapman is not entitled to a redundancy payment because he was offered a suitable alternative job in the form of the 'general workshop assistant' role.

83. In line with s138 ERA 1996, (set out above) a dismissal will not occur if the Claimant is re-employed within 4 weeks of the previous contract ending.

84. Following s141 ERA 1996, also set out above, if an employee refuses an offer of new employment, they will lose the right to a redundancy payment if the offer was of suitable employment and the refusal was unreasonable. If the role was unsuitable, or if the employee's refusal was reasonable, then they remain entitled to a redundancy payment.

85. It is common ground between the parties that Mr Chapman has not accepted an offer of employment from Mr Pook as the general workshop assistant.

86. I have considered whether the new contract offered is reasonable and suitable for the Claimant in accordance with s141 ERA 1996 and as such, whether any redundancy payment is payable given Mr Chapman's refusal of the offer.

87. The question of whether the role was suitable reasonable for Mr Chapman is very finally balanced. In considering the suitability and reasonableness of the job offer I have taken into account the following.

- a. Working hours and workplace.
  - i. I accept the working hours and workplace are identical and suitable for the Claimant.
- b. Pay and Benefits
  - i. Following correspondence between the parties, the pay and benefits were identical and therefore suitable for the Claimant.
- c. Job content and status.
  - i. Mr Chapman's evidence is that the offered job is a step down and takes him off a career path as a Welder / Fabricator. Mr Pook asserts that there is no change in status in the job as offered.



- ii. Mr Pook confirms in his evidence that Mr Chapman was employed at a junior stage of his career as a fabricator / welder and had been receiving training in that role. Mr Pook's evidence was that he was still early in this career and for this reason other employees with more experience were kept in the workplace rather than furloughed. It is clear then that the fabricator /welder position is specialised requiring several years of training. Mr Chapman stated he considered the general workshop assistant role to be an insult and a step down. I do not accept the role was offered as an insult and conclude that Mr Pook offered the role in good faith with the intention of keeping Mr Chapman in employment.
- iii. However, the contention that the new role is a step down is supported by the fact Mr Pook initially intended to pay a lower rate of pay for the role.
- iv. I conclude therefore that there is a difference in status between the two roles, and, given that Mr Chapman has been training and practicing his career as a welder / fabricator for the past 5 years, it is not unreasonable for him to refuse to accept a job outside of this specialism.

**d. Job Prospects**

- i. Mr Chapman argues that the change in job title would affect his future employability in his chosen career and a fabricator / welder. I accept, given my findings above in relation to job status, that Mr Chapman's job prospects could be affected.

88. I conclude therefore that there is a difference in status between the two roles, and, given that Mr Chapman has been training and practicing his career as a welder / fabricator for the past 5 years, it is not reasonable for him to accept a job outside of this specialism.

89. I therefore find that the dismissal of Mr Chapman was caused mainly by the cessation or diminution of the work and that Mr Chapman was dismissed by reason of redundancy. As the refusal of the alternative job offer was not unreasonable, the Claimant is owed a redundancy payment.

**Redundancy payment**

90. Turning to the question of redundancy payment, this is calculated according to a formula in the Employment Rights Act 1996 based on age, length of service and gross weekly pay. In light of the findings above, Mr Chapman was employed from 5/09/2016 to 7/09/2021 and had therefore accrued 5 years continuous service.

91. In each of those years he was over 22 and under 41 and therefore entitled to a total of 5 times a week's pay. The parties agree Mr Chapman's weekly gross pay was £440 therefore, his Redundancy payment is £2200.

**Notice Pay**

92. It is not disputed that Mr Chapman did not receive notice pay, and that notice pay would be owed if he had been dismissed.

93. According to term 14 of Mr Chapman's contract he was therefore entitled to 5 weeks payment in lieu of notice. Mr Chapman's weekly gross pay is £440 giving a total payment in lieu of notice of £2200.

Employment Judge Scott

Date: 16 September 2022

Reasons sent to the parties: 22 September 2022

FOR THE TRIBUNAL OFFICE