EMPLOYMENT TRIBUNALS

Claimant: Mr M Bojang

Respondent: Mitie Limited

Heard at: Bristol (by video and telephone) **On:** 14 October 2022

Before: Employment Judge C H O'Rourke

Representation
Claimant: in person
Respondent: Ms A Akers – counsel

RESERVED JUDGMENT

The Claimant's claim of failure to pay a redundancy payment is dismissed.

REASONS

Background and Issues

1. The Claimant was employed by the Respondent as a Retail Security Officer, for approximately six years, until the termination of his employment. Both the termination date, either 14 or 23 August 2021 and the reason for the termination, either dismissal or resignation, are in dispute. There is no dispute that until the events leading up to the termination of his employment, the Claimant worked mainly at a Sainsbury's store in Farlington, Portsmouth. It is also not in dispute that following a review of security procedures at that and other stores, it was decided that there was an excessive number of manned guarding hours and headcount and therefore a redundancy process was embarked upon and the Claimant's role was identified for redundancy.

2. It is also not in dispute that the Claimant was offered alternative roles, but declined to accept them and was not paid redundancy pay. He disputes that those roles were 'suitable alternative employment'.

3. Both the Claimant and the Respondent's witness had difficulties joining the video hearing and therefore with their and the Respondent counsel's agreement, I decided to proceed with them joining by telephone.

The Law

4. Sections 135 and 141 of the Employment Rights Act 1996 ('ERA') state:

135. The right.

(1) An employer shall pay a redundancy payment to any employee of his if the employee—

(a) is dismissed by the employer by reason of redundancy, or

(b) is …..

(2) Subsection (1) has effect subject to the following provisions of this Part (including, in particular, sections 140 to 144 ….).

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.

5. I was referred by Ms Akers to the following authorities:

   a. **Executors of JF Everest v Cox [1980] ICR 415, EAT,** which indicated that while the two matters to be judged — 'suitability' and

'reasonableness' — are questions of fact for the Tribunal, the reasonableness or unreasonableness of a refusal also depends on factors personal to the employee and is assessed subjectively from his or her point of view at the time of the refusal. Accordingly, a tribunal will fall into error if it substitutes its own view about the reasonableness of a refusal.

b. **Lincoln and Louth NHS Trust v Cowan EAT 895/99** (I could not locate a reference to the case referred to by Ms Akers, but this case sets out the same principle, namely that) a tribunal will first consider whether the alternative job offered is suitable. Only if it is will it then go on to consider whether the employee was reasonable in rejecting it. Where a suitable job offer is made, the employee would be well advised to carefully consider and respond to the offer before rejecting it. This is because the way in which an employee considers a suitable offer and responds (or does not respond) to it will be a relevant consideration in the overall assessment of reasonableness

The Facts

6. I heard evidence from the Claimant and on behalf of the Respondent from Mr Gregory Brown, the manager who conducted the redundancy process. Both representatives made submissions.

7. The Claimant's evidence was as follows:

   a. He was placed at risk of redundancy in July 2021 (all dates 2021) and had three consultation meetings with Mr Brown, who offered him alternative roles at stores in Waterlooville and Broadcut, both in the Portsmouth area. When it was suggested to him that the former store was five miles from his home, he said six and the latter, when suggested it was six, he said seven or eight miles.

   b. In cross-examination, he was referred to the record of the first consultation meeting, on 9 June [39], signed by both Mr Brown and the Claimant, on which is written '*Travel in Portsmouth cluster - Waterlooville, Broadcut maximum limits'*. He denied that he had ever agreed that he could work at either store and that these were his stated limits and said that he had already told Mr Brown he couldn't do this. When asked, therefore, why he had signed this form, with that text written in, he said that that text was not there when he signed the form and concluded, accordingly, therefore that Mr Brown must have inserted it later.

   c. He lives in Copnor, in Portsmouth and does not drive and is therefore dependent on public transport. He is married, with two children, one of whom was under the age at the time. He said that previously his hours of work had been varied, but that he routinely worked six days a week.

d. He said that as his hours of work at either of the alternative stores would be six days a week, from10am to 10pm, neither was suitable, as, while he could get there on public transport, there would be no public transport available after 10pm, to get home. Nor would he have had any family time and been able to support his wife. He therefore could not accept those offers.

e. He agreed that both roles involved the same work and pay. He denied that Mr Brown had told him that the shift pattern at Waterlooville would be fixed, Tuesday to Saturday, from 11am to 8pm (thus permitting him more time with his family and to be able to use public transport to get home). He said that '*some days you finish at 8pm, some days 10pm'*. He agreed that having two days off would have permitted him to spend more time with his family.

f. On informing Mr Brown of his rejection of the offers, on 2 August, he said that Mr Brown told him that his last shift would be on 14 August. He said he was invited to write a resignation letter and was informed that he would not be getting a redundancy payment. He refused to do this, despite being told by Mr Brown that everyone else had done so. In cross-examination, when it was suggested to him that it was he, in fact, who wished to leave on 14 August, as he had another job to go to, he reiterated that it was Mr Brown who told him that his last day would be 14 August. He agreed that he'd been told by both Mr Brown and his union rep that if he resigned he would not be entitled to a redundancy payment. He said that his union rep '*also suggested that I try a two-week trial period'* (at Waterlooville). When it was suggested to him that his union rep had so advised him, because he was resigning, without attempting the trial period and thus losing his entitlement to a redundancy payment, he said '*there is no letter of resignation'* and '*show me the letter*'.

g. It was suggested to him that he had told Mr Brown that he had a job with another employer, G4S, to start on 16 August, hence his wish to finish on 14 August. His answer to these suggestions were inconsistent, saying initially that he had '*had an interview with G4S and a job was in the pipeline'* and then '*yes'* to the repeated direct question that he told Mr Brown that he '*had a job to start on 16 August*'. In answer to the suggestion that he'd said that he '*was sick of retail'*, he denied this, saying that he preferred retail, but said that he didn't wish to have to face a '*possible future risk of redundancy'* (in any alternative role with the Respondent that he might have taken). He agreed that his new position with G4S was Monday to Friday, 9 to 5, which would permit him to spend more time with his family. He agreed that Mr Brown had encouraged him to contact G4S to ask if they would put off the start date of his employment with them, in order to permit him to do a two-week trial at Waterlooville, on the basis that if he did, he might be more likely to get a redundancy payment. He said that he did contact G4S, but, in any event, didn't want to do a trial at Waterlooville.

h. He agreed that when given notice of the redundancy of his position, it was to terminate on 23 August. On 18 August, he wrote to the Respondent stating that '…*waterlooville was not an alternative because I have issue with 2 of the managers that have moved from farlington to waterlooville 1 of them would make my marriage end if I work with her the other 1 was being a bully I don't want to name who the people are'* [46]. Mr Brown responded the same day, stating '*Why did you not raise any of the concerns that you have said below at any of your consultation meetings, you also had your Union Rep Paul Sony present at every meeting, if you didn't feel comfortable telling me or gemma then why didn't you raise it with him and then we could of discussed it as part of the process as a team*.' [45]. When it was put to the Claimant that this was the case, he said that he had previously raised this issue with Mr Brown in the first consultation meeting and when it was further suggested that that was not true, he said '*why would I lie?'* In answer to the question as to whether he had mentioned these persons' names to Mr Brown at the consultation meeting, he said he had and then when further asked as to why, therefore, he had said in his email that he didn't want to name the people (when that would seem an unnecessary precaution) he said that Mr Brown '*knew already'*.

8. Mr Brown's evidence was as follows:

a. The Claimant had told him at the first consultation that he was willing to travel to Waterlooville and Broadcut. He also said that in that meeting the Claimant had said that he wanted to leave Mitie, offering no reason and was advised to wait and review his options before making a decision.

b. Mr Brown denied that the Claimant had told him that he could not work at those stores, or that he had told him about the alleged problems with the managers (until his email of 18 August). He confirmed that he had told the Claimant that the hours of work at Waterlooville would be 11am to 8pm, Tuesday to Saturday (although, on further questioning, he agreed that he could not guarantee that those hours would always be the same, in the future).

c. He said that the Claimant rejected both roles at the second consultation meeting, on 8 July, stating that he wanted to leave on 14 August. In an effort to retain him, as he considered him a valued employee, he offered the Claimant a two-week trial period at both stores, but that the Claimant kept repeating that he wanted to go. He said that both he and the union rep warned him that he would forfeit his redundancy payment, if he resigned and asked him to think about his options.

d. At the final consultation meeting, on 2 August, the Claimant rejected the trial period, because he had found alternative employment with G4S, on better hours and the trial period clashed

with his start date in that employment. Both Mr Brown and the union rep encouraged the Claimant to attempt to delay that start date, in order that he could complete the trial period (on the basis that they considered that such a step would be more likely to result in a redundancy payment, if the trial was unsuccessful).

e. Mr Brown said that following the Claimant's rejection of the trial period, '*therefore, I took the Claimant to have effectively resigned from his employment with Mitie, his last day being 14 August 2021. I told the Claimant the same.'*

f. Mr Brown said that he was disappointed to read that the Claimant felt that he had been 'pushed' out of his employment and that he felt that he had done everything he could to retain him. He reiterated that at the first meeting the Claimant had stated that both stores were within his travel range, being only 5 and 7 miles, respectively, from his home, with good public transport links and while his current store was closer (2.6 miles), the travel time was not that dissimilar.

9. Closing Submissions. Both parties made submissions, as follows:

a. Respondent:

i. Ms Akers considered that there were two issues, firstly that the Claimant has to establish that he didn't resign with effect 14 August and, in that event that the alternative employment offered to him was not suitable.

ii. The Claimant did resign. While his effective date of termination was 21 August, his employment concluded on 14 August, at his choice, as he did not wish to work out his period of notice, as he had another job to go to. This is why he was adamant that that would be his last day. The Claimant is aware of his rights and if, as he says, he was dismissed/forced to leave, why has he not brought a claim of unfair dismissal?

iii. He was offered a trial period, but had his own reasons for wishing to leave early.

iv. It is not the case that a letter is required for resignation to be effective.

v. In the first consultation meeting, the Claimant had confirmed that both stores were within the limits of his travel range and his allegation today, which he has not previously made, despite having had the note of that meeting for some time, that he signed a 'blank sheet', is simply not credible.

vi. Nor is his belated assertion as to not wishing to work at the stores because of issues with managers there and having

informed Mr Brown of this at the first meeting credible, in light of his contradictory evidence as to having apparently named the managers to Mr Brown, at that meeting, but then, in his email of 18 August, declining to name them, with the explanation that Mr Brown already knew who they were.

vii. As to 'suitability', the jobs offered were the same, the only difference being the location. Mr Brown had considered the Claimant's desire to spend more time with his family, hence his offer of the five-day, 11am to 8pm role at Waterlooville, to and from which the Claimant would have been able to take public transport, with only marginal additional travel time. That offer was based on the hours available at that time and clearly Mr Brown was not in a position to predict the future.

viii. In respect of the 'reasonableness' of the Claimant's refusal, this was a permanent position, with his family life taken into account and he had not previously mentioned his alleged concerns with the managers at either store and of which he has offered no corroborative evidence. He could have taken the Waterlooville role and his refusal was therefore unreasonable, in the circumstances.

ix. In weighing up the evidence from either witness, it should be noted that the Claimant's evidence was inconsistent and implausible, whereas Mr Brown's was clear and straightforward, and he readily acknowledged any gaps in it.

b. <u>Claimant</u>

i. He had made Mr Brown aware of all his concerns, from the outset.

ii. The roles offered were not suitable alternative employment, due to the hours of work, in particular finishing at 10pm and being unable to take public transport. He would not have minded if he could have driven himself. Such hours would also have had a detrimental effect on his family life.

iii. He had not resigned but been told that his last day of work would be 14 August.

iv. He was not given the option of trials at any other store (other than the two named).

v. His main concern was job security and what the future might hold in terms of future redundancies, which he would not want to go through again.

vi. He had done his best to resolve this matter since he brought his claim, having written to the CEO and expecting the Respondent to take account of his good service and record.

10. Findings of Fact. I find as follows:

    a. Where there are conflicts in the evidence between the parties, I prefer the evidence of Mr Brown, as the Claimant's evidence was, on occasion, contradictory and I found his assertion, for the first time today, that he had signed a blank consultation meeting record, which Mr Brown had subsequently added to, to be deeply implausible. Nor was his account that he had told Mr Brown from the outset as to his alleged problems with the managers at the stores credible, in view of his implausible explanation for refusing to name them in his email. I don't accept either that explanation, or the allegation about the managers, for which there is no corroborative evidence.

    b. The Claimant did indicate, as recorded in the note of the first meeting that he was willing to consider travelling to both stores and I accept, on the balance of probabilities that Mr Brown did tell him that his hours at Waterlooville would be fixed (for the foreseeable future) at five days a week, from 11am to 8pm, allowing him to both use public transport and to spend more time (than he was before the redundancy process) with his family.

    c. The Claimant said that he did not wish to go through the possibility of another redundancy process and therefore sought other employment, which he was offered with G4S, at much more sociable hours (even to those being offered at Waterlooville) and which he clearly much preferred to the options offered to him by the Respondent, hence his refusal of alternative employment. It is absolutely clear, even from his own evidence that he needed to leave the Respondent's employment earlier than his termination date, in order to take up the G4S role he'd been offered and was unwilling, therefore, to work out his notice, stipulating that he had to finish by 14 August, or to consider any trial period, therefore effectively resigning as at that date. I query why else he would have said in evidence that both Mr Brown and the union rep advised him that if he resigned, he would be ineligible for a redundancy payment. I don't however simply rely on the conclusion that if he resigned, he was not therefore made redundant and thus rendered himself ineligible for a redundancy payment, but consider the issues as to suitability and reasonableness, nonetheless.

11. Conclusion on Issues.

    a. Suitability. I find that the role (particularly at Waterlooville) was suitable alternative employment, for the following reasons:

        i. It offered more 'family-friendly' hours of work than the Claimant's redundant role.

ii. He could get public transport to and from it, at only marginally greater travel times (two or three more miles on a bus, each way).

iii. Its terms were otherwise identical to those he already worked under.

b. Reasonableness of Refusal. Applying **Everest**, I'm conscious that I must not substitute my view of reasonableness for that of the Claimant's but consider the issue subjectively from his perspective. I find that the refusal was unreasonable, for the following reasons:

i. The reasons he offered for the refusal were either not genuinely held by him (the problems with the managers and the travel/family issues), or were not the real reason, which was that he had a better offer from another employer.

ii. He simply hoped that he could move to a more 'family-friendly' role and nonetheless remain eligible for a redundancy payment from the Respondent, even though he did not have another (legitimate) reason for refusing the alternative employment. He seemed to consider that the Respondent was not treating him fairly in this respect, bearing in mind his acknowledged previous good service and he therefore felt 'owed' this payment, if not legally, morally.

Conclusion

12. For these reasons, therefore, the Claimant's claim of failure to pay a redundancy payment is dismissed.

Employment Judge O'Rourke
Date: 17 October 2022

Reserved Judgment & Reasons sent to the Parties: 20 October 2022

FOR THE TRIBUNAL OFFICE