Neutral Citation Number: [2023] EAT 115

Case No: EA-2022-000591-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 31 August 2023

Before :
HIS HONOUR JUDGE JAMES TAYLER
MR DESMOND SMITH
MR STEVEN TORRANCE

- -

Between :

Mid and South Essex NHS Foundation Trust
(previously Mid Essex Hospital Services NHS Trust)

Appellant

- and –

(1) Mrs Catriona Stevenson
(2) Mrs Cathrona Leeke
(3) Mrs Sarah Stewart

Respondents

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- -

Simon Cheetham KC (instructed by Capsticks Solicitors LLP) for the **Appellant**
Raoul Downey (instructed through direct access) for the **Respondents**

Hearing date: 15 August 2023

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JUDGMENT

SUMMARY

REDUNDANCY

The Employment Tribunal did not err in law in concluding that the claimants had not "unreasonably" refused offers of "suitable employment", and so were not excluded from their entitlement to redundancy payments.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against the judgment of an Employment Tribunal sitting at East London after a hearing on 27 January 2022 via CVP before Employment Judge Burgher. The judgment was sent to the parties on 22 March 2022. The issue in the appeal is whether the Employment Tribunal erred in law in concluding that the claimants had not "unreasonably" refused offers of "suitable employment", and so were not excluded from their entitlement to redundancy payments.

The outline facts

2. The parties are referred to as the claimants and respondent as they were before the employment tribunal. The claimants were each employed in a role with the title Head of Human Resources. Their roles became redundant because of a restructure. The claimants were offered alternative employment in the role of Senior HR Lead. The claimants refused the offers. The claimants were dismissed as redundant. The respondent refused to pay redundancy payments to the claimants, contending that they had unreasonably refused offers of suitable employment. The claimants claimed unfair dismissal, breach of contract and redundancy payments. This appeal relates to the claims for redundancy payments.

The statutory provisions

3. An employee who is dismissed by reason of redundancy is generally entitled to a redundancy payment pursuant to section 135 Employment Rights Act 1996 ("**ERA**"). So far as is relevant to this appeal, section 141 ERA provides that an employee is not entitled to a redundancy payment if she unreasonably refuses an offer of suitable employment:

> 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**. [emphasis added]

4. The respondent accepted that the provisions of the contracts for the alternative role offered to the claimants differed to those of the original role. Accordingly, two questions arose under the statute: (1) was the offer "an offer of suitable employment in relation to" the claimants, and (2) if so, did the claimants "unreasonably" refuse the offer.

5. The second question is not whether it was reasonable for the employer to offer the role, or whether it would be reasonable for an employee to accept the role, but whether the particular employee "unreasonably" refused the offer. Put another way, the fact that it would have been reasonable for an employee to accept an offer of suitable employment does not necessarily mean that it was unreasonable for the particular employee to refuse it.

6. Section 141 ERA has been considered in a number of authorities that are of considerable assistance in analysing the application of the provision, but it is important that they are not seen as setting out alternative, or additional, tests to be applied, as if they formed part of the statute. The authorities offer guidance as to the application of the statutory provision, but do not replace or extend it. We shall return to the authorities relevant to the appeal after considering how it came about.

The proceedings prior to this appeal

7. The matter was first heard in the Employment Tribunal in June 2019. The claims for redundancy payments were dismissed in a judgment sent to the parties on 17 July 2019. EJ Burgher concluded that the Senior HR Lead role was suitable employment in relation to the claimants and that they had unreasonably refused the offer, so were not entitled to redundancy payments.

8. The claimants appealed. The appeal was heard by Bourne J on 14 July 2021. By a judgment handed down on 5 August 2021, Bourne J allowed the appeal, primarily on the basis that there had been insufficient analysis of the suitability of the roles, and remitted the claims to the same Employment Tribunal. At paragraph 53 Bourne J said:

> ... it is common ground that the questions of suitability and reasonableness, which are separate but connected, must be remitted to the Employment Tribunal

9. On remission, EJ Burgher again concluded, in respect of the first question, that the offer of the role of Senior HR Lead constituted an offer of suitable employment in relation to the claimants. He reached this conclusion after a detailed analysis of the roles that took up the majority of the judgment. That conclusion has not been challenged.

10. EJ Burgher reached a different conclusion to his original decision on the second question, and held that the claimants had not unreasonably refused the offers of suitable employment. The second question was dealt with more briefly than the first. EJ Burgher held:

> 45. I do not conclude that the Claimants were justified in considering that there was a loss of autonomy or status with the offer of the Senior HR Lead role. Indeed, I consider that their perceptions in this regard to be objectively groundless. However, on the evidence I do not doubt that their 'personal perception' was that there would be a loss of autonomy and status. These were matters that they clearly expressed at the time.
>
> 46. Given that they were to report to a Head of HR (albeit different grade) and they were unconvinced about the planning for the new role and its credibility in the future Group structure as no reports had been identified by that stage, the Claimants personal perception was that the role would be of reduced autonomy and status. Following *Bird* I do not conclude that their perceptions were groundless from their point of view.
>
> 47. I therefore revoke the decision in this regard and conclude that the Claimants did not unreasonably refuse suitable alternative work.

The appeal

11. The single ground of appeal is that:

> The Tribunal was in error in concluding that the Claimants did not unreasonably refuse the offer of suitable employment, because it misdirected itself that its findings on suitability were not relevant to reasonableness and failed to consider that, in consequence, that is not how the facts "ought to have appeared" to the Claimants.

12. The respondent asserts that EJ Burgher ignored key findings about the suitability of the employment in relation to the claimants when considering whether they had unreasonably refused the offer:

> (i) "whilst line management changed, the Claimants' day to day operation at their Trust would not have changed" (§10);
>
> (ii) they could previously have been allocated or directed to undertake tasks as Heads of HR (§11); the additional anticipated responsibilities indicated an increase in status, rather than any loss of status (§12); overall, "it was not reasonable to anticipate reduced levels of autonomy or status" (§15);
>
> (iii) being part of a larger group, rather than one single Trust, would also have made no substantive difference to autonomy or status (§§17, 21 et al);
>
> (iv) "whilst line management changed, the Claimants' day to day operation at their Trust would not have changed; they would still have a 'seat at the table' to discuss matters regarding their expertise with the Managing Director of the Trust and this change confirms this" (§20);

The relevant authorities

13. The respondent accepts that EJ Burgher set out the law about unreasonably refusing an offer of suitable employment correctly. The respondent asserts that the law was incorrectly applied to the facts.

14. In his skeleton argument, Mr Cheetham summarises the first question the Employment Tribunal had to answer, which is not challenged in this appeal, as follows:

> The question for an employment tribunal on "suitability" is whether the alternative job suits the particular person's skill, aptitudes and experience; no single factor is decisive, all must be considered together (Bird v Stoke-on-Trent PCT UKEAT/0074/11 per Keith J at ¶18, approving Harvey on Industrial Relations and Employment Law…

15. It is important to remember that the role must be suitable "in relation to the employee"

16. In his skeleton argument, Mr Cheetham says of the second question:

> "the question is not whether a reasonable employee would have accepted the employer's offer, but whether the particular employee, taking into account her personal circumstances, was being reasonable in refusing the offer at the time of the refusal".

17. In **Executors of J F Everest v Cox** [1980] I.C.R. 415, Phillips J held that:

> The employee's behaviour and conduct **must be judged, looking at it from her point of view**, on the basis of the **facts as they appeared, or ought reasonably to have appeared, to her** at the time the decision had to be made. [emphasis added]

18. In **Bird v Stoke-On-Trent Primary Care Trust** UKEAT/0074/11/DM Keith J held that the questions of whether employment is suitable in relation to an employee and whether an employee unreasonably refuses the offer should be considered separately, but may be interrelated:

> 17. In the light of sections 141(2) and 141(3)(b) of the Employment Rights Act 1996 , the questions for the Tribunal were whether the offers of either of the two posts constituted offers of suitable employment for Ms Bird, and whether her refusal of either of those offers was reasonable. Apart from occasional cases which have suggested otherwise – of which the decision of the Employment Appeal Tribunal in *Scotland (Lord McDonald presiding) in Tocher v General Motors Scotland Ltd* [1981] IRLR 55 at [13] is one – the law has always been that those **two questions have to be considered separately**: see, for example, the decision of the Employment Appeal Tribunal (Wood J presiding) in *Knott v Southampton and South-West Hampshire Health Authority* [1991] ICR 480 at pp 485G-486B. **But that does not mean that the two questions are completely unrelated. The more suitable the offer, the easier it may be for the employer to show that the employee's refusal of the offer was unreasonable**: see the decision of the Employment Appeal Tribunal (Judge Peter Clark presiding) in *Commission for Healthcare Audit and Inspection v Ward* (UKEAT/0579/07/JOJ) at [18]. It was for the Trust to prove the suitability of at least one of the posts for Ms Bird and the unreasonableness of her refusal of it. [emphasis added]

19. While the two questions may be interrelated, that is not necessarily the case. For example, if an employer fails to engage with an employee and properly to explain the terms of an offer of an alternative role, that might mean that the employee did not unreasonably refuse the role. In such circumstances, the fact that, on an objective analysis caried out after the event, the role was demonstrated to be suitable in relation to the employee, would be of no real relevance to the question of whether the employee unreasonably refused the role, because the employee could not have conducted that analysis when deciding whether to accept the role.

20. In **Bird,** Keith J stated that when considering whether an employee unreasonably refused an

offer of suitable employment:

> 19. The issue of reasonableness is also conveniently (and correctly) summarised in Harvey , op. cit ., para. 1552:
>
> > "The question is not whether a reasonable employee would have accepted the employer's offer, but whether that particular employee, taking into account his personal circumstances, was being reasonable in refusing the offer: did he have sound and justifiable reasons for turning down the offer?"
>
> As the Employment Appeal Tribunal (Phillips J presiding) said in *Executors of J F Everest v Cox* [1980] ICR 415 at p 418C, the question whether the employee had sound and justifiable reasons for refusing the offer has to be judged from the employee's point of view, on the basis of the facts as they appeared, or ought to have appeared, to the employee at the time the offer was refused.
>
> 20. In *Cambridge and District Co-operative Ltd v Ruse* [1993] IRLR 156 , the Employment Appeal Tribunal (Judge Hague QC presiding) said that loss of status was a factor which could make the employee's refusal of the offer reasonable. It also said at [18] that "as a matter of law, it is possible for the employee reasonably to refuse an objectively suitable offer on the ground of his personal perception of the employment offered". Indeed, that could be so even if other people think that "the personal perception" of the employee might be wholly unreasonable. That was not the case in Ruse because the industrial tribunal had merely found it possible that "he was being a little sensitive". But an employee's refusal of an otherwise suitable offer can still be said to be reasonable when he personally thinks that the post he is being offered involves a loss of status, even if that view might be groundless in the eyes of others, provided that it is not groundless from his point of view. An illustration of that was *Denton v Neepsend Ltd* [1976] IRLR 164 . A cold saw operator was offered alternative work on an abrasive cutting machine. The use of such a machine could generate a certain amount of dust, fumes and vapours, as well as some metal fragments, and the employee had something of an obsession about the possible hazards of exposure to them. His father-in-law had died as a result of chest trouble, and his own father had suffered from pneumoconiosis. Although the tribunal found that the new job was suitable for the employee, and although his fears about the danger of exposure to these hazards may have been groundless since his employers had complied with the relevant safety legislation, his refusal to work on the new machine was held at [12] to be reasonable since he "was being asked by his employers to undertake a completely different working environment in the sense that he might be exposed to fumes, vapours, dust and metal fragments to which he would not be exposed while working the cold saw …" We think that this sentence suggests that the tribunal had in effect found that the new job had not been suitable (despite its purported finding to the contrary) for this particular employer with his understandable fears given his family history. But whether that is right or not, the case supports the view that the employee's reasons for refusing the offer had only to be "sound and justifiable" from the employee's point of view, even if others might not have thought that his reasons were sound and justifiable.

The appeal

21. The respondent contends that the Employment Tribunal "misdirected itself that its findings on suitability were not relevant to reasonableness" and failed to consider how the facts "ought to have appeared" to the claimants.

22. It is important to remember that the relevant statutory test is whether the claimants "unreasonably" refused an offer of employment that was suitable in relation to them. The answer to the question of whether the alternative employment was suitable in relation to the claimants can be relevant to the question of whether it was refused unreasonably, because the "more suitable the offer, the easier it may be for the employer to show that the employee's refusal of the offer was unreasonable". It can also assist to ask how the facts "ought to have appeared" to the claimants. However, these formulations from the authorities are not the statutory test themselves, and should not be treated as such.

23. We consider that, in circumstances in which it is accepted that EJ Burgher set out the law correctly, specifically referred to how the facts "ought to have appeared" to the claimants (see paragraph 4 of his reasons) and quoted extensively from **Bird**, we should be slow to accept that he did not apply the correct legal principles to the facts that he found.

24. We will first consider the assertion that the Employment Tribunal "misdirected itself that its findings on suitability were not relevant to reasonableness". There was no explicit direction to that effect. The findings about suitability of employment that the respondent contend EJ Burgher should have taken into account, when considering whether the claimants unreasonably refused the role, were that "whilst line management changed, the Claimants' day to day operation at their Trust would not have changed", "it was not reasonable to anticipate reduced levels of autonomy or status", there would be "no substantive difference to autonomy or status" and "whilst line management changed, the Claimants' day to day operation at their Trust would not have changed". EJ Burgher stated "I do not conclude that the Claimants were justified in considering that there was a loss of autonomy or status with the offer of the Senior HR Lead role". He went on to hold "I consider that their perceptions in

this regard to be objectively groundless". We consider it is clear that EJ Burgher did take into account his findings that the role of Senior HR Lead was suitable in relation to the claimants, because it did not involve a loss of autonomy and status, when concluding that the claimants did not unreasonably refuse an offer of suitable employment, otherwise there was no reason for him to state so clearly that he concluded that the claimants' perception was "objectively groundless" in a section of the judgment in which he considered whether the claimants had refused the offer "unreasonably". We do not accept that EJ Burgher misdirected himself as the respondent asserts. Having concluded that the claimants' perception was objectively groundless EJ Burgher had to go on to consider whether, when seeing matters from their perspective, the claimants' refusal of the role was unreasonable.

25. EJ Burgher concluded that despite his determination, after his very detailed analysis, that the role was suitable in relation to the claimants, there was a sufficient basis for the claimants' perceptions of the role, for them not to have acted unreasonably in refusing it.

26. The fact that a very experienced employment judge concluded, after a detailed analysis, on remission from the EAT because his first attempt had not been sufficiently detailed, that the role of Senior HR Lead was suitable employment in relation to the claimants, is of less assistance to answering the question of whether the claimants unreasonably refused the offer than would have been the case if it were patently obvious, without the need for a detailed analysis, that the jobs were suitable for the claimants.

27. In any event, we consider it is clear that EJ Burgher did have regard to the findings of fact he had made when determining that the roles were suitable in relation to the claimants when he went on to conclude that the claimants did not "unreasonably" refuse the offer.

28. We next consider the contention that EJ Burgher failed to consider how the facts "ought to have appeared" to the claimants. EJ Burgher not only stated that "I do not doubt that their 'personal perception' was that there would be a loss of autonomy and status" but also that "they were to report to a Head of HR (albeit different grade)", "they were unconvinced about the planning for the new role and its credibility in the future Group structure" and "no reports had been identified". It was in

the light of those findings that he concluded that "the Claimants personal perception was that the role would be of reduced autonomy and status" and that "Following Bird I do not conclude that their perceptions were groundless from their point of view".

29. There is no requirement that an Employment Judge in every case specifically asks how the facts "ought to have appeared" to the claimants. Those words are guidance that assists in applying the statutory test of whether the role was unreasonably refused, but do not themselves set out a statutory test.

30. Similarly, if an employee forms an objectively incorrect perception about a role, the statutory test is not whether "their perceptions were groundless from their point of view"; it is whether the roles were refused "unreasonably". The wording relied on by EJ Burgher, that their perceptions were not "groundless from their point of view", was taken from **Bird** and assisted in analysing whether the refusal of the role was unreasonable. EJ Burgher then expressly directed himself to, and applied, the specific statutory wording in the next paragraph, in which he stated that "the Claimants did not unreasonably refuse suitable alternative work".

31. We do not consider that the respondent has established an error of law in the decision of the Employment Tribunal. The appeal is dismissed.