EMPLOYMENT TRIBUNALS

Claimant: **Mr G Stubbs**

Respondent: **Masonry Solutions (UK) Ltd**

Heard at: **Midland West** **On: 21st April 2023**

Before: **Employment Judge Steward**

Representation
Claimant: In Person
Respondent: Mr Wilford (Solicitor)

JUDGMENT

The decision of the Tribunal is:

The claim for redundancy pay and notice pay fails.

REASONS

Introduction

1. The Claimant brings claims for redundancy pay and notice period pay. He commenced employment on the 5th July 2010 in the role of estimator but was then promoted to the position of operations manager where he remained until his employment was terminated on the 18th November 2021. The Respondents temporarily ceased trade on the 24.3.2020 at the onset of the coronavirus pandemic. The Claimant remained on furlough. Over the forthcoming months the Respondents carried out a review of the business and by September 2020 the Claimant was at risk of redundancy.
2. On the 15th October 2020 the Respondents sent the Claimant an email stating/confirming formal notice of dismissal by way of redundancy with 3 months notice period but that the Claimant would remain on furlough until 31st October 2020. Thereafter he would remain on garden leave

and the employment would terminate by reason of redundancy on the 7th January 2021.

3. Thereafter the Claimant appealed and because of extensions to the furlough scheme the Claimant remained on Furlough. The appeal process was stayed by way of an email from the Respondent to the Claimant dated the 30th April 2021.
4. The Claimant remained on furlough and the government continued to extend the furlough scheme. At a further consultation meeting on the 8th September 2021 the Respondents set out the fact there had been significant changes in the business with 3 senior members of staff resigning. As a result, the role of operations manager was no longer redundant and the Claimants position was required from the 1st October 2021.
5. After further consultation and meetings (which will be discussed later in this judgment) the Claimant in a letter dated the 13th October 2021 said that he would not be returning to work. The Claimants case is simply that he was made redundant on the 15th October 2020 when he received the formal notice of redundancy. The Respondents case is quite simply that the Claimant was never made redundant. He remained employed and on furlough. He received furlough pay and the scheme was used to try and avert a redundancy. His redundancy appeal and redundancy were stayed. As a result of resignations he was offered his old job back. The Claimant disputes that this was his old job and states he is entitled to refuse the position and remained redundant as a result of the notice on the 15th October 2020.
6. I had the opportunity to read the bundle and witness statements. I heard from the Claimant and also Mr Bourne for the Respondents. I heard helpful submissions. I was also assisted by a position statement prepared by the Respondents dated the 17th March 2023. This document was a chronology and in large was agreed between the parties.

The Law

7. Section 138 of the Employment Rights Act 1996 states there is 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.

8. S.139 Employment Rights deals with 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.

9. Section 141 ERA entitled "Renewal of contract or re-engagement" provides:-

(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.*

The statute thus distinguishes between:-

2.1 an offer of suitable employment, and

2.2 if the employee unreasonably refused that offer.

The burden of proof is on the respondent as to both suitability and unreasonableness of refusal: *Kitching v Ward [1967] 2 ITR 464* & *Jones v Aston Cabinet Co Ltd [1973] ICR 292 (although Jones* identified a third head where the onus was also on the employer; namely the need for the offer to be made within the statutory period).

In *Knott v Southampton and South-West Hampshire Health Authority[1991] ICR 480* a case concerning the 1978 Act and Whitley terms (which went far further in relation to what constituted suitable alternative employment than the 1978 Act) the EAT (Wood J presiding) stressed the need to distinguish between the two; *"When applying the statutory provisions … it has always been important to distinguish issues of suitability of employment and the unreasonable refusal. Many factors may overlap, but the failure to separate the two issues has led in the past to unfavourable comment".*

10. More recent cases have however stressed that whilst suitability and reasonableness are separate issues they are not unrelated: The degree of objective suitability in the job offered may influence a tribunal's assessment of the reasonableness of the employee's decision to refuse it. Thus *"where the new job offer is overwhelmingly suitable it may be a little easier for the employer to show that a refusal by the employee is unreasonable. It is part of the balancing exercise which the Tribunal is charged to carry out"* per HHJ Peter Clark in *Commission for Healthcare Audit and Inspection v Ward UKEAT/0597/07* at [18]. That was more recently approved and applied in Bird v Stoke-on-Trent Primary Care Trust *[2011] UKEAT 0074/11.*

11. In Havenhand v Thomas Black Ltd. [1968] 1 WLR 1241, a case concerning ss. 3 (which required an offer "in writing") & 13 Redundancy Payments Act 1965 Lord Parker CJ determined "the offer must condescend to sufficient detail to bring to light and show the differences between the proposed contract and the old one." In the words of Waller J the sections drew

"…a distinction between the renewal of contracts or the re-engagement of employees where the other terms and conditions of

the employment do not differ from the corresponding provisions of the previous contract, when no offer in writing would be required: and other cases in subsection (b) where by contrast the renewal or re-engagement has to be in pursuance of an offer in writing.

In my view that contrast shows clearly that an offer in writing is designed to give to the employee notice of the different terms of his new contract of employment. Obviously a man who is terminating one employment wishes to know precisely what the different terms will be if he is re-engaged under a new contract of employment. I agree that this document could not be described as an offer in writing in pursuance of section 3 (2) (b), because whatever else it did, it did not mention either of the terms which were different from his old contract of employment."

12. Whilst the statute as then drawn was a substantively different and for instance did not provide for a trial period, in my judgment the words of Waller J still hold true today, because where the terms of the contract has changed the individual has to consider whether the offer is suitable and whether to accept the offer of the trial period. That point is reinforced by *McKindley v William Hill (Scotland) Ltd* [1985] IRLR 492 which concerned the requirements of s.84(5)(d) *Employment Protection (Consolidation) Act 1978. That provision* required the agreement to specify the terms and conditions of employment which will apply after the end of the trial period. It was argued that this meant the same as the written particulars of employment which an employer is bound to give under s.1 of the 1978 Act. The Court considered that did not necessarily follow determining *"… To be intelligible the agreement must embody important matters such as remuneration, status and job description. These are more than adequately dealt with in [the letters and enclosures]."*

13. Again in my judgment that still holds true; the employer need not give full statutory particulars but the offer must embody important matters such as remuneration, status and job description to enable the employee to consider his or her position.

14. In *Bird* at [18] the EAT approved the following quote from *Harvey on Industrial Relations and Employment Law (*the reference to that *particular employee* therein deriving from the words in sub-s. 3(b) & 4(c)) :-

"Under 'suitability' you must consider the nature of the employment offered. It is for the tribunal to make an objective assessment of the job offered (Carron Co v Robertson (1967) 2 ITR 484, Ct of Sess). It is not, however, an entirely objective test, in that the question is not whether the employment is suitable in relation to that sort of employee, but whether it is suitable in relation to that particular employee. It comes really to asking whether the job matches the person: does it suit his skills, aptitudes and experience? The whole of the job must be considered, not only the tasks to be performed, but the terms of employment, especially wages and hours, and the responsibility and status involved. The location may also be relevant, because 'commuting is not generally regarded as a joy' (Laing v Thistle Hotels Plc [2003] SLT 37, Ct of Sess, per Lord Ordinary Eassie). No single factor is decisive; all must be considered

as a package. Was it, in all the circumstances, a reasonable offer for that employer to suggest that job to that employee? And the sole criterion by which that is to be judged is 'suitability'."

15. Before continuing:-

"There has been talk in some of the cases that the new post should be "substantially" or "broadly" equivalent to the existing one (see, for example, Lord Parker CJ in Taylor v Kent County Council [1969] 2 QB 560 at p 566B and Lord Eassie in Laing), but that was doubted – correctly, we think – by Bridge J (as he then was) in Collier v Smith's Dock Co Ltd (1969) 4 ITR 338 on the basis that it puts an unwarranted gloss on the statutory language. In other words, the fact that the post which is being offered is different from the employee's existing post does not necessarily mean that it is unsuitable for that employee, but by analogy with the approach in Ward, the more different the posts are, the more difficult it may be for the employer to show that the post which is being offered is suitable for the employee."

16. As to the reasonableness of the refusal the CA in Devon Primary Care Trust v Readman *[2013] IRLR 878* confirmed that the correct test is that …

"20. … provided by Phillips J in the EAT in Everest's Executors v Cox [1980] ICR 415 at page 418:

> ***"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."***

21. The reasonableness or otherwise of the refusal depends on factors personal to the employee and is assessed subjectivity from the employee's point of view at the time of the refusal. By way of illustration of the application of the section, in Fuller v Stephanie Bowman (Sales) Ltd [1977] IRLR 87, a secretary refused to move to new offices because they were located over a sex shop. The Tribunal concluded that the claimant was being unduly sensitive and held her refusal to be unreasonable. It was however stated that the test was not the attitude of a reasonable woman, but the reasonable objections of that claimant."

17. Cox was approved in Bird which also approved (at [19]) the following quote from Harvey:

"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?"

18. Other factors that may render a decision to refuse an offer reasonable may include loss of status. For example, an employee who had been manager of a butcher's shop reasonably refused the offer of alternative work as manager of the butchery department in a large store because of his personal perception that it involved a loss of status: Cambridge and District Co-operative Society Ltd v Ruse *[1993] IRLR 156.*

19. The Respondents position statement dated the17th March 2023 is a relatively uncontroversial document. The issue of redundancy seems straightforward. Though the Claimant received an email giving him formal notice of redundancy on the 15th October 2020 its clear he never received a redundancy payment. The Claimant's appeal was stayed in the email of the 13th November 2020. It would appear that the Claimant was not made redundant. He remained on the furlough scheme which was extended throughout 2020 and 2021 by the government. He received furlough pay. It was confirmed in the email dated the 31st January 2021 that the Claimant continued to be employed by the Respondents. Its not disputed that the Claimant received another email dated the 30th April 2021 from the Respondents that further extended the furlough scheme until further notice The Claimants appeal against redundancy dismissal would continue to be stayed.

20. The Claimants monthly salary was 'topped up' by way of email on the 22nd June 2021. At page 262 in the bundle there is part of the transcript of a meeting between the Claimant and Mr Bourne dated the 4th November 2021. In the exchange the Claimant discusses pay rises and the fact he has not had a pay rise since 2017 and whether he could have a pay rise? It is a curious point to make if the Claimant saw himself as genuinely redundant? Upon considering the factual matrix in this case, provisions of S.139 of the Employment Rights Act 1996 and the fact that the Claimant did not receive any redundancy pay, his appeal was stayed and he remained on furlough etc I do not find that he had been made redundant.

21. What is clear though is S.141 of the Employment Rights Act 1996 is engaged. Under S.141(1)(a) the Respondents have made an offer before the end of his employment to re-engage him under a new contract of employment. The issue to determine is whether this was a suitable offer of employment by the Respondents and whether the Claimant has unreasonably refused the offer?

22. The Claimant was informed on the 8th September 2021 that there had been a significant change in the business with 3 senior members resigning. The role of operations manager was no longer redundant and that his position was required from 1st October 2021. This was on the same terms pay and title as previously. A further email was sent to the Claimant on the 13th September 2021 stating that there were 'no changes to the terms and conditions of the Claimants employment as operations manager.

23. A meeting took place between the Claimant and Danial Bourne on the 4th October 2021. During the meeting the Claimant stated he did not feel the offer of employment was genuine. Mr Bourne stated that the offer was "same as your previous role on the same terms reporting to myself not into Tom and we are looking at addressing some of your issues surrounding Tom and we realise there is some work that you both will need to do if you work in the same environments we are saying we are going to take you out of that environment and put you in a different environment you are not going to have to report to Tom". The Respondents indicate there is a genuine role for the Claimant Persistently throughout this interview the Respondents state that this is the same role as before.

24. The Respondents then email the Claimant on the 6th October 2021. In this email the Respondents state that the role of Operations Manager remains unchanged as do the associated terms and conditions of employment. An outline of the role was provided which outlined 12 tasks. This was discussed in evidence. The Claimant said he was familiar with 7 of these tasks. Premier WIP Sheet was a redundant task in any event so this reduced it to 11. When questioned on these tasks the Claimant accepted that this was a guide and that over the 10 years of his employment he had done all of these duties over the years.

25. The Claimant responded on the on the 8th October 2021. The majority of this letter the Claimant is pre occupied with the status of the redundancy but he does confirm at page 277 that he has undertaken some aspects of the work referred too at matters 1-4. The offer of employment is refused on various grounds at page 278 (which will be discussed in due course)

26. S.141(3) of the Employment Rights Act 1996 states

(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.*

I find that the capacity and place in which the Claimant would be employed, and the terms and conditions of his employment did not differ greatly from his previous contract. The Respondents even considered going to the length of arranging for the Claimant and Tom Rees not to come into very much contact with each other. Even if it could be argued that the provisions did differ from the previous contract the Respondents offer was still an offer of suitable employment to the Claimant. The terms and conditions were the same. The pay was the same. The role was substantially the same. There were 4 other areas that the Claimant was expected to do but he freely admitted when giving evidence that he had done some of these duties over the years. It was not a demotion. It was, on balance, virtually the same role on the same conditions and seemed a genuine offer.

27. Turning to S.141 (2) as (3) in my view is satisfied then has the Claimant unreasonably refused the offer? If he has, he is not entitled to a redundancy payment. The Claimant refused the offer in his letter dated 8th October 2021. In this letter he states there had been a irreparable breakdown of trust broken down into 3 areas. The first

was a lack of communication over the furlough period about the ongoing furlough period and even the inability to check in with him. I do not accept that there was a lack of communication over this period. Its clear from looking at the email exchanges that the Claimant was kept firmly up to date about furlough, extensions and the implications for the Claimant.

28. I do not find that the Respondents have operated in an illegal way towards the Claimant. I do not accept the Claimants contention that the Respondents have sought to coerce the Claimant back to work by scare tactics and bullying. The Respondents used the furlough scheme to keep the Claimant in his employment, reviewed business requirements and subsequently offered him back a job that was virtually the same as his old job or at least an offer of suitable employment.

29. The Claimant also raises concerns about the financial viability of the company and the fact that in the preceding year the company made a loss of £247,000. In that light the Claimant says he would be irresponsible to accept the offer. The Claimant also states that he wanted to be considered for roles in accountancy within the organisation. The Claimant also asserted that his role was a demotion. The Claimant though also states at page 280 that he had, during furlough, pursued examinations in Professional Financial Advice. He had passed 6 examinations after many months of hard work and study. He no longer wished to work in construction and wanted to pursue an alternative career in the financial services industry.

30. The Respondents replied on the 11th October 2021 expressing the fact this was not an 'offer' but that the role was available again. That the duties were not a 'considerable difference' as these were broad roles within duties previously undertaken. The duties and the seniority remain the same reporting to Mr Bourne. The Respondents assert that the refusal of the role by the Claimant was unreasonable. The Claimant would not be working out of the same office as Tom Reece.

Conclusion

31. The Claimant was not redundant pursuant to S.139 of the Employment Rights Act 1996. Though the Claimant had received a formal notice of redundancy he was never made redundant. He remained on furlough and his redundancy appeal was stayed. He never received a redundancy payment. Furlough was extended and the Claimant even discussed in a meeting the lack of a pay rise and whether he could have one.

32. As a result of resignations and a review of the business the Respondents wanted to re-engage the Claimant under a new contract of employment. S.141 of the Employment Rights Act 1996 is engaged. Section (3)(a)(i)(ii) are satisfied in my view and in the alternative Section (3)(b) is satisfied. Under S.(2) did the Claimant

unreasonably refuse the offer of employment. In my view he has. The offer was the same job on the same terms. Pay was the same. Holidays were the same. The role was not a demotion. There were some extra duties but they were duties that the Claimant had undertaken before. The reasons the Claimant gave for turning down the role were not reasonable. I do not find there was a breakdown in trust. The Respondents had communicated well with the Claimant over the furlough period. They had not acted illegally and had not

. coerced or bullied the Claimant. The fact they had been or were in financial difficulty did not stop the Claimant re engaging in his role. The company was still trading after coming out of the pandemic. Many organisations struggled over this period but survived. The Respondents were still trading and there was no suggestion in the evidence that they were currently struggling. The Claimant wanted to pursue a role in financial services. There were not sound and justifiable reasons to turn down the offer. The Claimants case for redundancy and notice pay fails.

Employment Judge Steward
21 April 2023