



EMPLOYMENT TRIBUNALS

Claimant: Mr K Young

Respondent: North Tyneside Council

HELD AT: Newcastle by CVP

ON: 08 December 2021

BEFORE: Employment Judge Moss

REPRESENTATION:

Claimant: Dr H Kay (Solicitor)

Respondent: Ms S Brewis (Counsel)

RESERVED JUDGMENT

1. The claimant is awarded a statutory redundancy payment.
2. The claimant's claim for breach of contract (for an enhanced contractual redundancy payment) is well founded and succeeds.
3. The parties are to notify the Tribunal by 15 February 2022 whether a remedy hearing is required and if so, dates of availability for a ½ day remedy hearing by CVP from 1 March 2022 to 30 June 2022.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic and all issues could be determined in a remote hearing.

REASONS

Claims and issues

1. By claim form dated 2 August 2021, the claimant brought a claim for a redundancy payment. Although not expressly stated as including a claim for breach of contract (failure to pay enhanced redundancy payment) the compensation sought as remedy was stipulated to be “£35,301, including the claimant’s statutory redundancy payment of £14,688”. It was therefore implicit, and was confirmed at the start of the hearing, that the claim encompassed both statutory and contractual entitlements to a redundancy payment.
2. It not being disputed that the claimant had been dismissed by the respondent for reason of redundancy, the matters in issue were identified as being whether the respondent had offered the claimant suitable alternative employment. If so, whether the claimant’s refusal to accept the offer was unreasonable, thereby depriving him of any right to a redundancy payment.
3. Although not raised as a specific issue by the parties, the derivation of any contractual entitlement would need to be established as a prerequisite to determining whether such entitlement had been lost.

Procedure

4. I was referred to documents within the Tribunal paper bundle, such bundle consisting of Section A: Pleadings and Employment Tribunal Correspondence A1-A37; Section B: Claimant’s Correspondence and Documents B1-B129; Section C: Respondent’s Correspondence and Documents C1-C83; Section D: Statements D1-D16. I heard evidence from the claimant on his behalf and from David Foster and Samantha Porter on behalf of the Respondent. Both parties made oral closing submissions.

Fact-findings

5. Mr Young was employed by North Tyneside Council (NTC) from 29 March 1993 until his dismissal on 7 June 2021. During that time he had transferred to Kier North Tyneside Limited (KNT) and back again to NTC, his terms and conditions being protected under the Transfer of Undertakings (Protection of Employment) Regulations 2006. At the time of his dismissal, Mr Young was employed as an Operations Manager within the respondent’s Service Delivery structure.
6. The claimant was employed on a KNT grade, his annual salary being £61,425. He was also paid a car allowance of £6750 as a contractual benefit. This had been a protected benefit on his transfer to the respondent from Kier North Tyneside Limited. The total remuneration package of £68,175 was broadly equivalent (slightly above) to Grade 17 on the NTC scale.

7. The claimant had three direct reports and he himself was accountable to the Senior Operations Manager, Alan Maskell. The claimant's role included some budget responsibility, procurement activity and oversight of the customer liaison team.
8. In January 2021 the respondent commenced a restructure process. The claimant was one of three Operations Managers at the time, all of whom reported to the Senior Operations Manager. As part of the restructure, all four posts were deleted and were replaced by three Service Delivery Manager posts. The new posts were on NTC Grade 15, the salary for which was £60,447. They would report to the Housing Property and Construction Manager, David Foster. A car allowance was not included as part of the remuneration package for the new posts.
9. Although it could not be quantified, Mr Foster thought the impact of loss of the car allowance may be mitigated to some extent for the claimant by way of tax relief and an increased mileage rate to that of an essential car user being claimable as an expense.
10. The claimant's basic salary would be protected for one year should he take up one of the SDM posts. The car allowance would not be subject to payment protection.
11. The claimant was informed of the respondent's re-design plans on 21 January 2021 at an individual consultation session with Mr Foster. During this session, Mr Foster explained that further information around the process could be found on 'Learning Pool' such as the Restructure and Redundancy Policy and Frequently Asked Questions.
12. The respondent's Restructure and Redundancy Procedure document that Mr Foster had directed the claimant to during the consultation session on 21 January 2021 is dated November 2017. The procedure applies to all Council employees and in the section on redundancy payments states "Employees made compulsory redundant will be paid as per the statutory ready reckoner which can be accessed via the link below: Payments will be based on the actual weekly wage as opposed to the statutory maximum".
13. The respondent's Redeployment Procedure that is also stated as applying to all Council employees includes "Employees who unreasonably refuse an offer of redeployment will lose any entitlement to redundancy pay". The FAQs relating to redeployment linked to redundancy state "A job would be a potentially suitable match if it is one grade up or down from your current job role, as per the Redeployment Procedure, and where your Redeployment form shows that you have the essential knowledge and skills required to do the job (the essential criteria) or that you may do so with a reasonable amount of training. It would also depend on how similar the terms and conditions are including: status, place of work, job duties, pay, hours and responsibilities".
14. Under the proposed new structure, the Service Delivery Manager (Housing Capital Investment) would have the same three direct reports as the claimant

had in his existing Operations Manager post. The job description for that role included that the post holder would manage several large teams. They would also have responsibility for a very large budget or have sole responsibility for a combination of income targets and budgets totalling a very large amount.

15. According to the senior structure chart, the claimant was not part of the senior management team in his existing role. The new SDM roles were included in the proposed new senior structure with the role of Senior Operations Manager having been removed.
16. On 22 January 2021, Mr Foster confirmed in an email that those affected were ring fenced for the new roles.
17. The claimant emailed Mr Foster on 24 January 2021 stating that he wished to apply for voluntary redundancy and he submitted his formal application on 9 February 2021.
18. Mr Foster sent a letter to the claimant on 17 February 2021 confirming that he was at risk of redundancy, together with a copy of the respondent's internal Redundancy FAQs document. The FAQs included "the Council will base your redundancy on your actual weekly salary and will not limit this to the statutory maximum".
19. The consultation closed on 23 February 2021 and Mr Foster informed the claimant that there was no longer a need for redundancy as one of those who had been ring fenced was leaving the organisation (Alan Maskell) and the three remaining members of staff could be slotted into the three new posts. The claimant was notified that his request for voluntary redundancy was not being approved.
20. The claimant had not raised any issues regarding the suitability of the Service Delivery Manager roles during the consultation period.
21. On 25 February 2021 Mr Foster emailed the claimant asking him to express a preference for one of the new Service Delivery Manager roles using terminology "now that the proposal is a slot in". The claimant responded the same day stating that he did not consider the offer of the new post to be reasonable suitable alternative employment. He gave as reasons that there was a two grade difference between the new role and his existing role whereas the respondent's FAQs on deployment stated that a job is a suitable match if it is one grade up or down from the employee's current grade – taking his car allowance into account, there would be a 12.78% cut in his current gross pay; that the new role involved a change in status as it was part of a senior management team and reported to a higher level of management and that the new role involved additional duties and responsibilities. The Service Delivery Manager (Housing and Capital Investment) role, which was the most similar to his existing role, involved leading on procurement, being responsible for the Customer Liaison Team and far greater budget responsibility.

22. Mr Foster responded on 28 February 2021 that the one grade stipulation was based on salary alone and did not take allowances into account. He said that the claimant had the relevant skills, knowledge and experience to fulfil the duties of the new role which takes on some responsibilities of the Senior Operations Manager. He referred to some differences between pay grades varying by over 12% so the role was deemed a suitable alternative in line with policies and procedures in place that had previously been developed and signed off collectively by colleagues in Legal, HR and the Trade Unions. In response to the claimant's concerns about a change of status and additional responsibility, Mr Foster stated that one reason for deletion of the Senior Operations Manager role was to eliminate duplication, that the claimant already had many of the responsibilities within his existing job role and had been operating at a senior level across the service. Having had regard to the Operations Manager job description Mr Foster stated the new post was a suitable alternative and a slot in.
23. The claimant received a letter on 1 March 2021 stating that his voluntary redundancy application could not be processed as his post was no longer at risk due to it being a proposed slot in. The claimant responded the same day by way of email to Mr Foster stating that he rejected the offer of a Service Delivery Manager post. He stated that he was declining the offer because he did not consider it to be reasonable suitable alternative employment and it was not a reasonable request at this stage of his career. Reference was made to his resignation being noted as of that day.
24. Mr Foster emailed the claimant on 3 March 2021 confirming that the respondent was not making him redundant, stating that if he was sure he wanted to resign a written resignation would be required but he might alternatively wait until he received a letter offering him the new Service Delivery Manager role before confirming he would not be accepting it and offer his resignation at that stage. No letter formally offering him the role was ever received. In terms of his understanding, the claimant did state in evidence "I am not saying David Foster had not said I was offered it, he mentioned three slot ins for three people, but I did not receive a formal offer, that's all I am saying".
25. At a meeting with Mr Foster on 17 March 2021, the claimant was informed that his employment was being terminated by reason of redundancy. By letter of the same date it was stated "You have been offered in writing a suitable alternative role within the Housing Property and Construction service which you have declined. As a result of this you will have forfeited your right to a redundancy payment".
26. The respondent did not make a redundancy payment, taking the view that the claimant had forfeited his right to such payment under the respondent's policies and procedures applicable at the time.
27. It was put to the claimant in cross examination that he had made it clear he wanted to leave and draw his pension, that his refusal to stay and work had nothing to do with the suitability of the job but his being intent on receiving

some sort of financial package. The claimant's evidence about that was that he had looked at the restructure packs and had done his homework. He did not want to be part of the senior management team. At 55 he did not want career development and had made that clear two years earlier to Mr Foster when there was an opportunity to progress at that time. He stated that he started as a joiner, worked his way up through the Council and knew he had hit his limit as Operations Manager. He always wanted someone between him and the management team and had always had that buffer for over 20 years. He stated that Alan Maskell had been the budget holder and it was Mr Maskell that would deal with the Health and Safety Executive if anything happened on one of the claimant's projects.

28. I found the claimant to be a credible witness and accept that he gave the new job role some consideration but had genuine concerns about a layer of management being removed and over the greater responsibility that would fall on his shoulders were he to take up the role.

Law

29. Part XI of the Employment Rights Act 1996 deals with redundancy payments.

30. Section 135 provides that an employer shall pay a redundancy payment to any employee of his if the employee is dismissed by the employer by reason of redundancy, although this is subject to various provisions including section 141.

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

- (1) This section applies where an offer (whether in writing or not) is made to an employee before the end of his employment –
 - (a) to renew his contract of employment, or
 - (b) to re-engage him under a new contract of employment,with renewal or re-engagement to take effect either immediately on, or after an interval of not more than four weeks after, the end of his employment.
- (2) Where subsection (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.
- (3) This subsection is satisfied where –
 - (a) the provisions of the contract as renewed, or of the new contract, as to –

- (i) the capacity and place in which the employee would be employed, and
 - (ii) the other terms and conditions of his employment,
- would not differ from the corresponding provisions of the previous contract, or
- (b) those provisions of the contract as renewed, or of the new contract, would differ from the corresponding provisions of the previous contract but the offer constitutes an offer of suitable employment in relation to the employee.

Conclusions

Contractual entitlement

32. I deal with the issue of where the claimant's contractual entitlement to a redundancy payment derives from cognisant of the fact that neither party raised it as a live issue, which I take to mean they were proceeding on the basis that the enhanced sum referred to in the ET1 was uncontroversial. The respondent's Restructure and Redundancy Policy was drawn to the attention of the claimant by Mr Foster during the individual consultation session on 21 January 2021. Mr Foster's conduct in doing so, together with the fact that the policy was published centrally on 'Learning Pool' and was accessible by the workforce generally, supports the inference that the respondent intended to be contractually bound by it. It undoubtedly meant the claimant had a reasonable expectation that any redundancy payment would be calculated in accordance with the published policy, and which contained a link to a measurable and definite method of calculation. Indeed, the respondent relies on the same document in support of its argument that the claimant's right to a redundancy payment was forfeited owing to his refusal to accept an offer of suitable alternative employment without reasonable explanation. The FAQs sent to the claimant by Mr Foster on 17 February 2021 reiterate "the Council will base your redundancy on your actual weekly salary and will not limit this to the statutory maximum". Viewed objectively, I am satisfied that an implied right to enhanced payments arose from the employer's communications and conduct, such right being eminently apt for incorporation into the claimant's employment contract.

The 'offer'

33. While there is no evidence of a formal offer of the 'Service Delivery Manager with responsibility for Housing and Capital Investment' being expressly made to the claimant using that language, I am satisfied that the communications between the parties, taken together, constituted an offer of that role having been made by the respondent and of that having been clearly understood by the claimant. This is evident from the fact that the claimant responded

refusing the 'offer'. He did not seek to resile from such position of understanding in his evidence when he stated "I am not saying David Foster had not said I was offered it, he mentioned three slot ins for three people, but I did not receive a formal offer, that's all I am saying". The claimant knew what was on offer in terms of remuneration and responsibilities and how the new role differed from his existing role because he highlighted differences as he perceived them in turning down the position. He accepted in evidence that he had done his homework and had carefully considered the matter with reference to the documentation provided by the respondent. The language used by the respondent of the role being a 'slot in' clearly conveyed the message that it was there for the claimant's taking, without any fear of competition. The claimant understood what was on offer having done his research and he firmly rejected the offer with full knowledge of its terms and conditions.

Suitability

34. I have concluded that the respondent has not discharged its burden of showing that the job offered amounted to suitable alternative employment. I reach this conclusion primarily due to the significant reduction there would be in the claimant's remuneration package. His contractual car allowance is not to be disregarded and, when that is factored in, the difference in remuneration is substantial. Even applying the respondent's own criteria of 'one grade up or down', the role of SDM would not constitute suitable alternative employment because the financial disparity is broadly equivalent to that between grades 15 and 17 on the respondent's pay scale. Although Mr Foster speculated that the impact might be mitigated by the effects of taxation and mileage expenses, there was no evidence before me of what that might mean for the claimant in real terms. While the financial implications for the claimant of accepting the role is the primary reason for finding it to be unsuitable, I have also been persuaded that the role would be unsuitable in terms of status and responsibilities. The claimant acknowledged that he does possess some of the skills required and had undertaken some of the functions but, as Senior Delivery Manager, he would become part of the senior management team and had not held that level of responsibility as Operations Manager. Although he would keep the same three direct reports, the job description for the new role meant that he could find himself managing several large teams. He would have responsibility for a very large budget or have sole responsibility for a combination of income targets and budgets totalling a very large amount. The buffer he had enjoyed for over 20 years would be lost and he would have an elevated level of responsibility that he was not seeking at this stage of his career.

Reasonableness

35. If it needs to be stated, it follows from my finding that the SDM role did not constitute suitable alternative employment that the claimant did not act unreasonably in refusing the offer. The question depends on factors personal to the employee and is to be assessed subjectively from his point of view at the time of the refusal. The fact that the other two Operations Managers

accepted the 'slot ins' does not render it unreasonable for the claimant to have rejected the offer.

36. Having found that the claimant did not unreasonably refuse the offer to re-engage him under a new contract of employment, the claimant is entitled to a statutory redundancy payment.
37. Having found that the claimant did not unreasonably refuse an offer of redeployment he did not lose his entitlement to redundancy pay under the respondent's redundancy scheme and is entitled to an enhanced contractual redundancy payment.
38. In accordance with *Ugradar v Lancashire Care NHS Foundation Trust [2019] UKEAT 0301/18* the claimant is entitled to a statutory redundancy payment in addition to the contractual redundancy payment, with only the contractual element being capped at £25,000. Payment of the sum claimed in the ET1 is therefore permissible by this judgment and I expect is capable of agreement between the parties. Should that not be the case, either party may seek a remedy hearing within 28 days of receiving this judgment.

Employment Judge Moss

Date 17 January 2022

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.