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EMPLOYMENT TRIBUNALS

Claimant: Mrs S Tricker

Respondent: Pathways Care Group

Heard at: East London Hearing Centre **On:** 27 January 2017

Before: Employment Judge Jones (sitting alone)

Representation

Claimant: In person with her son Mr Paul Taylor

Respondent: Mr D George (In house lay representative)
Miss S Rees (Area Manager)

JUDGMENT

The judgment of the Employment Tribunal is that the Claimant was not redundant on 20 April 2016. The Claimant's claim for a redundancy payment fails and is dismissed.

REASONS

Evidence

1 The Tribunal heard from the Claimant on her own behalf and for the Respondent; from Mr George, Marketing Manager and Ms Rees, Area Manager.

2 Both parties complained that the other had brought documents to today's Hearing that the other had never seen before. The Tribunal adjourned the Hearing so that both parties could look at the other party's documents. When we reconvened later in the morning both parties agreed that they could proceed.

3 The Tribunal made the following findings of fact from the evidence it heard. The Tribunal restricted itself to making findings on those matters that were relevant to the decision that it had to make.

Findings of Fact

4 The Claimant worked for the Respondent at its care home, Alexandra House, in Alresford. She was employed in 1998. The Claimant also lives in the village of Alresford and has done so for 40 years. Alexandra House was walking distance from her home.

5 The Claimant worked as a senior care worker at the home, which was a residential care home.

6 The Claimant's contract stated that her normal place of work was Alexandra House but that from time to time she may be required to work in other homes operated by the employer, as may be reasonably practicable. She was contracted to work 35 hours per week – which could include nights or weekends.

7 The Respondent provides care in care homes across the central and south eastern regions of England. It manages 10 care homes in total. Ms Sue Rees has been the Area Manager for the last 7 years and Mr George has been the Marketing manager for the past 5 years.

8 In January 2016, the Respondent took the decision to close Alexandra House. The Respondent considered that the home was no longer financially viable.

9 The Respondent began a series of consultation meetings with staff, service users and their families, the funding authority social work teams and advocates. Ms Rees was delegated the task of conducting those meetings by Colin Farebrother the Operations Director.

10 Ms Rees conducted the first meeting with staff on 20 January 2016. The Claimant and 8 other members of staff attended that meeting. There is a dispute between the parties over what Ms Rees said at that meeting. Ms Rees stated that she explained that there would be no redundancies as all staff were going to be offered jobs in other homes within the group. She recalls that she referred to Newlands, Parkdale and Stanway as homes within the Colchester region where they could be placed. The Claimant recalls that Ms Rees stated that everyone would be made redundant and that they would all be out of their jobs within 4 weeks.

11 The Claimant has also produced a statement signed by the other 8 workers – including the home manager Ms Moorcroft – all of whom attended the meeting. In that statement they confirmed that they heard Ms Rees say that they would all be made redundant. The Tribunal did not hear from anyone else who attended that meeting apart from the Claimant and Ms Rees.

12 The Tribunal considered whether staff heard the word 'redundancy' and immediately assumed that they were to be made redundant. The Claimant's evidence was that she ran out of the meeting in distress after Ms Rees made her statement. It was clearly a distressing time for all the staff. All the staff all came out of that meeting with the belief that the Respondent had decided to make them redundant and they all started looking elsewhere for work almost immediately. Most of the employees did not

remain in the Respondent's employment. There was an expectation that there would be redundancies and it is likely that that expectation came from what Ms Rees said.

13 Taking all the evidence into consideration, the Tribunal concludes that it is likely that at the time of this meeting, the Respondent considered that staff would have to be made redundant and that is what Ms Rees said at the meeting.

14 A further meeting was held on 27 January with the whole staff group where Ms Rees acknowledged that this was a difficult time for the staff and service users who had all worked or lived there for a long time. The Respondent confirmed however, that the decision had been made and the home was going to close.

15 By this time the Respondent had changed its position and decided that it had jobs for all the staff at its other homes. At this second meeting Ms Rees made it clear that there was the possibility of staff moving to positions in the Respondent's other homes. It is likely that after this meeting individual meetings were set up to discuss particular jobs and their suitability for particular members of staff.

16 There was another meeting with the staff group on 23 February at which further discussions were had about particular vacancies.

17 At one of the group meetings the Claimant became quite distressed. Although everyone was upset about the closure of the home – Ms Rees confirmed that the Claimant became so ill at one meeting that she offered to call her an ambulance and enquired whether she needed any other assistance. The Claimant refused that assistance but left the room with a colleague. Ms Rees was unable to recall which meeting that was.

18 On 23 February the Claimant met with Wendy Moorcroft, the home manager. This was an individual consultation meeting. Up until this time there had been no correspondence between the Respondent and the Claimant about the redundancy situation.

19 There is no note of this meeting. There is a note of Ms Moorcroft's report to Ms Rees after her meeting with the Claimant. In that note she confirmed that the Claimant had issues with travelling. The possibility of the Claimant getting a job with another company that was in the process of setting up a new residential home called "Butterflies" was mentioned in the meeting. Ms Moorcroft also noted that the Claimant told her that she was nervous about change. At the time, Butterflies was being set up in Alresford by Julie Webster, who was also Ms Moorcroft's sister. Ms Webster was unconnected with the Respondent.

20 Although there was no letter written to the Claimant with the job offer – it is likely that by the time of this meeting in February the Claimant had been offered the job in Newlands as it was discussed. The Respondent considered that the job was within a reasonable travelling distance and confirmed that it had sought legal advice on this. The Respondent did not have another place of business in the village of Alresford where the Claimant lived.

21 Ms Rees had a discussion with the Claimant about the matter on 3 March. This would appear from Ms Rees' note to have been an impromptu meeting as Ms Rees had attended the office to meet with the manager, Ms Moorcroft. Ms Rees' evidence was that Ms Moorcroft informed her that the Claimant was seeking a redundancy payout. The Respondent's stated position at that time was that redundancy was not an option for the Claimant as there were jobs available.

22 Ms Rees explained to the Claimant that Newlands did not at that time have a senior care worker in the staff team but that if the Claimant transferred there she would in accordance with her contract be the senior; and her pay and conditions would remain the same.

23 The Claimant was unsatisfied with that answer and remained unhappy about her job offer. She wrote to Colin Farebrother, the Respondent's Operations Director on 4 March. She complained about what Ms Rees had said about the senior position. She requested a meeting with him. The Claimant asked for a new contract which she proposed taking to her lawyers for advice. The Claimant did not state in that letter that the job at Newlands was unsuitable because of the distance from her home or because of the travel.

24 Mr Farebrother passed this letter to Mr George to deal with. Mr George met with the Claimant on 15 March.

25 At that meeting they discussed the Claimant's concerns. At that meeting the Claimant explained for the first time how the travel arrangements for the job she had been offered would not be suitable for her. She would have to wake up early to catch the bus to get to Newlands to start her shifts. She stated that she did not travel on buses. When asked whether there was a medical reason for this – she answered "no, I don't like buses".

26 She referred to the travel distance to Newlands as being an "issue" for her. She stated that it was not fair and confirmed that the way the matter had been handled up to that point had caused her distress. She also explained that being told that a senior job was being created for her at Newlands had also upset and distressed her. The Claimant was visibly upset in this meeting.

27 Mr George stressed to the Claimant at the end of that meeting that she was not being made redundant as the Respondent had a job for her.

28 Mr George wrote to the Claimant on 24 March confirming what he had said in the meeting that the Claimant had a job offer at Newlands and that it was as a senior and that this was not a job that had been created for her but was a real job. He also confirmed that the Claimant's employment would continue on the same terms.

29 Despite the statement that no redundancies would be made the Respondent did make two posts at Alexandra House redundant. The first was the manager as there was no position for a manager at any of their other homes. The second was Helen McWilliams who had issues with the care of her daughter. She approached the Respondent and provided evidence that it would not be possible for her to transfer to

Newlands given her daughter's care needs. The Respondent accepted that evidence and made her post redundant.

30 On 18 April, the Respondent wrote to the Claimant to confirm that Alexandra House was closing down and to formally inform her that she was to report to Newlands for work. The Tribunal has not seen a copy of that letter or the following letter dated 20 April but the Claimant confirmed that she received them. The 20 April letter was to offer her work at a second alternative location where the Respondent ran another care home.

31 On 20 April, the Claimant responded to Mr Farebrother by email. It is likely that her son, Paul Taylor wrote those letters for her as he usually conducted her correspondence. In the first email of that day she stated that the locations that the Respondent had offered were unreasonable. The letter stated that the Claimant suffered from anxiety and depression and that having to take the bus and walk for 2.5 miles to get to her location would cause her considerable stress and have a negative impact on her health.

32 The second email of 20 April stated that the second offer was also unreasonable. The Claimant has confirmed that it was slightly closer than Newlands. It would have required her to commute for 55 minutes each way with more than one bus and a walk. Both homes were within the Colchester area. In her emails the Claimant refused both offers of employment. She asked to be made redundant.

33 The Respondent confirmed in a letter dated 21 April that it was prepared to consider the Claimant's situation and a meeting was set up for her to provide evidence of her reasons for refusing the alternative job offers. The meeting was arranged for 12 May.

34 Unfortunately, the Claimant did not attend that meeting. She stated that she did not do so as she had not received an agenda although it is unlikely that anything else was to be discussed apart from her reasons for not being able to take up the jobs offered. A second meeting was arranged for 29 May. The Claimant attended the Respondent's offices as arranged. The meeting did not happen as she wanted her son to attend by telephone and the Respondent refused to let him as it felt that it could not verify who was on the phone. It is unfortunate that the parties could not find a way to resolve that issue as that meeting could have provided them with an opportunity to sort matters between them.

35 The Claimant left the meeting. It is unlikely that she brought any evidence with her to that meeting as she did not leave any documents with the Respondent in support of her position that the offer of work at Newlands was unsuitable because of her medical issues. It was not her case at the Hearing that she had brought any evidence with her to the meeting.

36 The Claimant pursued the possibility of a job with Julie Webster who was her line manager's sister. The Claimant was offered a post at Butterflies. She was unable to start before her DBS check was completed. Once that was done she was able to start work. The Claimant started working at Butterflies on the Saturday after Alexandra House closed. It is likely that this was on 23 April as Alexandra House closed on

20 April. The Claimant had worked with Ms Webster before as she used to manage Alexandra House. The Claimant has been employed by Ms Webster at Butterflies since she left the Respondent. It is within walking distance of the Claimant's home as Alexandra House had been previously.

37 The Claimant never resigned from the Respondent's employment.

38 In her ET1 she stated that she sent the GP's letter dated 3 June to the Respondent on 8 June as by then, the early conciliation process had proved unsuccessful. The Respondent does not recall receiving it. Although she ceased working at Alexandra House on 20 April it was not until June that she obtained a letter from the GP as requested by the Respondent in April.

39 The Tribunal finds it likely that the GP's letter was obtained for this litigation as the Claimant did not get it in time for the meeting on 29 May as she had been asked to. She got it once the conciliation process had concluded. The Claim was issued on 27 June.

40 The Respondent dispute that this document was ever sent to it. Mr Farebrother was not a witness today but during a break, after the matter was raised in the Hearing, Mr George contacted him and he sent in an email confirming that had not seen it before today. The Claimant challenged that evidence as she stated that she sent it to the Respondent on 8 June. She confirmed that it was sent to the Respondent after the ACAS Conciliation process completed. The ACAS certificate confirmed that the early conciliation notification was received on 28 May and the Certificate was issued on 2 June 2016. It is likely that the document was sent to the Respondent in June.

41 Even if that were not the case, it is likely that it was sent to Mr Farebrother in September when the Claimant's representative told the Tribunal that he had done so.

42 On 17 September, the Claimant wrote to the Tribunal and enclosed a copy of the GP's letter, copies of Google maps showing the distance of Newlands from her home as opposed to the travel to Alexandra House, a copy of her original contract; and a calculation of redundancy pay from the government's website. The letter stated that it had been copied to Pathways Care Group.

43 At that time, the matter was listed for Hearing on 13 October. On 12 October, the Respondent's new solicitors applied to have the matter postponed as they had recently been instructed. On the same day the Claimant objected to the postponement. The Claimant also confirmed that she was also attaching copies of the documents (which included the GP's letter) that had already been sent on 17 September as the Respondent stated that it had not received the attached documents.

44 The GP's letter stated that the Claimant's history of depression and anxiety has left her with a phobia of getting on public transport which leads to severe anxiety and panic attacks and that she gets around by relying on lifts from family and friends. The GP advised that if she was to have to rely on public transport for work it would result in a flare-up of her depression and anxiety symptoms and would not be recommended.

45 In her ET1 the Claimant stated that what she wanted was for the Respondent to provide her with a job in the village of Alresford where she has lived for the past 40 years and as they have not been able to do so she claimed that she was entitled to a redundancy payment.

46 The Respondent did not have any other homes in Alresford.

47 **Law**

48 The Tribunal considered that the issues it had to decide were as follows:-

48.1 Whether there was a true redundancy situation at the Respondent.

48.2 Whether the Respondent had made the Claimant a reasonable offer of suitable alternative employment.

48.3 Was it reasonable for the Claimant to refuse the offer of work at Newlands

48.4 Was the Claimant's post redundant?

48.5 If not, then what was her status?

49 Section 139(1) of the Employment Rights Act defines redundancy as occurring when an employee is dismissed and the reason for the dismissal is that:-

49.1 Her employer ceased to carry on the business for which she was employed, or

49.2 Her employer ceased to do so at the place in which she was employed; or

49.3 The fact that the requirements of that business -

49.3.1 For employees to carry out work of a particular kind, or for

49.3.2 Employees to carry out work of a particular kind in the place where she was so employed by the employer has ceased or diminished or is expected to cease or diminish.

50 An employer is under a duty to see whether there are any other suitable jobs that the employee could be offered – before making that person redundant.

51 If suitable alternative employment is offered and the employee refuses it before giving it a trial or the employee unreasonably refuses to accept it – that person is not redundant and will lose their right to a redundancy payment. Such an employee can be treated as having resigned and no longer employed.

52 If the Respondent fails to offer suitable alternative employment, then the employee is either redundant or continues to be employed.

53 Where an employee refuses alternative employment the first issue for the tribunal is to decide whether there was a proper offer of further employment. If there was no proper offer, then the employee will be redundant.

54 If there is an offer, then it must have been made before the end of the previous employment in accordance with section 141 of the Employment Rights Act 1996. The tribunal has also to consider whether the terms offered differed in any respects from the previous terms of employment – whether as to capacity, place of employment or any other terms and conditions of employment. If not, then the only issue is whether the employee was reasonable in refusing the offer. If he was reasonable in doing so, he retains his right to a redundancy payment. If he was not reasonable in refusing the offer then he loses it.

55 Where, as in this case, the employee refuses further employment on different terms i.e. at a different location – there may be two issues: firstly, whether the employment offered was suitable and the secondly whether in the circumstances it was reasonable for the employee to refuse it. In the case of *Knott v Southampton and South-West Hampshire Health Authority* [1991] ICR 480 the EAT ruled that the tribunal had to distinguish these two issues and consider them separately and that a failure to do so could lead to unfavourable comment.

56 When considering suitability, the tribunal is to consider whether, on an objective assessment, the job offered matched the employee or was a reasonable offer to make in the circumstances. The next issue of reasonableness of refusal can for example, arise where the employee agrees that the job itself is fine but that he has other good reasons such as family commitments that would lead him to turn it down. The law is that there may be some overlap between the two issues.

57 Under suitability, the tribunal has to consider the nature of the employment offered and objectively assess whether it was suitable to the particular employee. Suitability includes consideration of whether the job matches her skills and experience. Also, whether the tasks to be completed, the hours, pay, the responsibility and status involved; are all suitable to this particular employee. The travel involved and the location are also relevant to the question of suitability. (*Laing v Thistle Hotels plc* 2003 SLT 37 Court of Sessions) *Harvey* states that the whole of the job must be considered by the tribunal in assessing suitability. No single factor is decisive and all must be considered as a package. The question for the tribunal is whether, in all the circumstances, it was a reasonable offer for that employer to make to that employee. The new job does not need to be substantially or broadly equivalent to the existing one. That means that even if the new job is different to the employee's existing job it does not mean that it is unsuitable for her.

58 Where the tribunal decides that the new job was suitable for the employee then the next issue is whether it was reasonable to refuse it. This issue may arise where the job offered was on the same terms as the existing job and so the issue of suitability does not arise and the only issue is whether it was reasonable to refuse it.

59 *Harvey* states that the question here is not whether a reasonable employee would have accepted the employer's offer but whether this particular employee, taking into account his personal circumstances, was being reasonable in refusing the offer.

Did this employee have sound and justifiable reasons for turning down the offer? The EAT in *Bird v Stoke-on-Trent PCT* approved that as an accurate statement of the law

60 In the case of *Hudson v George Harrison Ltd* [2003] All ER (D) 381 the EAT stated that, in a similar case to this one, the tribunal had erred in focusing entirely on the time taken to travel to work. The tribunal needed to consider the employee's personal circumstances. Her behaviour and conduct had to be judged, looking at it from her point of view, on the basis of the facts as they appeared, or ought to be reasonable to have appeared, at the time the decision had to be made.

61 The EAT also stated in *Bird* that it was important that a tribunal must not substitute its own view about the reasonableness of the decision for refusal, but must consider whether someone in the employee's particular circumstances could reasonably have taken the view of the alternative post that she did.

62 The courts have also held that it was a relevant factor that the employee had taken the precaution of arranging another job with a different employer but it was not conclusive in favour of the reasonableness of the refusal.

63 It is for the employer to show both that the employment offered was suitable for the employee and that her refusal was unreasonable.

64 Also, *Harvey* states that it is immaterial that the employee had reasonable grounds for refusing if s/he in fact relied on other, unreasonable grounds.

Applying law to facts

65 It is this Tribunal's judgment that there was a true redundancy situation at Alexandra House. The Respondent ceased to carry on its business at this venue.

66 That means that as of 20 April 2016 the members of staff who were still employed at Alexandra House were potentially redundant.

67 Although the Respondent's position was that no redundancies would be paid – it did make two people redundant.

68 The Respondent were therefore open to making staff redundant.

69 The question for the Tribunal was whether the offer of work at Newlands and the other venue were suitable offers at the time.

70 At the time the Claimant objected for more than one reason: clearly after working at this venue for 17 years she was not in a hurry to leave and it would have been quite difficult to do so.

71 The Claimant objected to the offer because she wanted a new contract because her place of work was no longer going to be Alexandra House. Her letter of 4 March makes no mention of the venue being unsuitable.

72 The Respondent knew that she was in talks with the owner of Butterflies and there was a concern that she wanted to be made redundant before moving on.

73 In this Tribunal's judgment – the Respondent were under a duty to offer her alternative work that suited her skills and abilities and was within a reasonable travelling distance. It is this Tribunal's judgment that the job that the Claimant was offered at Newlands was the same post as she had previously occupied at Alexandra House. Also, it was on the same terms and conditions in relation to pay, hours and status. The Respondent offered the Claimant another job in the Colchester area which was within reasonable travelling distance from her home. It is this Tribunal's judgment that the offer of the job at Newlands was suitable alternative employment.

74 If she had taken up the job at Newlands – it would not have been a breach of contract but would instead have been in accordance with it and would have prevented her from becoming redundant.

75 The Claimant began to seek employment before the end date of her employment with the Respondent. That is not unusual and it is likely that everyone else did so – apart from the two members of staff that stayed with the Respondent.

76 The Claimant objected because she did not want to travel to the new homes where the Respondent had offered her jobs.

77 The Respondent is under a duty to offer any position that it had that was suitable. The Claimant did not say at the time and has not said to the Tribunal today that any of the other 7 homes that the Respondent ran was nearer or more suitable for her than Newlands was.

78 The Claimant did not refer to medical reasons for her not being able to take up the job at Newlands until 20 April, her last day of work at Alexandra House. The Respondent was prepared to consider this and asked her for medical evidence to support her case that being transferred to Newlands would be detrimental to her health but that was not forthcoming until the Claimant was contemplating taking the matter to a Tribunal.

79 In contrast, it is likely that Ms McWilliams presented the Respondent with evidence to support her case that her personal circumstances as it related to the care of her daughter meant that she could not transfer. As the Respondent were reluctant to make anyone redundant it is unlikely that they did so for her without evidence.

80 The offer of work at Newlands was appropriate as the Respondent did not have medical evidence to support the Claimant's contention that it was not. The Claimant had initially denied that she had any medical reasons for not wanting to travel to Newlands.

81 The Claimant submitted that she was advised that she did not need to provide medical evidence. However, it is this Tribunal's judgment that in these particular circumstances, where the Respondent had offered to her what was a suitable vacancy in terms of location, nature of the job, wages and hours – that it would have been

appropriate for her to have given them any evidence she had to support her contention that it was not suitable for her.

82 This is even more so when the Claimant had also insisted that she be given a new contract before agreeing to work at Newlands and queried whether there was a real senior position at Newlands. There would have been some confusion over her reasons for refusing the role and it would have assisted in clarifying her position and in making it clear to the Respondent why their offer was not reasonable.

83 The Claimant failed to give the Respondent the information necessary to show that the offer of work at Newlands was unsuitable for her. In those circumstances, her refusal of the job was unreasonable. She had not given the Respondent the information it needed. She did not provide that information until she had decided to take action against the Respondent in this tribunal. When the GP letter dated 3 June was sent to the Respondent it was part of her case papers.

84 The Claimant found another job before Alexandra House closed and it is likely that she decided that she no longer wanted to work for the Respondent. The delay in her start date was due to a delay in her DBS check being produced and not because she was waiting for the Respondent to consider her medical evidence. The Claimant started at Butterflies a few days after Alexandra house closed. There is no further correspondence between the parties and she did not chase them.

85 In the circumstances, it is this Tribunal's judgment that at the time it was made, the offer of work at Newlands was a reasonable offer of suitable alternative employment. The Claimant's refusal was unreasonable in the circumstances where she had not given the Respondent evidence to support her contention that she could not travel on public transport and that she had medical reasons for refusing the job. She needed to do so because this was one of a variety of reasons she had given for refusing the job. The Claimant was not redundant. The Respondent had every intention of continuing to employ her. The Claimant chose to work elsewhere.

86 The claim failed and is dismissed.

87 The Tribunal apologises for the delay in the promulgation of this judgment and reasons. The oral judgment and reasons were given in open court on 27 January 2017.

Employment Judge Jones

28 April 2017