**On a redundancy, when is it reasonable for the employee to refuse an offer of suitable alternative employment?**

This Court of Appeal case looks at how far an employee can say an offer of alternative employment is not suitable or reasonable. *Published: 24.09.13*

***Devon Primary Care Trust v Readman | Court of Appeal | 2013***

**Background**

Under the Employment Rights Act 1996, a potentially redundant employee who unreasonably refuses an offer of suitable alternative employment, may lose their entitlement to a statutory redundancy payment from his or her employer.

The case law in this area makes it clear, however, that an employment tribunal must apply an objective test when it is assessing the suitability of any alternative employment offered by an employer. The case law also makes it clear that the employment tribunal must apply a subjective test when it is assessing the reasonableness of the employee’s refusal to accept the offer of alternative employment.  The employment tribunal has to consider whether or not the employee had sound and justifiable reasons for turning down the offer.

If an employee reasonably refuses an offer of alternative employment, or the alternative employment is not suitable, then the employee is entitled to a statutory redundancy payment when he or she is made redundant.

The Court of Appeal in this case had to decide whether or not an employee’s refusal to accept suitable alternative employment was reasonable.

**The facts**

Mrs Readman had been employed as a nurse by Devon Primary Care Trust (‘the Trust’) and its predecessors since 1976.  In 1985 Mrs Readman began community nursing.  Following a number of promotions Mrs Readman became a Community Modern Matron.  In this position she was responsible for running community and district nursing in her area.  The role was classed as a band 8A professional lead role.  In this role Mrs Readman managed approximately 120 staff and she had an office at Teignmouth Hospital.

Following an amalgamation of services Mrs Readman was told in November 2007 that she was at risk of redundancy.  Mrs Readman applied for a band 8A lead role in the new structure but she was unsuccessful.

As a result, the Trust offered Mrs Readman three options.  It said she could take up one of the following position:

* Nurse Team Manager (Community) Teignmouth;
* Nurse Team Manager (Community) in any of a number of locations; or
* Modern Matron at Teignmouth Hospital.

The first two options involved positions at a lower grade (band 7).  This meant a loss of status, a loss of professional lead responsibilities and some financial loss.

The third option was a band 8A role but, instead of undertaking duties as a community matron, Mrs Readman would be required to undertake duties as a matron in a small hospital.  Mrs Readman already knew the hospital well because she had an office there in her role as Community Modern Matron.

Mrs Readman rejected the third option. Instead she accepted a Nurse Team Manager (Community) position on a trial period.  Mrs Readman had been contemplating emigrating to Canada.  She received an offer of a job in Canada and consequently terminated her trial period and moved to Canada.

Mrs Readman was entitled to a substantially enhanced redundancy payment which the Trust refused to pay her.  It said she had unreasonably refused an offer of suitable alternative employment.

The Trust’s argument was that the options given to Mrs Readman were offers of suitable alternative employment which Mrs Readman had unreasonably refused. Mrs Readman issued a claim in the employment tribunal for her unpaid redundancy pay.

**The Employment Tribunal’s decision**

The employment tribunal found that the two band 7 positions were not suitable alternative employment.

However, the employment tribunal found that the position of Modern Matron in Teignmouth Hospital was suitable alternative employment. It said that Mrs Readman was familiar with the hospital because she already had an office there.  As a result she knew many of the staff, the GPs, the procedures and the layout of the hospital.  It accepted that she would be supervising the care of patients in a hospital rather than in their homes but it thought her skill set was transferable.

The tribunal then turned to Mrs Readman’s refusal of the position.  It found that her decision had been made against the background of her desire to emigrate to Canada and her desire to take advantage of her redundancy rights and benefits.  On that basis it held that she had unreasonably refused an offer of alternative employment.

Mrs Readman appealed to the Employment Appeal Tribunal (‘EAT’).

**The EAT’s decision**

The EAT found that Mrs Readman’s refusal to accept the position of Modern Matron in Teignmouth Hospital was not unreasonable.  It went on to say her decision to refuse the position for ‘the reasons she gave and viewed from her point of view was within the band of reasonable responses which were open to her.’

The Trust appealed to the Court of Appeal.

**The Court of Appeal’s decision**

The Court of Appeal held that the case should be remitted to the employment tribunal for it to determine whether or not Mrs Readman’s refusal of the position of Modern Matron at Teignmouth Hospital was unreasonable. Factors for the employment tribunal to look at will include the fact that Mrs Readman had spent 30 years working in the community and not a hospital; and how far did Mrs Readman’s decision to move to Canada influence her opinion of the offer of alternative employment – was she too keen to refuse the job offer so that she would be paid her enhanced redundancy payment before moving to Canada?

It agreed that the tribunal had applied the correct test when it said: ‘The reasonableness or otherwise of the refusal depends on factors personal to the employee and is assessed subjectivity (‘sic’) from the employee’s point of view at the time of the refusal.’  However, it went on to say that the tribunal had applied the test wrongly when it had not considered in any detail Mrs Readman’s reasons for refusing the offer.

The Court of Appeal then went on to find that the EAT’s reference to the ‘reasonable responses test’ had been misplaced.  The proper test is to consider the particular employee in the particular situation.  There is no justification for importing a reasonable response test.

**In practice**

In practice this situation does not come up too often.  However, highlighting to an employee that they may lose their redundancy payment if they unreasonably refuse an offer of alternative employment is a useful tactic.  It can be used during a restructuring programme to encourage an employee to take up an alternative position rather than being made redundant.  It is a particularly important tool in companies where employees have enhanced redundancy payment schemes or where a large number of employees have long service.

Any employer that is considering a large scale restructuring or redundancy programme should carefully consider the process it intends to follow.   During such a process an employer cannot force an ‘at risk’ employee to take up alternative employment if it is not suitable rather than being made redundant.  Therefore, if an employer does not want to ‘lose’ one or more employees then it should avoid putting them at risk or, alternatively, make it very attractive for them to stay.  We can help and advise on the best process to follow in this type of situation.