THE INDUSTRIAL TRIBUNALS

CASE REF: 1081/21

CLAIMANT: **Darren Campbell**

RESPONDENT: **Martin Contracts (NI) Ltd**

JUDGMENT

1. The Tribunal unanimously finds that the claimant was dismissed by the respondent by reason of redundancy.

2. The respondent is ordered to pay to the claimant the sum of £5040.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Browne**

Members: **Mr M McKeown**
Mr A Kerr

APPEARANCES:

The claimant attended and represented himself.

The respondent was represented by Mr G Cumiskey of Peninsula.

ISSUES AND EVIDENCE

1. The claimant's claim is for the payment of £5040, being the amount to which he claims he is entitled on foot of being dismissed by the respondent by reason of redundancy.

2. The respondent resists his claim that he was dismissed, stating that any potential redundancy situation was remedied by reason of the respondent identifying a suitable post for him, which the respondent claims he unreasonably refused to accept.

3. The claimant was employed by the respondent in its business, comprising mechanical, electrical and building contracts, from April 2011 until 28 October 2020. He worked for the respondent as a quantity surveyor, pricing its tenders for contracts in construction work.

4. The start of lockdown in March 2020 in response to the Covid-19 pandemic meant that the respondent was advised to place all of its staff on furlough, effective from 23 March 2020.The claimant remained on furlough until he left the respondent's employment on 28 October 2020.

5. The resulting loss of trade for the respondent in its business meant that in June 2020, it identified a real risk that it might need to lay off staff, or even cease trading altogether.

6. The respondent therefore retained the services of an employment consultant in June 2020. On 17 June 2020, the respondent's company secretary, Mrs Donna Martin, the wife of the managing director, Mr Seamus Martin, emailed the claimant, requesting that he attend a meeting with both of them the following day.

7. At that meeting, the claimant was informed by Mr and Mrs Martin that his role was at risk of redundancy, and that a redundancy consultation was therefore under way.

8. On 24 June 2020, Donna Martin sent an "at risk" letter to the claimant, stating that, due to the downturn in work, the work that he carried out had reduced totally and that future orders were unlikely, so the respondent would be unable to sustain his role.

9. On 26 June, there was a consultation meeting between the claimant and the Martins. Mr Martin informed the claimant that, whilst trying to avoid the claimant's redundancy, one of Mr Martin's contacts might have work for the claimant in London. Mrs Martin also asked the claimant if he had any ideas as to how to avoid redundancy, but he had none.

10. On 7 July 2020, another at-risk letter was emailed to the claimant, and a second consultation meeting took place on 8 July 2020. Again, the claimant was asked about ideas to for contracts, but again, he had none.

11. The respondent during this time had been submitting tenders for contracts, but nothing definite was in place. The respondent asked the claimant to write up a company profile to submit when spreading the net of enquiry to tender for contracts in London.

12. On 20 August 2020, the third and final consultation was held. The claimant was informed that there was very little change since the last meeting, in that there remained no alternative to redundancy.

13. On 26 August 2020, the claimant was informed by letter contained in an email from Mrs Martin on behalf of the respondent that his redundancy was confirmed. That email also included a breakdown of his redundancy financial entitlement figures.

14. The email also informed the claimant that he had "… the right to take reasonable time off to look for alternative employment, attend job interviews or arrange training". The letter also stated that the respondent would "… continue in our efforts to locate suitable employment for you within the company".

15. The letter concluded by stating “I am sorry that your employment with us has ended. I would like to take this opportunity of thanking you for your contribution and service with the company and wish you well for the future”. The letter also stated that the claimant was entitled to nine weeks’ notice, which he was required to work. His last day of employment was therefore set in the letter as 28 October 2020.

16. On Tuesday 1 September 2020, a meeting was arranged between the Martins and the claimant for the following day. Whilst the Martins originally suggested the early morning, they agreed to the claimant’s request for a slightly later time. In fact, the claimant had arranged a job interview with a new potential employer in Belfast, arranged by a recruitment firm on his behalf. The claimant did not wish to disclose to the respondent that this was the reason for seeking a later time for their meeting.

17. At the meeting on 2 September, the claimant disclosed that potential alternative work in London and Dublin had been identified for him by a recruitment agency, but that, due to having a young family, he was unwilling to be absent from home.

18. It was noted by the tribunal that the reception by the respondent to this information was somewhat frosty. Mr Martin asked the claimant what would happen when the respondent secured a job contract, the claimant indicated that, if he was offered a job, he would accept it. Mr Martin then asked the claimant what was the point of him (Mr Martin) looking for work, and that he had been “doing your job, contacting people to try and get work to price any job, any time we asked you any ideas of getting work you always replied no, I don’t know”. The claimant did not respond to Mr Martin’s assertions.

19. On Friday 4 September 2020, the claimant was offered the job for which he had been interviewed on 2 September, with his start date to be confirmed. He accepted the offer on the same date. There was email evidence which confirmed both his date of interview; his offer of appointment, and his acceptance. He did not inform the respondent until Monday 7 September 2020.

20. On Monday 7 September at 2.56 pm, the claimant received an email from the respondent, requiring him to work two days that week under flexible furlough. He replied promptly, asking for clarification of the days he was required to attend, as one of the dates in the letter was incorrect. That clarification arrived by email at 2.56 pm, stating that the respondent required the claimant “to complete some work while on your notice period [Tuesday 8 and Wednesday 11 [sic] September 2020] …… We are doing everything we possibly can to ensure we are able to survive the challenges we are facing.”

21. That letter also specified that the claimant’s return to work on those two days would be paid at the reduced furlough rate, in response to which the claimant replied at 4.32 pm, pointing out that, as he was working redundancy notice and was not therefore on furlough, his pay should have been at full rate.

22. At 4.50 pm on the same day, the claimant sent an email to the respondent, stating: “Following receipt of your letter of 26 August 2020 confirming that my employment with Martin Contracts was to be terminated by reason of redundancy I can confirm that I have been offered alternative employment with another company. Should I

need to agree an alteration to the end date ... 28 October 2020 then I will be in touch. … I would like to thank both you and Seamus for your employment over the last few years."

23. At 5.47 pm, the respondent replied, stating "I want to confirm that we had anticipated tomorrow morning to inform you that at the moment it appears that your position is no longer at risk of redundancy. This is because the company has now received an increase of work which will help retain the role going forward. Although I wish to give you my best assurances at this time, I do feel it is only fair to add that outside of this present period of consultation, this letter cannot be taken as a permanent guarantee of your position. However, as far as it is reasonably possible to foresee, you have no current cause for concern."

24. The letter went on to confirm that the claimant was expected to attend work as per his normal weekly work schedule from the following day, 8 September 2020.

25. There was no reference whatever in that letter to the contents of the claimant's earlier letter or its contents. The respondent claimed at the tribunal hearing that the claimant had not specified in his letter that he had accepted the offer. The claimant asserted in evidence that his earlier letter had made it very clear that he was leaving to take up another job, and had thanked the respondent for his employment.

26. There was no reference in the respondent's letter to seeking any clarification as to what the claimant was actually intending to do about the job offer. Nor was there any apparent reason for the respondent sending that later letter, other than as a direct rebuttal to the claimant's earlier one, the meaning of which the respondent claimed at the hearing not to have been clear.

27. At 7.27 pm on the same date, the claimant replied by email: "As per my last email I have secured employment elsewhere and as such I would be unable to accept any potential withdrawal of the agreed redundancy". There was no response by the respondent to that email.

28. The claimant attended work as required on Tuesday 8 and Wednesday 9 September 2020, but no further dates were arranged for him to attend on flexible furlough, notwithstanding that the respondent on 7 September had informed him that he should attend as normal from 8 September.

29. On 15 September 2020, the respondent sent an email letter to the claimant, referring to "your resignation email of 7 September", and purported to accept it. The claimant replied on 16 September 2020, refuting that he had resigned, and asserting that his redundancy notice remained valid. He also rejected the offer to return to work, "on the reasonable grounds that I have secured suitable employment elsewhere".

30. The respondent at the hearing argued that the claimant had unreasonably refused its offer to reinstate him to his role, because business had improved to the point where his job was secure again.

31. The respondent in its initial grounds of resistance argued that it on 4 September 2020 "received news that it had new jobs to price". That development was not raised by the respondent in the emails to the claimant on 7 September 2020, which offered him only two days' work on flexible furlough, to be paid at the furlough rate.

32. The respondent in evidence produced a sheet of potential and completed contracts. The Tribunal noted that many of those contracts were of very modest value, and that other contracts were largely confined to tenders submitted but not yet confirmed as being awarded to the respondent.

33. The respondent also argued that the claimant had unreasonably delayed informing the respondent that he had secured new employment.

34. It further submitted in its initial resistance document that the claimant had requested nine weeks' notice from first being informed on 18 June 2020 that his job was at risk. That argument appeared to be factually flawed in that the respondent's later evidence to the Tribunal was that the claimant had asked Mrs Martin if the respondent wished to give him that period of notice at that time, so that it could continue to be able to collect furlough payments and not forfeit that money. The respondent's evidence was that Mrs Martin replied that she wished to take [professional] advice as to the proper procedure.

THE RELEVANT LAW

35. The relevant provisions of the Employment Rights (Northern Ireland) Order are contained in:

> **"The right**
>
> **170.**—(1) An employer shall pay a redundancy payment to any employee of his if the employee—
>
> (a) is dismissed by the employer by reason of redundancy, or
>
> (b) is eligible for a redundancy payment by reason of being laid off or kept on short-time.
>
> …
>
> **Circumstances in which an employee is dismissed**
>
> **171.**—(1) Subject to the provisions of this Article and Articles 172 and 173, for the purposes of this Part an employee is dismissed by his employer if (and only if)—
>
> (a) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice)
>
> …

No dismissal in cases of renewal of contract or re-engagement

173.—(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.

…

Redundancy

174.—(1) For the purposes of this Order 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.

…

Renewal of contract or re-engagement

176.—(1) This Article 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 paragraph (3) is satisfied, the employee is not entitled to a redundancy payment if he unreasonably refuses the offer.

(3) This paragraph 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."

FINDINGS AND CONCLUSIONS

36. The Tribunal unanimously concluded from the uncontested evidence on that aspect that the claimant was dismissed by the respondent on 26 August for the reason of redundancy, mainly attributable to the fact that the work of a particular kind which he was employed to carry out had either ceased or diminished or was expected to do so.

37. The wording of the letter was unequivocal, and it was accompanied by a written calculation of the relevant entitlement to redundancy payment, as well as a finish date of 28 October, and concluded with the good wishes by the respondent for his future.

38. It therefore was unsurprising that the claimant would seek new employment, before his employment with the respondent ended. Indeed, the Tribunal considered that the only surprise would have been if the claimant had not done so. It was in fact made clear to him that he would be facilitated by the respondent in pursuit of new employment.

39. The Tribunal found that the respondent was well aware of the fact of, and the reason for, the claimant seeking a new job. The claimant had made it clear to the respondent at their meeting on 2 September 2020 that he was doing so, and in fact discussed reasons for not accepting potential employment in London or in Dublin. That same discussion included criticism of the claimant by Mr Martin, as to spending his time pursuing work, which might secure the claimant's employment with the respondent.

40. It was of note that at no stage during that meeting did the respondent seek to change the claimant's mind about leaving by any allusion to its later position that the business was back in a position where there was a reasonable prospect of not needing to make him redundant.

41. That absence of mention of the revived prospects of the claimant's job no longer being at risk was repeated by the respondent's email letter of 7 September 2020, requiring him to attend for two days that same week.

42. The Tribunal found that the claimant's 4.50 pm email of 7 September was abundantly clear that the claimant had been offered another job. The Tribunal found that it further was sufficiently clear that the claimant was going to accept it, and that the only variable was his actual date of departure within his notice period, as set by the respondent in its letter to him of 26 August 2020.

43. The Tribunal was satisfied as to the clarity of the claimant's email. It concluded that, at the very least, the wording was ample notice to the respondent that there was a live prospect that he had secured another job, sufficient for it to enquire as to the actual situation. The respondent was well aware from the conversation a few days earlier, that the claimant, if offered a suitable job, had every intention of accepting it. There was no evidence that the claimant had ever previously sought alternative employment, and the respondent could only have been acutely aware of looming redundancy as being the only reason why he would leave.

44. The Tribunal did not accept the respondent's contention that it had intended to inform the claimant the next day that his job was now secure. There was every opportunity to inform the claimant, whom the Martins well knew to understandably be gravely concerned about his perilous financial situation, that his job was no longer at risk. At no point until after the claimant twice informed the respondent on 7

September 2020 that he had found a new post was there any hint from the respondent that redundancy was no longer an issue.

45. The Tribunal was not satisfied that the respondent's assertions as to an upturn in work sufficient to revoke the redundancy situation was supported by any of the documentary evidence, or by the respondent's communications with the claimant.

46. The Tribunal found that even the wording of the letter sent to the claimant on 7 September 2020, purporting to cancel the redundancy notice sent less than two weeks previously, was riddled with ambivalence as to the security of the claimant's position.

47. The Tribunal concluded that the claimant had informed the respondent about his new job, in effect on the next working day after he accepted the offer of employment. The Tribunal further concluded that the language used by him was clear, and sat easily with the conversation he had recently had about his search for work, and his plain intention to leave. The respondent's only discernible reaction was to criticise the claimant, with no hint to him which could be interpreted as reassurance as to his position.

48. It also appeared to the Tribunal that, if the respondent suddenly found itself in a position where someone of the claimant's skills and his knowledge of the respondent's business were urgently required, it might reasonably have been expected to seek to persuade him to stay. Instead, the respondent only purported to accept what it referred to as his resignation, thereby leaving itself without a person ideally placed immediately to help it recover lost ground.

49. The Tribunal concluded that the letter to him on 7 September was more likely than not cobbled together in response to his imminent departure, in order to avoid having to pay his redundancy entitlement.

50. The Tribunal concluded that the claimant was impelled by the need to secure employment due to what he reasonably perceived to be his dismissal for the reason of redundancy.

51. The Tribunal was satisfied that the respondent failed to provide the claimant with any ground, in time or at all, on which he reasonably would be expected to turn down the offer of a new job commensurate with his previous salary and conditions. The Tribunal further concluded that the purported offer by the respondent of reinstatement to his employment fell well short of the reassurance or factual position anyone in his position might reasonably be expected to accept.

52. The Tribunal therefore concluded that the claimant was dismissed for the reason of redundancy, and that his refusal of the offer of re-engagement was reasonable.

53. The respondent is therefore ordered to pay to the claimant the sum of **£5040**, calculated as follows: 9 years' service x 1 week's redundancy pay @ £560 = £5040.

54. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: **28 October 2021, Belfast.**

This judgment was entered in the register and issued to the parties on: