



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms J Lacey

**Respondent:** Magnox Limited

**HEARD AT:** BURY ST EDMUNDS **ON:** 12<sup>th</sup> May 2017

**BEFORE:** Employment Judge Postle

## REPRESENTATION

**For the Claimant:** Mr Stephens (Counsel)

**For the Respondent:** Miss Davies (Counsel)

## REMEDY JUDGMENT

1. Pursuant to a liability Judgment promulgated on the 11<sup>th</sup> January 2017.
2. The Respondents are ordered to pay to the Claimant the enhanced severance payment in the sum of £25,388.30.
3. The Respondents are ordered to pay the Claimant's issue and setting down fee in the sum of £1,200.

## REASONS

1. The claim for notice pay is no longer pursued and is therefore dismissed on withdrawal.
2. The Claimant's claim for the loss of enhanced severance payment is agreed in the sum of £25,388.30. What is not agreed is the Claimant's assertion that in addition to the enhanced severance payment that she is entitled to an additional basic award either from the constructive

dismissal claim or a statutory redundancy payment from the redundancy claim.

3. Dealing with the above issue first, the Claimant's Counsel has submitted a Canadian Authority, Regina v Hall (1954) which he asserts is the authority for the proposition that the words 'including' to be found on page 14 of the remedy bundle in relation to severance payments does not mean 'including' but means 'in addition to', and is not part of that sum as set out in the way it is calculated. As Counsel for the Respondent points out the Tribunal is clearly not bound by an authority from a Canadian case and in my view on a plain and literal meaning of the word 'including' and considering the definition contained in the dictionary it is comprised of; "reckoning as part of a whole, shut in, enclosed with to be made up of or contain" again the plain and literal meaning of that clearly means what it says it is part of the sum, it is included. So the severance payment sum calculated at page 14 clearly does include as suggested a statutory redundancy payment and again as far as any basic award might be payable that is set off against the enhanced severance payment.
4. As to the loss of earnings and expenses arising at the liability hearing the Claimant has indicated that the income derived from her new consultancy work is greater than that which she received from the Respondents. I remind myself that a compensatory award is to compensate for the losses that flow from a dismissal it would therefore seem that in the absence of evidence to the contrary that the Claimant will have suffered no financial loss for those 3 days she is claiming taking into account the income that she would have received from the Respondent set against the income she now receives in her new employment albeit self employed, that sum would be greater and therefore there is no loss.
5. As to expenses namely the fees payable for issuing and setting down they clearly are payable to/or recoverable by the Claimant and they amount to £1,200.
6. So far as expenses of travel are concerned, and attending the Tribunal they are not recoverable although they may be recoverable under a costs claim ahead.
7. So the sums due to the Claimant are £25,388.30 which is the enhanced severance payment together with £1,200 for the reimbursement of the issues fee and setting down fee, which makes total of £26,588.30.

### **Claimant's Cost Application**

8. This is an application for costs by the Claimant, it is advanced on two grounds; that the response was misconceived and that it had no reasonable prospect of success and/or the Respondents have acted

unreasonably in the way that the proceedings have been defended. In support of that the Claimant's Counsel advances paragraphs from the Tribunals findings from the Liability Hearing particularly at paragraph 41, the Respondents had mistakenly applied the law in requiring the employee to take the new temporary job and suggesting as a result of supplying her with the new temporary job that in effect prevents the Claimant from obtaining the redundancy package. Paragraph 44, what the Respondents have done is breached the Claimant's contract by failing to acknowledge the Claimants right to a redundancy payment when she was made redundant from her position. The unilaterally altering of the Claimant's contract by offering her then a temporary role which would only last for 6 months was a fundamental breach. There was no guarantee by the Respondents what would happen at the end of September and therefore that uncertainty made the Claimant's refusal to accept the role perfectly reasonable. Paragraph 46, one can conclude from the manner in which the Claimant was treated by the Respondents by unilaterally trying to alter her terms and conditions and avoiding making a payment her under the voluntary severance package this was a breach of contract. It was fundamental and the Claimant was entitled to consider herself constructively dismissed as a result of the Respondents failure to acknowledge the fact that she was quite simply redundant. Her job and position no longer existed, the role she was being offered was a temporary role, it was not a reasonable alternative and there was no guarantee of its duration and the Claimant's right to refuse that, was perfectly reasonable. Paragraph 47 furthermore the Respondent's properly failed to engage with the Claimant regarding her redundancy, the alternative temporary role and again we repeat attempted to unilaterally change the Claimant's Terms and Conditions of Employment by moving her into a different role which was to be on a temporary basis only. A fact that the Claimant says was supported by the correspondence prior to the Claimants dismissal and at page 1 of remedy bundle the costs section we have a letter by the Claimant's Solicitors to the Respondents of the 31<sup>st</sup> March 2016 which says:-

"We do not consider that the temporary position offered to our client is suitable alternative to redundancy as by its very nature, it is of course temporary Ms Lacey is therefore at liberty to refuse this offer of alternative employment and still receive the enhanced redundancy package which was estimated at £28,798.60 in May 2015. In the event that you consider the temporary position is effectively an extended notice period this is also not acceptable, you are not permitted to change her role without her consent which she has not provided. Our client was told by Mr Johnson that if she wished to leave before the end of her temporary contract she would need to resign and leave with nothing. We do not consider that to be correct, she is entitled to refuse the temporary position without waiving her right to redundancy payment."

9. On the 4<sup>th</sup> April 2016 the Respondents wrote at pages 3 & 4 simply denying the Claimants position and suggesting that she was not entitled under any circumstances to a redundancy position. There was then prior to the issue to proceedings telephone discussions by ACAS under early conciliation which we see taking place on the 20<sup>th</sup> May and the 13<sup>th</sup> June during which the Respondents made no offer to try and settle the matter. The conciliation came to an end on the 17<sup>th</sup> June 2016 and there were further discussions with the Respondents on the 13<sup>th</sup> September, but there was little appetite by the Respondents to settle at that stage. Further telephone discussions from the Claimant's Solicitors on 16<sup>th</sup> September saying they were willing to settle in the region of £29,000 and the Respondents came back again by telephone on the 26<sup>th</sup> September saying they rejected the offer and there was no counter proposal. Again on the 20<sup>th</sup> October 2016 at page 11 & 12 of the Costs Schedule bundle the Claimant's Solicitor wrote to the Respondents setting out their view following the receipt of the Respondent's ET3 and witness statements that the response had no reasonable prospect of success and they again set out and repeat their reasonings as had been previously advanced.
10. Miss Davies Counsel for the Respondent has helpfully provided a written skeleton argument which sets out the Respondents defence to the costs application, particularly the reasoning why the claim was not misconceived or unreasonable, in some detail at paragraph 27 where she deals with each part of the Claimant's claim. Miss Davies concludes by saying that the case had many different routes and many different angles on the facts and law and the fact that the Tribunal found against the Respondents should not lead to the conclusion that the Respondents defense was unreasonable or in any way misconceived.
11. So far as the law is concerned that we find in the Employment Tribunals Rules of Procedure Regulations 2013 particularly at Rule 76 which says that a Tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that:-
  - a) A party or that parties representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or part or the way that the proceedings or part have been conducted; or
  - b) Any claim or response had no reasonable prospect of success; or
  - c) Not relevant for the purposes of these proceedings.
12. Rule 78 says that the amount of costs un-assessed cannot exceed £20,000 otherwise they should be the subject of a detailed assessment as one would expect before a County Court Judge and can now be

conducted by an Employment Judge. It is a two stage test that one looks at, are any of the grounds under Rule 76 relevant and if so, should the Tribunal exercise its discretion. The words are 'may make an order if the ground is made out'. Now looking at the facts it is plain as a pikestaff that the Claimant was made redundant, she was not best fitted to a permanent role, there was no suitable alternative role and any temporary role which had been advanced by the Respondents the Claimant was perfectly entitled to reject as not suitable. On that basis it is difficult to see why the Respondents continued or pursued with the defence of the claim. I repeat had the Respondents addressed their mind to the plain and simple facts of this case a great deal of time and expense would have been saved. The response in my view on the facts was doomed to fail and therefore the Claimant is entitled to a cost order. The parties then requested a short adjournment to see whether the amount of costs could be agreed.

13. Upon returning to the Tribunal the Parties' Counsels confirmed that an agreement had been reached that the Respondent would pay the Claimant's costs in total of £12,500 inclusive of VAT.

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Employment Judge Postle, Bury St Edmunds.

Dated: 07 June 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS