



EMPLOYMENT TRIBUNALS

Claimant: Miss Hales

Respondent: Adecco UK Ltd

Heard at: Southampton

On: 25 July 2017

Before: Employment Judge Kolanko

Representation

Claimant: In Person

Respondent: Mr R Hayes, In-house Lawyer

JUDGMENT

1. The claimant is not entitled to a redundancy payment in accordance with the layoff provisions recited in paragraphs 147 – 154 of the Employment Rights Act 1996.

REASONS

Nature of Claims

1. This matter comes before me by way of an application brought by the claimant seeking a redundancy payment. She claims it by reason of two alternative grounds that she was dismissed, alternatively that she is entitled to a redundancy payment pursuant to the layoff provisions incorporated within Section 147 – 154 of the Employment Rights Act 1996.

Background Facts

2. The background history may be summarised relatively shortly.

2.1 The claimant commenced employment with the respondent's predecessor under the TUPE Regulations on 20 November 2000. The claimant was engaged through an employment agency who assigned her by way of various assignments to other third parties. The claimant signed a contract with the respondent on 21 October 2013. The job title the claimant was described as was Administrator.

2.2 Under paragraph Clause 3 Place or Work and Duties of Employment it states:

"The employee will not have a permanent place of work, the employee will work at different temporary work places which will usually comprise of the premises of the clients of Adecco to which the employee is assigned from time to time by Adecco. The employee undertakes travel inside and outside the United Kingdom as Adecco require in the performance of the employee's duties. The employee will be required to attend each workplace in accordance with the requirements of Adecco and carry out such work as specified for that work assignment subject to the instructions of Adecco.

For the avoidance of doubt notwithstanding the fact that the employee may seek to accommodate the particular work requirements of, or other requests of the client, while attending client's premises the employee shall at all times be subject to the control and instructions of Adecco. The employee will comply with reasonable requests and instructions given by Adecco on any matter concerning or relating to this contract of employment.

The employee will be obliged to accept any assignment which Adecco requires the employee to carry out which Adecco considers suitable for the employee given the employee's skills, qualification and experience.

Adecco will seek suitable work assignments for the employee to carry out on a continuous basis in accordance with the employee's skills, qualification and experience and Adecco will offer such work assignments to the employee as and when such work assignments become available. In any event which Adecco undertakes, the employee will be offered a minimum of 400 hours on paid assignments in any twelve month period commencing on date of this agreement takes effect".

2.3 Under Clause 4 Pay it states:

"Adecco will pay the employee weekly in arrears by credit transfer to the employee's nominated bank account or by such method as may be agreed by the parties. The employee will be paid an hourly rate which may vary according to the individual client assignment and solely to any deductions agreed with the employee will not be less than the national minimum wage currently enforced at the time of the agreement. The total pay received by the employee will be calculated according to the total number of hours worked by the employee on assignment".

2.4 Under Continuity of employment Clause 13

"In accordance with Clause 3 above the employee will be obliged to accept any assignment which Adecco requires the employee to carry out and which Adecco considers suitable for the employee given the employee's skills, qualifications and experience. Furthermore as provided for in Clause

3 above Adecco undertakes to seek suitable work assignments for the employee to carry out on a continuous basis in accordance with the employee's skills, qualifications and experience. Adecco also undertakes to offer the employee a minimum of 400 hours on paid assignment or proportionately less if the employee works part-time upon the terms referred to in Clause 3 of this agreement.

Notwithstanding this the employee recognises that there may be periods when no work is available upon which events of the employee acknowledges and agrees that during such periods no remuneration will be due to the employee under this agreement. In respect of such periods where work is not available the employee will continue to accrue continuity of employment and for the avoidance of doubt such periods would count towards any qualifying service period required for any statutory employment rights.

There is also a requirement to give termination by notice which in terms of someone who is twelve years or more is thirteen weeks no contractual notice".

2.5 The claimant has been the subject of assignment agreements to IBM for a number of years. There were terms of agreement that are specific to the particular assignment that take priority over the general terms and conditions whilst the assignment with the particular customer is underway. It not surprising because the main contract identifies that there may be variations of hourly rates and hours worked. The amended addendum terms and conditions in respect of IBM identifies the hourly rate bonus entitlement and the hours of employment.

2.6 On 21 June 2016 the claimant was notified of the end of her assignment with IBM (bundle page 36). In the letter from Mr Street the claimant's onsite manager who appears to have had dealings with the claimant solely by way of telephone stating:

"I therefore write to confirm that your assignment at IBM will end on the 30 June 2016. As we discussed the end of your current employment at IBM is not the end of your relationship with Adecco and wherever possible we will endeavour to locate a suitable position for your within IBM. Should this not be possible we will consider alternative assignments with other Adecco clients. To enable me to assist you with this could you please send me an up-to-date copy of your CV to circulate to the local branch network. However, I would recommend that you contact them direct and arrange to visit the branch to raise your profile with them. Please also make sure your CV is clear to people not familiar with IBM terminology. In the meantime please do not hesitate to contact me if you have any queries".

2.7 The claimant continued to work for IBM until 30 June. It appears and accepted by the claimant that prior to this letter which was purported to be 2 June but was only received by way of an email as I have indicated on the 21 June 2016 but the claimant was aware that this employment was coming to an end and the reason for that is that she was informed of this by IBM on 14 April. There is a dispute between the parties as to a conversation the claimant had with Mr Sweet on the day after the claimant had been informed by IBM on 15 April. The claimant contending that Mr Sweet informed her that her contract of employment with the respondent was going

to end on 30 June. Mr Sweet contending that he simply confirmed what had been told by IBM to the claimant the day before that the assignments would be ending on 30 June and that her contract still remained with the respondent. This dispute of evidence I have to say I prefer Mr Sweet's evidence on this particular matter.

- 2.8 On 21 June there was a phone conversation with Mr Sweet and Mr Sweet informed the claimant that if job offers were not successful that the claimant may well be able to apply for a redundancy payment.
- 2.9 Correspondence thereafter is maintained between Mr Sweet and the claimant explaining the various options by way of an example bundle page 37. He talks in terms of what may happen if the claimant sought to obtain post outside of Adecco in which case the employment would come to an end alternatively if they secured another job for the claimant through Adecco Group then the continuity would continue. Within an email on the 27 June 2016 Mr Sweet confirmed and also noted the fact that the claimant would not in such circumstances be able to claim redundancy under layoff from Adecco.
- 2.10 Matters proceeded and certainly on 27 June Mr Sweet is confirming that if the claimant took a role through the respondent continuity would continue.
- 2.11 In July there is correspondence between the claimant and Mr Sweet regarding the claimant doing another job with IBM (Bundle page 47A). The claimant raises the point in email correspondence on 27 July (bundle page 47C) that during this layoff period she was anxious to have her P45 so that she would obtain seekers allowance and the claimant enquires of this (bundle page 47B). Mr Sweet on 27 July responds stating:

“As I have said we will continue to support you in your redeployment until such time that you are successful in securing a new role. This is in context of securing employment elsewhere and not through Adecco and you would then resign and we would issue your P45. I note that you have requested your P45 in the email below, are you saying that you wish to resign in order for us to issue your P45 so that you can apply for job seekers allowance as at 1 August. If this is the case and you would like us to issue your P45 please confirm and we will do so this week”.

- 2.12 Again the claimant then responded saying:

“Andrew could you please call me this is the first you have said about resigning and withholding my P45. You told me that Adecco was only obliged to look for roles up to 31 July and after that I could apply for redundancy as I am redundant”.

- 2.13 Mr Sweet responded the same day:

“Adecco did not make you redundant and at this point and even after 31 July you are not redundant. We will continue to assist you in your redeployment until such time as you tell us otherwise. Initially we are not

withholding your P45, However, we will only issue your P45 upon receipt of your resignation as your P45 is a certificate given to an employee at the end of a period of employment providing details of your tax code, gross pay and tax paid for that your to be passed to a subsequent employer or benefit agency”.

- 2.14 Further correspondence then continues on that day with Mr Sweet responding:

“I have not at any point said that Adecco would stop looking for roles for you on 31 July. We will continue to assist with your redeployment until you tell us otherwise as I have stated. When we discussed sending you job adverts from other agencies, I said we were able to do so and it would be entirely up to you as to whether you would pursue these vacancies or not and we would play no part in the application process with any external vacancies. We did not send any information or guidelines out to you as there were no such documents to send you other than your end of assignment letter. As stated previously you are not redundant, you will remain an employee of Adecco unless you tell us otherwise”.

- 2.15 Again as I say a job was sought and the claimant expressed interest but was not successful in relation to the job.

- 2.16 Notwithstanding Mr Sweet’s comments that no P45 would be issued unless the claimant sought it by way of resignation. On 29 July payroll sent a P45 to the claimant.

- 2.17 On 25 August 2016 the claimant had sought legal advice from Citizens Advice Bureau and provided and obtained the assistance of a Barrister under the Free Representation Unit who wrote to the respondent on 25 August 2016 (page 49 of the bundle). The barrister indicates that the claimant had not been provided with work since 30 June and either was laid off or if there was no contractual entitlement there was scope for contending that unilateral withholding of pay amounted to a repudiation of her employment contract and hence a dismissal.

- 2.18 If it is the case that Adecco have an express contractual right to layoff Miss Hales, it is Miss Hales’ position that layoff has lasted for more than four consecutive weeks and therefore she is entitled to claim a redundancy payment. During the layoff period complained of Miss Hales has actively engaged with Adecco regarding alternative work.

- 2.19 Miss Fenwick sought clarification of the position which was provided subsequently by Miss Girling on 31 August when she wrote an email directly to the claimant in which she stated:

“Following the letter received from Kate Fenwick I can confirm that at the time of your assignment at IBM you were employed by Adecco under a contract of employment. I can also confirm that as per our letter to you on 2 June you were not dismissed from Adecco only that your assignment at IBM was brought to a close. Should you wish to bring a claim for redundancy by reason of layoff, we would assess the claim and respond on this accordingly”.

- 2.20 Miss Girling at this stage had been taken over from Mr Sweet.
- 2.21 On 1 September (bundle page 53) the claimant wrote what is accepted was a notice of intention to apply for a redundancy payment in which she indicated that she wished to receive a payment, not having been paid since the 30 June and indicated that her redundancy entitlement would be in the sum of £10,777.50 for fifteen years employment. She then purported to say that Adecco has forty days to meet the settlement payment of this claim together with an explanation of how this is calculated.
- 2.22 Following on from the sending of this email letter, Miss Girling wrote on 8 September, effectively within the statutory time limit serving what has been described as a counter notice. She stated:
- “Adecco wish to issue you with a counter notice further to your letter dated 1 September of which we received on 2 September. Under Sections 147 – 155 of the Employment Rights Act 1996 we contest any liability to pay a redundancy payment as we believe there will be alternative work available for you that we foresee will last for a period of thirteen weeks or more. We will discuss shortly with you the specific details relating to this opportunity. Should you need further assistance please contact your Adecco representative Kelly Thompson”.
- 2.23 It appears that on document 57 in the bundle show that on 12 September Miss Girling sent a job offer saying what they would like to make to the claimant:
- “The role is going to be working on our Amazon account doing a resourcing role. The pay rate will be £9.75 per hour. There will be a possibility of two locations either out of Southampton or Portsmouth offices. However, we could potentially consider working from home. We are looking for a start date of 19 September but we could push this back to 26 September if that would make it easier for you. Please can you advise us as a matter of urgency if you are able to take this role. The end date on this role isn't confirmed, however it will last more than thirteen weeks”.
- 2.24 The claimant by email on 19 September 2016 (bundle page 65) wrote to Miss Girling first of all she communicated the very sad news that her sister had died last night and in response to the proposed job stated:
- “I cannot accept this role the salary is not comparable, the role is not a communication specialism, it is a clerical role. I do not travel for site meetings or training also as previously discussed I cannot be involved with recruiting individual 0 hours contract on moral and ethical grounds”.
- 2.25 Notwithstanding this Miss Girling wrote again on 17 October to the claimant noting that she had declined the role that Adecco believes was a suitable alternative role in line with the contract of employment and stating that it would continue to contest liability to pay redundancy payment under layoff:

“However, we are happy to look for further assignments for you as you have requested, can you confirm if you would like us to continue to look for alternative roles for you”.

2.26 The claimant on the same day wrote back stating:

“Thank you for your email. As it has now been with ACAS I think best that you draw a line and end this activity”.

2.27 This ultimately ended further communication or discussion between the parties. It is proper to record that the claimant found alternative employment on 3 October on a full-time basis on a fixed year contract.

The Law

3 Those are the background matters. The legal provisions are contained within the Employment Rights Act 1996. Section 148 talks of the eligibility by reason of layoff or short term and it is not in dispute that the claimant had achieved the requisite periods of layoff and put in a notice in accordance with the provisions of Section 148 so it is not necessary for me to recite them here. The respondent in turn under Section 49 served a counter notice in accordance with the statutory provisions which remained outstanding.

4 Section 152 addresses the question of what happens if a notice of intention to apply for a redundancy payment is made by the claimant by an employee a counter notice is served and is not withdrawn. It talks in terms of the matter having to go to a Tribunal to determine and the only defence that is available effectively to an employer to respond to a claim for redundancy payment is that contained in Section 152(1) states:

“An employee is not entitled to redundancy payment in pursuance of a notice of intention to claim if on the date of service the notice it was reasonably to be expected that the employee, if he continued to be employed by the same employer would not later than four weeks after that date, enter on a period of employment of not less than thirteen weeks during which he would not be laid off or kept on short time for any week and the employer gives a counter notice to the employee within seven days after the service of the notice of intention to claim”.

5 That is the legal provisions that are pertained to this case. I indicated that the claimant has put her case on two basis. First of all she claims that she was dismissed at a meeting with Mr Sweet on 15 April that ended on 30 June. I am satisfied that the evidence of documents supplied that the claimant was not dismissed. She had received correspondence to the effect that the P45 would only be sent if the claimant resigned and that it was up to her to decide. The sending of the P45 can in certain circumstances evidence with other conduct an intention to dismiss but I do not find in this context that the issue of a P45 two days after Mr Sweet had made it quite clear that no P45 would be sent unless the claimant wished it by way of resigning was an error and not an intention to dismiss the claimant. The claimant fails in relation to that limb.

- 6 I then have to address the question as to whether under the statutory provisions the claimant is entitled to a redundancy payment by virtue of the provisions under the layoff which I have recited.
- 7 It appears that the procedures for layoff appear to have been complied with on both sides and there was sufficient layoff period for a notice of intention to apply for redundancy and for a counter notice to be served.
- 8 The issue to be determined is whether at the date of the notice of intention to claim redundancy it was reasonably to be expected that the employee if he had continued to be employed not later than four weeks from that date enter into a period of employment by the same employer for not less than twelve weeks during which he would not be laid off.
- 9 The evidence I have received is that the claimant was offered a post. It is proper to record that it is to be a post that can be entered into under the same contract of employment. I have recorded the contractual provisions that based the contractual arrangements between the claimant and the respondent and indeed in keeping with cases such as this, it is a very flexible contract which gives facility for an assignment to be offered which effectively doesn't necessarily have to be at the same contractual hourly rate or the same hours necessary and providing it comes within the ample ambit of the wide terms of the agreement it is deemed to be a proper offer of employment.
- 10 Having considered the evidence provided by Miss Girling in particular at paragraph 25 of her statement where she goes into considerable detail as to why the offer of the assignment fell well within the terms of the claimant's contract of employment and noting of course that the claimant had no wish to question or take issue with the evidence given by Miss Girling I am obliged to come to the conclusion that the offer of employment as recited in the correspondence that I have referred to does meet the requirements of Section 152(1) of the Employment Rights Act 1996. It therefore follows that the layoff provisions applicable in this case did not render the claimant being entitled to a redundancy payment which must stand dismissed.

Employment Judge Kolanko

Date 1 August 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON

8 August 2017

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FOR THE TRIBUNAL OFFICE