THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr N Karavias	**AND**	**Northumberland Tyne & Wear NHS Foundation Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 25 July 2017**

Before: **Employment Judge Hargrove**

Appearances

For the Claimant: **In person**
For the Respondent: **Ms K Jeram of Counsel**

JUDGMENT

The judgment of the Employment Tribunal is as follows:-

1 The claimant is entitled to a statutory redundancy payment of £7,424.50 pursuant to section 163 of the Employment Rights Act 1996.

2 The respondent is ordered in addition to pay to the claimant the balance of the contractual redundancy payment due upon termination of his contract pursuant to Article 4 of the Employment Tribunals (Extension of Jurisdiction) Order 1994 amounting to £21,037.50.

3 The respondent is ordered to pay to the claimant Tribunal fees of £390 – **NOTE: This order was made by the Tribunal prior to the Supreme Court Decision in Unison v The Lord Chancellor, judgment in which was handed down on 27 July 2017. In consequence of that judgment, this part of the judgment is suspended upon the basis that the claimant should be able to recover the**

total amount of the Tribunal fees he has paid from HMCTS. Failing such recovery, he has liberty to apply to the Tribunal in writing.

4 Pursuant to rule 76(1)(a) and (b) and rule 78 the claimant is ordered to pay to the respondent costs of £4,682.23.

5 It is noted and recorded that the claimant agrees that he owes to the respondent the sum of £741.48 in respect of a debt for the computer scheme, in respect of which, however, the Tribunal makes no order having no power to do so.

REASONS

1 This hearing was listed to consider two matters following a substantive hearing on liability. That hearing took place on 24 and 27 March 2017 and resulted in a judgment and reasons initially sent to the parties on 2 May 2017. The judgment was to the following effect:-

> "1 The claimant's claim of unfair dismissal is not well-founded.
>
> 2 The claimant is entitled to a redundancy payment pursuant to section 163 of the Employment Rights Act 1996".

2 On **4 May 2017** the claimant wrote to the Employment Tribunal making application to be awarded a proportion of the Tribunal fees of £1,200 which he had paid; and secondly asking for the debt of £741.48 for the computer scheme to be written-off; and thirdly applying for payment of the contractual NHS redundancy payment amounting to £28,462.

3 The Tribunal has already dealt with the claimant's claim for a share of the Tribunal fees, and for the debt for the computer scheme to be written-off, above. The matter which has principally concerned this hearing has been the issue of the claimant's claim for a contractual redundancy payment. This claim was clearly identified in his original claim form as a breach of contract claim.

4 At the substantive hearing, the Tribunal considered and rejected the claimant's claim of unfair dismissal. It also considered the claimant's claim for a redundancy payment, the respondent raising the issue that the claimant had lost his right to the payment of any redundancy upon the basis that the claimant had unreasonably refused an offer made by the respondent to re-engage the claimant under a new contract of employment constituting suitable alternative employment, under section 141 of the Employment Rights Act. The claimant failed on the unfair dismissal claim and it was dismissed. In respect of the claim for a redundancy payment, the Tribunal found that the claimant had not unreasonably refused an offer of suitable alternative employment. It is the recollection of the Tribunal, and of the claimant, that the Tribunal was notified by counsel that if the claimant were successful on his claim for a statutory redundancy payment under the provisions in Part 11 of the Employment Rights Act, there would be no issue but that the claimant would also be entitled, subject to calculation, to a contractual redundancy payment under the provisions in section 16 of Agenda for Change. The Tribunal had specifically identified at the

start of the hearing that there was an issue as to whether the claimant was entitled to an enhanced redundancy payment under Agenda for Change. Counsel did not notify the Tribunal that any additional liability issue arose in the case of the contractual redundancy claim, which was a breach of contract claim . In consequence the Tribunal did not receive any representations nor did it deal with the issue which has now been raised. In consequence of all of this, I deliberately did not specify the amount of the redundancy payment due. I do not accuse Ms Jeram of any impropriety in that respect, it may well be that there has been some misunderstanding, or a failure of communication but the issue now raised should have been raised during the original liability hearing; and if it had been it would have been dealt with. I expressed the view at the outset of this hearing that the respondent would need leave to raise this issue, but I note that the respondent's original response at paragraphs 24-25 did mention the provisions in paragraphs 16.19 and 16.20 of Agenda for Change, which are the provisions material to the point now being raised.

5 The claimant's e-mail of 4 May was ordered to be copied to the respondent for comments. The respondent responded in two e-mails to the Tribunal dated **30 May 2017**. Unhelpfully, in the view of the Employment Judge having regard to the past history, the respondent took the point that the original judgment of the Tribunal dealt with both liability and remedy; and that any alteration to the judgment required an application for reconsideration by the claimant. The respondent further claimed the claimant was only entitled to a statutory redundancy payment. That ignored the fact that the claimant had clearly made a claim in his original claim form for a contractual redundancy payment, which had been recognised by the Tribunal at the start of the original liability hearing and which had not been dealt with.

6 Despite this background, I have decided that the claimant is very clearly entitled to have his contractual pay claim decided and the matter is clearly not res judicata against him. Equally however, I have determined that it would be appropriate to allow the respondent to be heard on the issue now raised. This means that there are effectively two live issues for the consideration of this Tribunal:-

6.1 Notwithstanding the Tribunal's finding that the claimant did not unreasonably refuse a suitable offer of alternative employment, are the provisions particularly set out in section 16.20 of Agenda for Change to be interpreted as meaning that the claimant loses his right to a contractual redundancy payment on the grounds of his supposed lack of "flexibility"?

6.2 Should a costs order be made against the claimant in favour of the respondent on the basis that the claimant had acted otherwise unreasonably in bringing and/or continuing his unfair dismissal claim; or on the basis that such claim had no reasonable prospects of success?

As to the first issue the respondent sought to rely upon an additional witness statement from Lynne Shaw, who had given evidence at the original liability hearing. I was notified by counsel for the respondent that the witness statement did not deal with the circumstances of any previous occasion when an applicant

for a contractual redundancy payment had been turned down by the respondent in circumstances where it was agreed that the applicant was entitled to a statutory redundancy payment. I was informed that the additional witness statement did deal with circumstances in which the respondent had purportedly refused applications for a contractual redundancy payment in circumstances where it was considered that the claimant had not acted "flexibly" in dealing with an offer of alternative employment. For two reasons I declined to allow the witness statement to be admitted. The first was that I considered that it would only be of the most marginal relevance to the issue to be decided in this case; and the claimant had not had the opportunity to investigate any other case nor had any documentation been produced in respect of any other case, although I accept that the claimant had received the additional witness statement a few days before this hearing. The second ground was that this evidence, even if relevant, should have been produced at the time of the original statement when the issue was live.

7 I turn now to the relevant provisions in paragraph 16 of Agenda for Change. This is the section which deals with employees' entitlement to redundancy pay in the NHS, taking effect from 1 October 2006. The section adopts specifically the provisions in section 139 of the Employment Rights Act which contains the definition of redundancy and also adopts the suitable alternative employment provisions contained in sections 138 and 141 of the Employment Rights Act. The AfC paragraph however contains some modifications. These include a provision accepting continuous service in respect of the present or any previous NHS employer in calculating the length of employment and reckonable service. Secondly, and more significantly, the contractual redundancy payment was significantly increased to provide for a reference to a month's pay for each year of service as opposed to the statutory entitlement to a week's pay by which the statutory entitlement was calculated, in accordance with sections 221-229 of the Employment Rights Act. That provision is in paragraph 16.7. There were also some additional provisions excluding eligibility which are set out in paragraph 16.17, these included dismissal for reasons of misconduct; that the employee had obtained suitable alternative employment with the same or another NHS employer; and, relevantly, that he had unreasonably refused to accept or apply for suitable alternative employment with the same or another NHS employer. Section 16.19 contains the definition of "suitable employment" for the purposes of that basis for exclusion from eligibility which is particularly material to the issue now raised by the respondent. Section 16.19 states:-

> "Suitable alternative employment, for the purposes of paragraph 17, should be determined by reference to sections 138 and 141 of the Employment Rights Act 1996. In considering whether a post is suitable alternative employment, regard should be had to the personal circumstances of the employee. Employees will however, be expected to show some flexibility". (Tribunal's underlining).

The reference to "for the purposes of paragraph 17" in paragraph 16.19 is clearly a reference to the exclusionary principle contained within paragraph 16.17 described above. In summary, Ms Jeram's submission was that the provision in paragraph 16.19 and in particular in the last sentence added an additional hurdle

which the employee had to overcome to be entitled to a contractual redundancy payment as opposed to a statutory redundancy payment. The respondent agrees that the Agenda for Change terms were expressly incorporated into the claimant's contract of employment – see page 38 of the bundle:-

> "Your statement is not exhaustive or definitive of the contract. Your employment is also governed by the Agenda for Change NHS terms and conditions of service handbook …".

In paragraph 11 of the skeleton argument the respondent puts the claimant to proof that the enhanced redundancy pay provisions are apt for incorporation so that they are legally binding. Counsel cited a passage from the judgment of Hoffman J in **Alexander v Standard Telephone & Cables Limited No 2 IRLR page 286 paragraph 31**:-

> "Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract".

Ms Jeram argues that the use of the words "arrangements for redundancy pay" in the introductory paragraph to section 16 of Agenda for Change casts doubt on whether that particular part of the Agenda for Change document is apt to be a term of the contract. I fundamentally disagree with that submission. The detail in paragraph 16 and the detailed way in which it is drafted; its specific references to and adoption of equivalent sections in the Employment Rights Act dealing with redundancy payments; and its detailed formula for the calculation of the enhanced redundancy payment all demonstrate that that section is apt to be a term of the contract and it was clearly expressly incorporated in the contract. The only issue remaining relates to the meaning and effect of the last sentence in paragraph 16.19. I was helpfully referred to the principle regarding the approach to modern contractual interpretation summarised by Lord Hoffman in **Investors Compensation Scheme Limited v West Bromwich Building Society No 1 [1998] 1 Weekly Law Reports at page 896 at page 912**:-

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract".

In my view there are two issues for me to decide here. The first is whether the expression "employees will however be expected to show some flexibility" was intended to have some contractual effect; and the second is, if it was, how the term is to be interpreted in the light of the express adoption of the provisions in section 138 and in particular section 141 of the Employment Rights Act. I have had little assistance as to what meaning the document or that phrase would convey to a reasonable person having the background knowledge reasonably available to the parties in a situation in which they were at at the time of the contract, presumably at the time of the negotiation between the unions and the

employers at the time of Agenda for Change. I have concluded however that these words were not intended to have separate contractual effect and that they were not intended to add a gloss to the statutory test. A proposed concept of flexibility is one which would be very difficult to apply and judge and in particular to judge alongside the separate tests of suitability and whether an employee has unreasonably refused an offer of alternative employment. The words are in my view mere surplussage, an exhortation or expectation not intended to have legal effect. If I am wrong about that however I would still not find that the claimant failed "to show some flexibility". He did, after all, apply albeit unsuccessfully, for another job within the new structure. Having found that the claimant reasonably refused the reduced Band 4 post of Information Technician, it would be illogical for the Tribunal now to find that a reasonable refusal demonstrated inflexibility on his part.

8 **The respondent's costs application**

The relevant rules in the 2013 Regulations

Rule 76(1) provides that:-

> "A Tribunal may make a costs order … and shall consider whether to do so, where it considers that –
>
> (a) a party or that party's 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 … had no reasonable prospect of success".

This is sometimes referred to as the threshold test, which if met, may lead to the making of a costs order. Note that the rule provides that in those circumstances the Tribunal may make a costs order. It is not required to do so. If the Tribunal exercises a discretion to make a costs order, rule 78 defines the amount of a costs order. A costs order may order the paying party to pay the receiving party a specified amount not exceeding £20,000 in respect of the costs of the receiving party. A Tribunal may order a detailed assessment to be carried out by a County Court to assess the fees. The Tribunal also may order the paying party to pay a specified amount of a Tribunal fee paid by the receiving party. The Tribunal may also take into account the paying party's ability to pay. This is contained in rule 84 which states:-

> "In deciding whether to make a costs order and if so in what amount, the tribunal may have regard to the paying party's ability to pay".

In this case, on 6 February 2017 the respondent's solicitors wrote what I regard as a reasonably temperate costs warning letter on a without prejudice basis. They pointed out that for the respondent to defend the claim successfully it would be required only to demonstrate:-

(1) That a genuine redundancy situation existed;

(2) That the redundancy was the real reason for the dismissal;

(3) That it adopted a fair basis to select for redundancy in terms of –

(a) the constitution of the selection pool of employees from which redundancies were to be made or alternatively that the affected employee was in a unique role and therefore not included in a selection pool; and that it carried out a fair and meaningful consultation within the context of a fair dismissal procedure and gave adequate consideration to finding suitable alternative employment".

The letter went out onto indicate that various points being put forward on the claimant's behalf were in fact not well-founded. It is appropriate however, to indicate that the costs warning letter also referred to the weakness of the claimant's claim for a redundancy payment with particular reference to the application for a contractual redundancy payment, on which the claimant has succeeded, although the respondent had refused even the statutory redundancy payment. In the view of this Tribunal it has been amply demonstrated that the claimant should have known, having had the opportunity to take legal advice, that his claim of unfair dismissal had no reasonable prospects of success from shortly after the delivery of this letter. There was clearly a redundancy situation not only in the information technology department but also much wider in Phase 2 of the redundancy round. From the start the claimant raised issues with the respondent which demonstrated that he refused to accept the obvious fact of the redundancy of his particular post. He raised objections during the course of the hearing including that a senior post within the department had been offered to someone else, but he did not apply for that post for himself, and it was irrelevant to his claim That situation had arisen before the redundancies were considered in Phase 2, in January 2016. The claimant's response to the announced redundancy of his post following the initial consultation was that he went off sick and cleared his desk. He did not apply for an equivalent Band 5 post to his available at another Trust, although he did apply for another Band 5 post unsuccessfully within this Trust. As to consultation, the claimant had ample opportunity to make representations. Essentially his position remained that he did not accept that his existing role was or needed to be redundant and that remained his position despite clear evidence to the contrary during the adequate consultation which took place, and in which he did not fully engage In these circumstances I find that the cost threshold has been met. It is a material fact for the exercise of the discretion that the respondent did issue an appropriate costs warning letter. Notwithstanding that, the claimant continued with his claim of unfair dismissal, although clearly it was reasonable for him to continue with his claim for a redundancy payment. In all of the circumstances it is appropriate for the Tribunal to make a costs order and I have taken into account in assessing the claimant's means that he is in receipt of a substantial contractual redundancy payment which will greatly exceed the amount of the costs claimed by the respondent. As to the amount, I note that the respondent has confined it to 70% of the costs incurred from the date of the expiry of the costs warning, 14

February 2017 onwards. That seems to me to be a realistic adjustment to take into account that the greater part of the costs were incurred in the defence to the unfair dismissal claim than to the unsuccessful defence of the redundancy payment claim. In these circumstances I order the claimant to pay to the respondent the sum of £4,682.23. I am satisfied that that amount of costs was properly incurred by the respondent in the defence of the claimant's claim which had no reasonable prospects of success.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
2 August 2017
JUDGMENT SENT TO THE PARTIES ON

3 August 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL