EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104370/2016

Held in Glasgow on 29 November 2017

Employment Judge: Shona MacLean
Member: Mrs L M Millar

Mrs Ann Downie — Claimant
Represented by:
Ms N Braganza
Counsel

Coherent Scotland Ltd — Respondent
Represented by:
Ms A Stobbard
Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is the reinstatement is not practicable and the Respondent is ordered to pay the Claimant a monetary award of £37,559, which requires to be grossed up to take account of tax.

REASONS

Introduction

1. On 8 March 2017 the Tribunal issued its Judgment to the parties which included the following order of reinstatement (the Reinstatement Order):

   The Respondent unfairly dismissed the claimant and the Employment Tribunal orders that:

   a. the Claimant be reinstated as HR Manager such reinstatement to take effect no later than 1 May 2017;
   b. the Claimant shall be treated in all respects, including entitlement to holidays, as if she had not been dismissed;

c. the Respondent shall pay to the claimant arrears of pay of £22,331 if the claimant is reinstated on 1 May 2017 and a further £562.84 for every further week until reinstatement takes place;

d. the Claimant shall be restored to the respondent's pension scheme and the Respondent shall pay any employers' contributions necessary to ensure the Claimant is in the position she would have been had she not been dismissed (subject to the Claimant making any contributions that she would have made had she not been dismissed)."

2. On 28 April 2017, the Claimant's representative wrote to the Tribunal's office advising that the Respondent had not agreed to reinstate the Claimant and had not given any reasons other than that there was no job for her. The Claimant's representative confirmed that the Respondent had paid the amount ordered for injury to feelings and repaid the Tribunal fees. Accordingly, the Claimant's representative requested a remedy hearing in respect of non-compliance with the Reinstatement Order.

3. At the remedy hearing Markus Schulzke, European HR Director gave evidence for the Respondent. The Claimant gave evidence on her own account. The parties lodged productions to which the Tribunal was referred.

4. The Tribunal had to determine the following issues:

a. Has the Respondent shown on the balance of probabilities that complying with the Reinstatement Order was impracticable?

b. What compensation should be paid to the Claimant?

5. The Tribunal made the following additional findings in fact in respect of the issues that it required to determine.

Findings in Fact

6. The Respondent has employed Mr Schulzke for around 25 years. For the last 15 years he has held the position of European HR Director.

7. Around March 2016 Mr Schulzke became aware that consideration was being given to the Respondent acquiring Rofin-Sinar Technologies (Rofin). Rofin

employed approximately 2,500 employees worldwide. Approximately 1,000 employees were based in Germany and 50 employees were based in the United Kingdom. Rofin has offices in Daventry and Oxfordshire. Mr Schulzke was involved in a significant due diligence process. It was against this background that around March 2016 Mr Schulzke identified the need for a full-time HR Manager.

8. At the 8 March Meeting the Claimant was told that she required to increase her hours from 22.5 hours per week to full-time. The Claimant declined to so do at the 9 March Meeting. Mr Schulzke said that the Claimant's proposals of making another part-time appointment or job share would be consider.

9. On 11 April 2016 Jen Allan HR Administrative Assistant returned from maternity leave.

10. At the 12 April Meeting the Claimant was told that the Respondent proposed to replace the part-time HR Manager role with a full time HR Manager. The Claimant was told that her job was "at risk" of redundancy. At the 13 April Meeting Mr Schulzke indicated that having read a letter from the Claimant he thought that job share was a good idea and consideration would be given to it.

11. At the 19 April Meeting Mr Schulzke stated that there was a clear and significant increase in the strategic workload and the Respondent had to have continuity in its delivery.

12. At the 28 April Meeting, there was no dispute about the Claimant's performance. The Respondent required her to work full time. Dr Dorman advised that the Respondent required a full-time role therefore the part time role was deleted. The Claimant was being dismissed on grounds of redundancy and there was a right of appeal.

13. At the date of termination of the Claimant's employment she was 51 years of age. She had been continuously employed for eight years. The Claimant received a redundancy payment £5,748 and pay in lieu of notice for eight weeks amounting to £4,711.27 gross, taxed through PAYE.

14. By letter dated 6 May 2016 the Claimant appealed that decision. The Claimant remained unable to increase her hours to work full-time.

15. Around May 2016 Mr Schulzke approached Michael Page Human Resources (MPHR) to recruit a full-time HR Manager (production R2). MPHR proposed to source an HR Manager using its UK database and associated network; targeted head hunting of relevant sectors and agreed advertising campaign.

16. Mr Schulzke was seeking a candidate with a background with high volume manufacturing typically someone with experience with lean philosophy with a view to streamlining processes and working with management in succession planning.

17. On 17 and 18 May 2016 the Respondent advertised the Claimant's job on a full-time basis.

18. On 24 May 2016, the Claimant's appeal was considered by Mr Gleeson and not upheld.

19. Mr Schulzke was involved in the interviewing process for a full time HR Manager. He met a few candidates. Mr Schulzke understood that the part-time post was redundant.

20. The preferred candidate, Donald Mackay was employed in car manufacturing for more than five years and had experience of reporting to structures throughout Europe, streamlining processes and managing succession planning. Mr Mackay was offered employment with the Respondent in late June 2016. Mr Schulzke had to convince the preferred candidate to change employer. Mr Schulzke considered that Mr Mackay would probably not accept the offer if it was on a temporary basis.

21. ACAS issued an early conciliation certificate on 15 July 2016.

22. Ms Allan recruited a temporary HR Administrative Assistant, Panagiotis Papalymperis in July 2016. He has been engaged in a number of fixed term contracts with the current expiring in February 2018.

23. The Claimant presented a claim form to the Tribunal's office on 23 August 2016. It was sent to the Respondent by post on 24 August 2016.

24. Mr MacKay commenced employment with the Respondent on 28 August 2016. Since his appointment Mr Mackay has been involved in providing HR support in various projects integrating Rofin into the Respondent's business. He has travelled to the Respondent's site in Oxfordshire where there was closure which involved supporting and consulting affected employees. There has also been a consolidation of Respondent's office in Ely and integration with the Respondent's Daventry office. This has involved Mr Mackay travelling significantly to these sites meeting employees and management.

25. At the Respondent's site in Glasgow time and attendance processes have improved resulting in less time and administrative resource being spent on this function. Mr Mackay has been involved in dealing with the HR implications of suspending the production of similar products being produced in Germany and Glasgow resulting in the transfer of work to Glasgow. While initially the headcount was neutral for Glasgow it has subsequently resulted in 15 employees being recruited. Mr Mackay has also been working on developing the second level management with a view to leadership coaching and putting in place succession management. This included identifying potential successors for the roles and working to support potential candidates on their weaknesses.

26. Around 9 March 2017 the Respondent received the Reinstatement Order which was to take effect on 1 May 2017. Mr Schulzke had a discussion with Dr Dorman. There was also discussion with Dr Dorman and Mark Reekie, Senior Vice President of HR in the US.

27. Mr Mackay had been in post for six months. He was involved in several projects at Glasgow. Many of the integration projects in which Mr Mackay had been involved were ongoing as were the employee consultation processes. He was committed to the leadership and succession planning. The view that the Respondent reached was that Mr Mackay needed to remain in post. There was consideration about whether there would be any other role for the

Claimant in Glasgow or elsewhere. The conclusion was there was no need for additional HR Manager resource in Glasgow. An opportunity was available in Germany but the individual requires a good understanding of the German language and labour law.

28. Via the Respondent's solicitor on or around 20 March 2017 the Claimant was paid the award for injury to feelings. Her representatives were repaid the Tribunal fees by the Respondent.

29. On 3 April 2017, the Claimant wrote to Dr Dorman suggesting a meeting. Mr Schulzke did not consider that there would be anything new arising out of the meeting as there was no job for the Claimant. A meeting did not take place. Mr Schulzke informed his solicitor and understood that this was being communicated to the Claimant's representative.

30. On 28 April 2017, the Claimant's representative sent an email to the Tribunal's office requesting that a remedy hearing be fixed because the Respondent had not agreed to reinstate the Claimant and has not given reasons, other than to say there is no job for her (production C52).

31. The Claimant wrote to Dr Dorman on 1 May 2017 (production C58). In the letter the Claimant referred to her unlawful dismissal. She stated that she understood that there was increased project work with the transfer of work from Germany which increased recruitment and headcount and a nightshift might be introduced. The Claimant also considered that action was needed to address the equality issues that were highlighted through her own treatment and subsequent unfair dismissal. The Claimant listed several actions to ensure future compliance. The Claimant concluded:

"*Putting aside the actions for addressing equality issues there has been a substantial increase in the amount of work of the HR Manager since I was unlawfully dismissed. Therefore, on my reinstatement, it should be possible to find a way to retain the new HR Manager Don Mackay. I would again propose that we arrange to meet to work through the practicalities, to provide me with an update on current issues and to a date or returning to the*

company. If you are requiring some independent practical support in reinstatement I would be happy for a conciliator from ACAS to attend the meeting.

I genuinely believe that as advised by the Tribunal it is possible to draw a line under the situation and to reinstate me. I look forward to resuming my role and re-establishing good relationships with my colleagues and continue to support you as before with a very professional HR service."

32. Dr Dorman replied by letter dated 9 May 2017 (production C56). He referred to the Respondent having reviewed its requirements and considering how it could accommodate the Claimant back into the business but it was unable to find a position to allow this to happen. Dr Dorman stated that the Respondent had a human resources function which comprised a full time Human Resources Manager and two Generalists who covered the requirement of the business in terms of human resources and there were no further vacancies in the HR function in the United Kingdom.

33. The Claimant wrote again to Dr Dorman on 7 July 2017 asking for a meeting. Dr Dorman replied by letter dated 14 July 2017 saying that the position had not changed.

34. Following the termination of her employment the Claimant has made reasonable efforts to mitigate her loss.

35. From June 2017 until 5 October 2017 the Claimant provided consultancy services to Anderson Bell & Christie Ltd (production C64). On 28 August 2017 the claimant entered an assignment to provide services to the Wise Group. This assignment was from 28 August 2017 to 13 December 2017 (production C75).

36. The Claimant's loss of income from the end of her notice period until the date of the Tribunal Hearing on 24 February 2017 (8 months) was £17,261. Her loss of income from 25 February 2017 to 29 November 2017 was £19,710. From this requires to be deducted the income received from the consultancy

work from 1 June 2017 to 5 October 2017 (£2,120) and less the income from employment from 28 August to 29 November 2017 (£3,312).

Observations on Witnesses and Evidence

37. Mr Schulzke was present during the merits hearing but did not given evidence. From the Claimant's evidence at the merits hearing the Tribunal understood that she had worked closely with him for eight years and they had a good relationship. The Tribunal also understood from her evidence at the merits hearing that in 2016 Mr Schulzke was more receptive to considering the Claimant's proposals than Dr Dorman.

38. Mr Schulzke gave evidence at the remedy hearing without the assistance of an interpreter. This was understandable given that his English was fluent. However, the Tribunal was mindful that English was not his first language. The Tribunal considered that he gave his evidence honestly and candidly. The Tribunal found him credible and reliable. The Tribunal did not detect any animosity toward the Claimant. The Tribunal also considered that when Mr Schulzke was recruiting a full-time HR Manager he believed that the post of part-time HR Manager was redundant and accepted that the Claimant was unable to work full time.

39. When giving evidence at the merits hearing the Tribunal found the Claimant to be credible and reliable. The Tribunal recorded in the Judgment that she did not display any animosity during the merits hearing towards Mr Schulzke, Dr Dorman or Mr Gleeson and looked forward to working with them in the future. During the remedy hearing the Claimant was loquacious. The Tribunal found her evidence equivocal. She described how she loved her job and her colleagues were fantastic. The Claimant had been invited along to a social event; her "colleagues" had read the Judgment online and had expected her back. The Claimant also described initiating all the contact with the Respondent but being totally ignored. She said that she was "gobsmacked" when she was told that there was no job for her. She did not consider that the Respondent had tried and she was being discriminated again. The Tribunal did not doubt that the Claimant had an amicable relationship with several

people with whom she had worked. However, the Tribunal felt unconvinced particularly given the tone of the letter of 1 May 2017 that the Claimant was well disposed towards or respected the senior management team with whom she would be working.

Submissions

The Respondent

40. The issue for the Tribunal was whether reinstatement was practicable. In effect this was the Respondent's second bite of the cherry to establish that reinstatement was not practicable. The first was when the Tribunal considered whether to make the order at the Hearing at which the Respondent was found liable for unfair dismissal.

41. The Reinstatement Order was made on 8 March 2017. The Respondent has refused to comply with it. This was The Respondent's view was if there was compliance with the Reinstatement Order there would be overstaffing.

42. The Tribunal was reminded that the Respondent had complied with its Judgment in so far as it related to the discrimination claim. There had been no application to amend to include any other form of discrimination claim. The Respondent did not understand the reference to injury to feelings. The Tribunal was referred to Section 117(4) of the Employment Rights Act 1996 (the ERA).

43. The Respondent's primary position was that it was not practicable to comply with the Reinstatement Order. The Respondent's position was that the work could not be undertaken by anything other than a permanent replacement. It was a senior management role who was part of the senior management team. Given the integration of the new business and ongoing acquisitions there was a need for succession management retention and leadership. The Respondent was also invoking the Lean process. Many tasks needed to be undertaken which was why there was a need for a level hire.

44. Mr Schulzke had been on the recruitment panel. He said that Mr Mackay needed to be persuaded to give up his existing role to take up employment

with the Respondent. He would have been unable to recruit at that level if the offer was on a temporary basis. Mr Mackay needed to be offered secure employment to give up his existing role. The role was for a replacement for the claimant but also a wider remit.

45. The Tribunal was invited to find that it was not practicable to re-instate the Claimant without dismissing another employee. When the Reinstatement Order was to be complied with there was a HR Manager who was a full time equivalent. An additional HR Manager would be excess capacity. While it was accepted that more could have been done to communicate the discussion it was clear that discussions went on beyond date of compliance with the Reinstatement Order.

46. If the Tribunal did not accept the Respondent's position then the Tribunal can consider whether the Respondent, even of erroneous had a genuine belief.

47. Mr Schulzke was a credible witness. He was quick to agree when points were not in his favour. He was speaking in English which was not his first language.

48. The Tribunal was referred to *Coleman & Another v Magnet Joinery Limited ICR (CA) [1975] 46* and *Cold Dawn Tubes Limited v Middleton EAT [1992] IRC 318*.

49. The Respondent submitted that there were aggravating factors in this case and that, when referring to the Judgement from the merits hearing, no aggravating features were identified or set out. While aggravating features could occur where the Respondent discriminated deliberately or with malice. That was not the case here. The Respondent was entitled, in terms of Section 117 to attempt to persuade the Tribunal of its view. The Respondent was not in breach of its legal obligations as there is no legal obligation to re-instate. Even if the Tribunal took the view that the Respondent was wrong in coming to the decision it did in relation to reinstatement that does not demonstrate that there are any aggravating features such as to warrant a penalty. The Tribunal is invited to find that there are no aggravating features to warrant any penalty to the Secretary of State.

The Claimant

50. Considering there was no evidence of the Respondent making any effort to reinstate the Claimant in her HR Manager role. There was no evidence of that it was impracticable for the Respondent to do so. The Respondent started recruiting for the Claimant's replacement after her dismissal and while her appeal was ongoing. There was no reasonable period permitted for the Claimant's return. There was no evidence that it was not reasonably practicable for her to return given the date of Mr MacKay's appointment. The evidence points to the Claimant doing all she could to enable the Respondent to reinstate her but the Respondent appears to have disregarded her.

51. The Respondent's position was striking given that its position has always been that there was an increasing workload. There was no issue about the Claimant's performance.

52. Considering the absence of evidence that it was not reasonably practicable for the Respondent to have found work for the claimant the Claimant seeks an order for reinstatement from the Tribunal or alternatively compensation as detailed in the schedule of loss.

53. The Tribunal was referred to Section 114 and Section 116 of the ERA. The Tribunal was reminded that it was a question of fact for the Tribunal and the burden is on the employer (see *Port of London Authority v Payne [1994] IRLR 9*).

54. The Respondent failed to discharge the burden that it was not reasonably practicable to find HR work for the claimant. There was no evidence of any efforts having been made whether in correspondence or email. The Respondent appears to believe that the replacement for the Claimant trumped an order to reinstate her. There was no evidence of any reasonable period passing prior to this replacement nor there was any evidence to show that it was not reasonably practicable to have employed him to carry out the Claimant's work. The Claimant had always gone above and beyond her role to express how she wanted to stay with the Respondent both pre and post

dismissal including in her claim form. The Respondent was fully aware of the extent to which she wanted to keep her job which she enjoyed and valued.

55. In the context of the Respondent's size and administrative resources the unsubstantiated assertion that the Respondent had not been able to reinstate was not made out.

56. The Tribunal was invited to order reinstatement and compensation as set out in the schedule of loss.

57. The Tribunal was also invited to impose a financial penalty under Section 12 of the Employment Tribunals Act 1996. The Respondent continued to refer to needing a full time HR Manager and referenced the travel that was involved.

Deliberations

58. When the Tribunal decided to make the Reinstatement Order in March 2017 it took account of the Claimant's wish to be reinstated; on the evidence before it the Tribunal made a provisional assessment that it was practicable for the Respondent to comply with a reinstatement order and it would be just to make it. The Respondent did not comply with the Reinstatement Order.

59. The Tribunal therefore considered that now it had to make a final determination on practicability. It was for the Respondent to show on the balance of probabilities that complying with the Reinstatement Order was impracticable. The issue was practicability at the time of the proposed reinstatement not the date of dismissal.

60. The Tribunal accepted Mr Schulzke's evidence that the Respondent's time and attendance procedures had improved and involved less HR resources. Ms Allen and Mr Papalymperis were HR Administrative Assistants who would be responsible for general HR matters. Mr Papalymperis was in any event engaged on a fixed term contract expiring in February 2018. Mr Mackay was employed on a permanent full-time basis. If the Reinstatement Order was complied with the Respondent would be overstaffed to the extent of a part-time HR Manager. While the Claimant listed additional projects in which she

considered she could be involved there was no evidence that Respondent intended to undertake these projects or had the financial resources for this work.

61. The Tribunal considered that when making a final determination on practicability under Section 117 of the ERA the criteria of practicability are the same and the provisions of Section 116 still apply to limit the circumstances in which this can be established. The Tribunal therefore considered whether one of the alternative conditions in Section 116(6) was met: that it was not practicable for the Respondent to arrange for the Claimant's job to be done without engaging Mr Mackay, or that Mr Mackay was engaged after a reasonable time following the dismissal and at a point when the Claimant had not intimated her wish to be re-employed and by the time Mr Mackay was engaged it was no longer reasonable for the Respondent to arrange for the Claimant's work to be done except by a permanent replacement.

62. In the Tribunal's view although the Claimant was dismissed on 29 April 2016 and Mr Mackay was not engaged until 28 August 2016 the Claimant intimated her wish to be re-employed after her dismissal and in her claim in the Tribunal proceedings. During this period Ms Allen and from July 2016 Mr Papalymperis were dealing with general HR matters. They did not have the experience to do the Claimant's job which Mr Schulzke covered following her dismissal. Given his wider remit in Europe and the significant amount of high level HR work flowing from the Respondent's acquisition of Rofin the Tribunal considered that it was not practicable for the Respondent to arrange for the Claimant's work to be done without engaging a replacement. The Tribunal also considered that given the level of expertise required and the ongoing nature of the work it was highly unlikely that a replacement would accept the appointment unless it was being offered on a permanent basis.

63. Notwithstanding the Respondent's submissions at the merits hearing about loss of trust and confidence the Tribunal did not understand the Respondent to be insisting upon that point.

64. The Tribunal then turned to consider the award of monetary compensation. The Tribunal considered the statutory formula for the basic award. At the date of termination, the Claimant had been continuously employed by the Respondent for eight years. She was 51 years of age and the statutory cap on a week's wages was £479. The basic award is £5,748.

65. The Tribunal did not consider that there should be any reduction to the basic award. While Section 122(4) of the ERA provides for a reduction where the employee has been dismissed for redundancy and has received a redundancy payment the Tribunal found that the Claimant was not redundant and her dismissal was unfair.

66. Turning to the compensatory award, the Tribunal referred to the Claimant's schedule of loss. The Tribunal's understood that the parties agreed that the Claimant's loss of income from the end of her notice period, 23 June 2016 to the date of the merits hearing on 24 February 2017 was £17,261 calculated as follows:

8 months x £1,748	£13,984
Pay increase from 1 December 2016 =3%	£157
Loss of benefits: 8 months x £104	£832
Loss of pension: 8 months £94	£752
Loss of bonus: 8 months x £192	£1,536
	£17,261

67. The agreed loss of income from 25 February 2017 to the remedy hearing on 29 November 2017 was £14,278 calculated as follows:

9 months x £1,800 (including 3% increase)	£16,200
Loss of benefits: 9 months x £104	£936
Loss of pension: 9 months £94	£846
Loss of bonus: 9 months x £192	£1,728
	£19,710

Less income from consultancy work		
From 1 June to 5 October 2017		
4 x £530	£2,120	
Less income from employment		
From 28 August to 29 November 2017		
3 x £1,104	£3,312	£5,432
		£14,278

68. The Tribunal then considered future loss. The Claimant's schedule of loss referred to future loss of salary, benefits, pension and bonus of 12 months. In the Tribunal's view compensation is for financial loss not to punish the Respondent. The Claimant received the Judgment on March 2017. The Tribunal appreciated that having made the Reinstatement Order the Claimant hoped that the Respondent would comply. The Claimant knew in May 2017 that the Reinstatement Order was not being complied with. Since June 2017 she had found some employment. The Tribunal understood that the Claimant was disappointed not to be reinstated. However, she is an experienced HR professional who remains in the Tribunal's view highly likely to secure new employment particularly now that the option of returning to work for the Respondent is no longer available. The Tribunal therefore decided that it would be just and equitable to award a future loss salary, benefits, pension and bonus of three months, plus £500 loss of statutory right less payments received that is £272 calculated as follows:

3 months x £1,800 (including 3% increase)	£5,400
Loss of benefits: 3 months x £104	£312
Loss of pension: 3 months £94	£282
Loss of bonus: 3 months x £192	£576
	£6,572
Less income from employment to 16 December	£552
	£6,020

Add loss of statutory rights		500
		£6,502
Less termination payment		£5,748
		£272

69. The Tribunal calculated the total monetary award as follows:

Basic Award		£5,748
Compensatory Award		
Immediate Loss (£17,261 + £14,278)	£31,539	
Future Loss	272	£31,811
		£37,559

70. Having concluded that reinstatement was not practicable the Tribunal did not make an additional award. The Tribunal noted that the monetary award is more than £30,000 and therefore requires to be grossed up. The Tribunal has insufficient information relating to the Claimant's income tax/allowances to make the appropriate calculation.

71. The Tribunal was not satisfied that any further award should be made to the Claimant for aggravated damages for what she claimed was post termination discrimination.

72. The remedy hearing was to consider the practicability of reinstatement, following the non-compliance with the Reinstatement Order. There had been discussion with HR in the US, the Respondent deliberated and formed the view that it had sufficient staff and therefore could not re-instate the Claimant without it leading to overstaffing. While the Claimant considered that decision was wrong the Tribunal did not consider that the Respondent deliberately discriminated against her or with malice when it reached its decision.

73. The Tribunal was not satisfied that there were aggravating features to warrant exercising its discretion to impose a financial penalty under Section 12A of the Employment Tribunals Act 1996.

Employment Judge: Shona MacLean
Date of Judgment: 05 March 2018
Entered in register: 07 March 2018
and copied to parties