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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mrs H Masterson	**AND**	The London Borough of Camden

Heard at: London Central

On:11-12 December 2019 and 9 January 2020

Before: Employment Judge Walker

Representation
For the Claimant: Miss C Hunt, of Counsel
For the Respondent: Miss A Stroud, of Counsel

RESERVED JUDGMENT

The Respondent must pay the Claimant a statutory redundancy payment in the sum of £12,446.

REASONS

The Claim

The Claimant claimed a redundancy payment.

The Evidence

1 The Claimant gave evidence on her own behalf as did Victoria Wallas, formerly the Acting Head of Regulatory Services for the Respondent, and Claire Marriott, the Claimant's trade union officer and the Camden Unison Convener for Supporting Communities.

2 The Respondent's witnesses were Susan Greening, HR Business Advisor for the Respondent, and Mr Jamie Akinola, the Head of Public Protection within the Council's Place Management Division for the Respondent.

3 I was provided with an agreed bundle of documents.

Issues

4 The Claimant sought a redundancy payment. There was no dispute as to whether the Clamant was made redundant. The dispute centred on a role that the Respondent had offered the Claimant after her redundancy was agreed, when she was undertaking an extended notice period to facilitate a transition to a new organisation.

5. At the outset I asked the parties to discuss the issues and it had took us sometime to reach agreement on them but we eventually defined them as follows:

1. Did the Claimant accept and start the HS2 role so that she was re-engaged by the Respondent?

2. What was the Claimant doing between 25 June and 30 September (i.e. what she carrying out the HS2 role?)

3. If the Claimant was carrying out the HS2 role, did the notice of redundancy given on 24 April 2018 cease to be effective?

4. Alternatively – in essence the same question – had the Claimant been reengaged into the HS2 role within the meaning of s.138(1).

5. What was the reason for the Claimant's employment ending? Was it redundancy as alleged by the Claimant or as the Respondent says in practice a resignation?

6. Were the provisions of the HS2 contract different from the Claimant's previous terms and conditions

7. If yes, and if the Claimant had resigned, did she do so within four weeks of starting work under the new contract so that s.138(1) did not apply?

6.The Respondent agreed that there was no issue over the question of whether the Claimant had rejected suitable alternative employment.

Facts

7. For the purposes of calculating continuous employment the Claimant commenced employment in September 1987.

8. On 16 January 2012 she began working for the Respondent as Principal Environmental Health Officer in the Noise and Licencing Team ("Principal EHO"). The Claimant was seconded from that role to the HS2 project between September 2014 and February 2017. This was a stage of the petitioning of the HS2 Bill through Parliament through to gaining Royal Ascent of appropriate legislation called the High Speed Rail (London-West Midlands) at 2017. The role involved environmental health impact assessment of the scheme in Camden, setting and agreeing noise, vibration and construction standards and representing Camden in various respects.

9. Thereafter, the Claimant was appointed to acting up Noise and Licencing Manager in June 2017. The terms and conditions applicable to her are included in the bundle and have a flexibility clause at 2.1 which states "You will be required to carry out any reasonable duties and hours of work appropriate to your grade or level."

10. One of the legal assurances obtained while the legislation was being processed, was that HS2 would fund Camden to cover a Community HS2 Environmental Health Officer for a two-year period following the HS2 legislation. Accordingly, the Respondent created that role. The Respondent had considerable difficulty finding a suitable candidate for the role. An initial candidate operated on a fixed term contract basis and thereafter a second individual was appointed called Peter Rodham.

11. The Claimant gave evidence that amongst various duties she had a management oversight role in relation to Peter Rodham as well as another member of staff involved in the HS2 project. She also had to deal with day to day functions in the Noise and Licencing team and to manage the contracted "out of hours" responsive noise service. She therefore had considerable knowledge about the HS2 work.

12. In 2017 and 2018, the Respondent was under financial pressure and set out to reorganise and reduce costs. A first consultation in relation to a reorganisation for regulatory services started around April and May 2017. This was followed by a second restructure called Environmental Health Business and Consumer Services Structure, which was put to staff on 24 January 2018. In the course of the second restructure, the Claimant's substantive post, which was Principal EHO and the role she has been acting up into, which was Noise and Licencing

Enforcement Manager, were both deleted from the new structure. That new structure was proposed to go live from 1 April 2018.

13. During the consultation, the Claimant applied for voluntary redundancy. Mr Dunphy, who was the Director of Place Management, eventually, and apparently reluctantly, accepted her application for voluntary redundancy on 18 April 2018 but the Claimant's departure date was delayed until 30 September 2018 to assist with the transition. Mr Dunphy confirmed that the Claimant would continue to receive her acting up allowance as it was acknowledged that during the transition period the Claimant would have to cover a number of noise management and related roles.

14. At pages 121 and 122 of the bundle there is an email from Mr Dunphy to various members of staff who appear to be in HR copied to Mr Darren Wilsher and Vicky Wallas (who were more closely involved in directly managing the Claimant), which confirms Mr Dunphy had accepted the Claimant for voluntary redundancy. He referred to this and to another person in the same position and explained he had asked then to remain for an extended notice period, saying "I have asked them to stay for an extended notice period to ensure we have adequate cover in pollution and health and safety, the exact length will be dependent on recruitment and may vary between each of them and will be for Darren and Vicky to discuss and agree with them, but I think it would be somewhere over three months but less than six".

15. On 9 April 2018 Mr Dunphy sent an email letter to the Claimant confirming that he had agreed her request for voluntary redundancy. He explained that this was conditional on the Claimant agreeing to work an extended notice period until a new person could be recruited to the ringfenced alternative post of Pollution Principal Officer, because the post was critical to the business. It was thought this would take some time and effectively likely to be in September 2018.

16. After a little correspondence over the question of leaving date, Vicky Wallas eventually emailed the HR team to say that Helen Masterson had seen Paul Dunphy today to discuss her extended notice period and Vicky Wallas had discussed exact dates with her. They had reached agreement that the last day of employment would be Sunday 30 September and the last working day would be Friday 28 September.

17. Thereafter, documentation was drawn up which constituted an open letter to the Claimant dated 24 April 2018 headed formal notice of redundancy. The letter confirmed that the following restructure of the Claimants substantive position of Principal EHO (Noise) had been deleted and she was excluded from the selection process for the post in the new structure. She was being issued with formal notice that her employment will be terminated by reason of redundancy.

18. The letter confirmed that the Claimant was entitled to six weeks' notice based on her having completed six years of service in Camden and for business continuity reasons the notice date would commence on 13 August 2018 with the last day of service being 30 September 2018. The Claimant's redundancy entitlement was set out in the letter and she was also told that she would not be entitled to a redundancy payment if she entered into further employment within an organisation listed in the Redundancy Payments Modification Order 1983 within four weeks of leaving the Respondent, unless the job offer was made after the last day of service. She was told if a job offer was made before the redundancy date and she was unsure whether this would affect her severance package she was encouraged to seek advice from the HR business advisor.

19. The redundancy letter also said that during the notice period the Claimant was required to continue to meet all contractual obligations to the Respondent some of which included compliance with organisational policies and procedures, fulfilling requirements of the post – acknowledging that there may be a transition period, reasonable attendance, leaving work in order and a satisfactory handover.

20. The letter also attached a settlement agreement. I understand the settlement agreement maybe the subject of further litigation in another court and I will therefore say as little as possible about it.

21. The letter did say "however, irrespective of whether you sign settlement agreement or not, you are still entitled to your enhanced statutory redundancy payment (excluding the discretionary payment), provided you are not redeployed within your notice period.

22. I believe that a second letter was prepared as the first letter had a minor error in the monetary calculation but in other respects the position was exactly the same.

23. The Claimant had some questions about the wording of her own. She then saw a solicitor and returned the signed Settlement Agreement. This was returned to the Respondent on 27 April 2018.

24. Shortly after that, Peter Rodham gave notice to terminate his employment. In consequence the role Community EHO Officer for the HS2 became vacant and the Respondent was clearly concerned to address that vacancy.

25. Vicky Wallas, who managed the Claimant on an acting up basis with the title Acting Head of Regulatory Services, approached the Claimant and asked her

if she would be interested in covering that role on a fixed term contract which would end on 31 March 2019.

26. Miss Wallas submitted a witness statement and gave evidence at this hearing. The Respondent suggested that her evidence at the hearing provided more information than her witness statement and that her witness statement should be preferred insofar as it did not address certain issues. I do not think that is an appropriate approach. Miss Wallas was a sensible and clear witness and I found her evidence entirely credible. The fact that she provided more detail in the course of questioning is not unusual. I accept that some of the matters she explained might have been matters which she could have addressed in her witness statement, but I do not see that as a reason to reject her evidence. I found her to be a credible witness.

27. Miss Wallas gave evidence was that this HS2 role was important and that the role was normally funded by HS2 itself. She knew there would be concerns if this was not filled and she knew the Claimant, Miss Masterson, had relevant experience. She therefore encouraged the Claimant to consider this role. She was however very clear that the Claimant was particularly concerned to protect her redundancy and was anxious about the implications on that redundancy of accepting the role.

28. The Claimant's response to the discussion was to email Vicky Wallas with a series of questions about the role. Her questions indicated that she would want her enhanced acting up pay maintained throughout the time but she thought it was within the budget total amount funded by HS2. She also wanted a new voluntary redundancy letter sent out and agreed and signed by both parties with a termination date of 31 March 2019 and an adjustment to the calculation of redundancy for the extra period of employment. Additionally, she wanted the cost of her solicitor making additional checks to be paid by the Respondent and she wanted her current terms for her existing job all to apply into the new termination date.

29. The Claimant also referred to the possibility of HS2 proposing to extend the Community EHO deadline beyond 31 March 2019, which would change the voluntary redundancy date and said that in that event she would want any further changes to be mutually agreed.

30. There was no reply to that letter for a period of time. Meanwhile, on 24 May 2018, Darren Wilshire who was the Environmental Health Manager wrote to a number member of staff including the Claimant listing four jobs with relevant job adverts attached and details of how to apply. His letter explained that they were being opened for expressions of interest to staff affected by the regulatory service reorganisation and would go to internal and external advert unless they

were filled at this stage. He asked for expressions of interest by the closing date of 4 June. The HS2 role was one of these four roles. The Claimant submitted an expression of interest on the closing date.

31. Subsequently, Vicky Wallas replied to the Claimant's questions about the role by an email dated 19 June. She said she had discussed the situation with HR and they needed to liaise with legal but she could respond point by point. She then took the email which the Claimant had sent and inserted in it her own comments which the Tribunal were told had been largely taken from information supplied to her by HR.

32. The responses in relation to the question on pay was "on the basis you are successful in your application for the post and the acting up salary is within the HS2 funding provisions this can be agreed". The response did not mention the fact that it also required management to make and get approval for the acting up salary, referred to as "making a business case". In practice a business case was not made promptly or indeed as fully as required initially and it took some time for a full business case to be made. Only once that was properly made, was formal approval obtained.

33. The second question the Claimant had raised with regard to wanting a new voluntary redundancy offer letter sent out and agreed and signed by both parties with a termination date of 31 March received an answer as follows "if you take up the new, contracted post, your redundancy will be deferred as the situation has changed. The notice, and the associated paperwork, will be issued nearer the time prior to the start of the notice period associated with a new post and it will be based on your completed years of service at Camden".

34. The Claimant had been told by Vicky Wallas that there was at least one situation she knew of where there had been an extension to the voluntary redundancy date, so, this appeared to reflect that approach. However, Vicky Wallas' response did clearly say that the notice and associated paperwork would be issued nearer the time, prior to the notice period associated with the new post.

35. The third question about the solicitor's costs for additional checks was responded to with confirmation that Camden would "pay for additional checks that are carried out when the new paperwork be issued near the start of the new notice period, e.g. as the HS2 contract work came to an end". However, it also said "we would not anticipate paying for any additional checks at this time as arguably its part of the same agreement".

36. The Claimant on being questioned said repeatedly that she read this in the context of the letter as a whole as indicating there was going to be an agreement at this time of some sort.

37. In relation to the fourth question about current terms and conditions for pay including acting up allowance, pension, annual leave of her existing job applying until the new termination date, the answer was “yes they will apply”.

38. In response to the fifth question about the deadline and other changes being mutually agreed if HS2 proposed to change the Community EHO deadline beyond 31 March 2019, the answer was “They will need to be mutually agreed, and any associated paperwork issued nearer the time”.

39. The Claimant had been managed by Vicky Wallas who as I have noted was Acting Head of Environmental Health but on 18 June 2018, Jamie Akinola joined the Respondent. His current title is Head of Public Protection within the Council’s Place Management division but he started in the post that Vicky Wallas had been undertaking on an “acting up” basis. However, initially Vicky Wallas was still working in much the same role and managing the Claimant. The work load was divided between Vicky Wallas, Darren Wilshire and Mr Akinola for a period of time. Ms Greening gave evidence that Ms Wallas continued to have primary responsibility for the Claimant until she left.

40. On 22 June 2018, (which was the end of the first week when Mr Akinola commenced work), Vicky Wallas and Darren Wilshire interviewed the Claimant for the HS2 post as Community EHO. She was apparently the only candidate and at the end of the meeting, they told her that they wanted to offer her the job. She had gone to the meeting armed with a copy of her email of 3 May and the reply dated 19 June, which include both her original questions and the responses cut and pasted into that by Vicky Wallas. Vicky Wallas gave clear evidence that, while they had effectively had a verbal agreement in principle, this was very much subject to the Claimant getting clarification on terms that concerned her. Vicky Wallas did not regard the situation as cut and dried at that point, but rather to be resolved. The Claimant’s evidence was also that she had indicated her agreement but on the basis, that the details could be worked out and satisfactory paperwork prepared. They did not agree a start date.

41. Mr Rodham had left on 26 May 2018 and the post had been vacant for almost a month by the time of the Claimant’s interview. HS2 knew Mr Rodham had left and that the position was vacant. The Tribunal were told that for a period of time HS2 did not provide any funding for the role. It was regarded as a highly important and high-profile role within the Respondents organisation and efforts were made to cover urgent matters. Specifically, the Claimant who was familiar with the matter and had been Mr Rodham’s Direct Line Manager for relevant purposes, took on urgent matters along with the other work on roles that she was covering through the transition period.

42. Despite having told the Claimant she was the successful candidate, no paperwork was prepared or given to the Claimant, so on 11 July 2018 the Claimant sent an email to the HR team copied to Vicky Wallas and Jamie Akinola asking them what the position was. She said she understood that while she had accepted verbally subject to the agreement on the terms and conditions this was referred to HR to arrange an offer letter. She had no response some three weeks later. She knew there had been annual leave in HR but was concerned time that time was ticking and no further progress had been made. She said "you will be aware that I have sought clarification on the terms and conditions for this temporary eighteen-month post as I had previously accepted redundancy from my P. EHO post due to post due to leave on 30/918 (termination date formally kicks in in mid august). I am also due to take leave 24/7-10/8 and 20/8-1/9 so not around much in the near future".

43. She then said "At the moment my last day at Camden is scheduled on 28/9/18. If I am to accept the HS2 Community EHO temporary post which would delay [by] statutory redundancy date until Oct 19 period, there are conditions to be agreed. These have been set out and agreed in principle as per the email attached but need to be formally confirmed as part of the job contract and Settlement agreement. This is key to me remaining at Camden". She then asked if they could urgently confirm how this could be expedited.

44. Still nothing happened and no paperwork arrived. Almost two weeks later, on 24 July, Vicky Wallas emailed HR stating "Helen started the post at High Speed 2 Community Officer on 2 July. She will be in post until end October 2019 when the HS2 funding ends". She then referred to the cost code and the HS2 cost centre and the relevant manager for that. The email confirmed that the Claimant would continue on her 35-hour week. She attached an email to the Claimant, which she said confirmed that she would continue on her acting up salary, following agreement with Paul Dunphy. I understand that was a reference to the acting up salary payable during the transition period, rather than under the new post, as that had still to be sorted out. She explained the Claimant was about to go on leave.

45. There was in fact no direct evidence that the Claimant had started work on HS2 on 2 July and the actual situation was a matter in contention between the parties in this claim. Ms Wallas was asked about this email when she gave evidence and she said that she did not write that because the Claimant had actually started the full time HS role but rather to try to set up an audit trail, as she was concerned about the funding situation.

46. In the event, matters were delayed further. The business case had not been made at this point. On 13 August 2018, Beth Freane, from HR emailed Jamie Akinola stating that Vicky's business case needs to include justification for

an enhanced salary, length of time, the outcome of any recruitment activity including number applied, number short listed candidates and employment market information such as evidence of similar roles being offered by other organisation – this would be available on job boards. They needed this for justification of any increase so that they had an audit trail. The business case then needed to be approved by Paul Dunphy and the request would then need to go through Senay Yesil.

47. Vicky Wallas left the Respondent on 17 August 2018. She prepared the business case shortly before leaving. Through the summer period the Claimant had quite a bit of holiday. She had taken one week between 30 July and 6 August and she took another two weeks between 20 August and 2 September. She returned to the office on 3 September. It appears that when she returned the formal job offer letter had still not been prepared, although the business case had been approved by Paul Dunphy on 14 August 2018.

48. For the first time, on 7 September 2018 the Claimant was sent an offer letter for the new role. The offer letter did not ask the Claimant to sign it to accept it, although it attached a document called "Practitioner Manager Contract of Employment" which did provide for the Claimant to sign it to accept the Respondent's offer of employment. This was sent to the Claimant by email from HR. The Claimant did not sign it. The covering letter did say "your notice of redundancy will be deferred for this period" (which referred to the period up to 31 October 2019) "until your last day of service". It said, "We will re-issue your notice documents closer to the time in line with your notice period of 7 weeks if you are still in a redundancy situation". The hours of work were recorded as a minimum of 36 per week. The Claimant had been working for 35 hours per week previously.

49. The Claimant's first response on 11 September 2018 was to thank the HR team member who had sent the documents to her for the "fixed term contract and deferred redundancy letter" and to confirm that she had forwarded this to her solicitor. Having consulted with her solicitor and the union, the Claimant responded on 13 September 2018 and pointed out that her solicitor and union had some concerns. Her solicitor had advised her that she needed a legally binding agreement regarding her redundancy otherwise she had no legal commitment to redundancy after 30 September. She also asked why she needed to sign a new temporary fixed term job contract as the union had advised she should remain on the old contract if the job offer was dated from 25 June 2018 and similar to her substantive post which reflects her current terms and conditions and working week of 35 hours. She made it clear she would like to remain with the Respondent to undertake the role but she needed to secure some certainty as to her job contract and terms and conditions. It is not material

but the end date had already been moved from March 2019 to October 2019 and the Claimant was aware of this.

50. There was an exchange between Mr Akinola and HR and then it was agreed they would arrange a meeting to go over the matters with the Claimant and the union. This meeting was arranged for 20 September.

51. Notes were made at that meeting by the Claimant and by her union representative. The union representative's notes were manuscript notes in a note book which she typed up some while later. The Claimant also wrote notes. Her manuscript notes no longer exist. The Claimant said she typed up her notes that evening and her notes are based on her original manuscript notes. The Respondent's HR representative made notes but due to an IT issue was no longer able to access them.

52. There is some dispute as to precisely what happened at this meeting. As noted above, the Claimant and her trade union representative made notes that are challenged by the Respondent's witnesses as being inaccurate despite the fact that they do not have their own copies of notes of the meeting. I do not think it is necessary for me to decide exactly what happened, as I do not believe it assists in the determination of the issues before me. I have said I would make every effort to avoid straying into areas which might relate to the dispute over the settlement agreement, which I understand is to be litigated in another court.

53. Both the Respondent's witnesses do agree the Claimant made it clear at that meeting that she wanted to leave on 30 September 2018, which was the date when her original redundancy was due to take effect.

54. The Claimant then wrote an email to Jamie Akinola on Friday 21 September when she was off work assisting a family member and said "just wanted to follow up our meeting yesterday to say thank you for clarifying my contractual situation on the first SA and my plans to leave Camden on 30 September. I have really enjoyed my time at Camden and have learnt so much working alongside you on EH strategy and vison in these last few months. It is a shame how the reorganisation worked out and the fall out created for me before you arrived. I am conscious of the little time I have left at Camden which is not ideal but hope you can understand why I have to stick to the original SLA agreement. There was no response to that from Mr Akinola.

55. Thereafter the Claimant put out a notice to her colleagues. Additionally, the Claimant wrote to Claire Marriott for the union on 26 September referring to the fact that she had done the announcement to her team and HR to Monday morning and had met Mr Akinola who was very good and understood why. She said he had made plans on Friday very quickly to get cover for the HS2 post. He

understood where I was coming from. Lots of tears on Monday but it is now a weight off my shoulders and I am trying to use the short time I have left to handover my work and notes as much as I can.

56. She also wrote “interesting have had no response from Sue Greening or a signed version of the SA since our Thursday meeting. Jamie says not to worry as he is speaking to her line manager and they are doing internal emails to sort it out. Paul if being informed also”.

57. Sue Greening was forwarded a copy of the invite to all the staff for leaving drinks by Jamie Akinola and she replied to him on 25 September 2018 referring to the fact that [the Claimant] was not included in the original employees being made voluntary redundant and she could not find any paperwork submitted to Mike and Jo on Helen as part of the redundancy approval process. She points out “The unions also queried the number of posts /redundancies at the CJCC earlier this year.”

58. She then says, “Helen expressed an interest in the HS2 role at the end of April and is currently employed under a FTC and so not in a redundancy situation”. She asked if she had misunderstood anything would they let her know.

59. There was then an exchange of emails which indicate that there was going to be a discussion between Mr Dunphy and somebody at the head of HR.

60. The Claimant did some handover notes and left. The Respondent did not pay the statutory redundancy and disputes the position saying the Claimant left voluntarily.

61. As part of the situation, it was the Respondent’s case that the Claimant had in practice begun the HS2 job and the evidence relied on was as follows:

61.1 The draft contract of employment for the Claimant offering her the role indicated the start date as 25 June 2018. The interview was on Friday 22 June and that would have been the Monday immediately following that interview. There was, however, no paperwork in the bundle anywhere which explained where that date had come from and the Claimant disputed that she had ever started the role at that time.

61.2 The Respondent also referred to Miss Wallas’s email dated 24 July in which she said that [the Claimant] started the post on 2 July. As I have noted, Miss Wallas was asked about that and explained that this was a funding situation. She wanted to create an audit trail. She was concerned that HS2 were not funding the role while some work was being done. The email did not accurately reflect what the Claimant was

doing. Rather, its contents reflected her concern about funding. I have considered the Respondent's comments on the credibility of this evidence as it appears to contradict Ms Wallas' own email, but I do not know what HS2 were actually told about the funding situation. It seems there was some communication which led them to pay only 50 per cent of the funding indicating they had not been told that the Claimant was carrying out the role on a full-time basis.

61.3 The Respondent also relied upon Mr Akinola's evidence that it was his recollection that the Claimant was not in the office very much and based on the amount of time he saw her he did not think she could be carrying out other work beyond HS2. Rather it was his firm belief or assumption that she must have been doing the HS2 work full time. The office was an open plan office. There were 30 or 40 desks in a relatively small area given the number of people involved. People were expected to hot desk although some clearly had a tendency to sit in the same location. Mr Akinola expected that as a manager, the Claimant would be regularly present in the office doing line management liaison with her subordinates, which he says he did not particularly see. He did confirm that there were meeting rooms on the floor and break out areas and indeed meetings rooms on other floors.

62 The evidence that suggests the Claimant was not carrying out the HS2 role is the following.

62.1 The Claimant's evidence was that she did not start the HS2 role and that she did no more than was consistent with her duties to assist and cover during the transition, under the redundancy letter. In the ET1 she said she continued to cover the principal EHO role and the temporary HS2 role as well as a further Noise Management role. The Claimant said she had started to cover the urgent HS2 work when Mr Rodham left. That was effectively from the beginning of June 2018 sometime before she was interviewed for and offered the post. She did this because she regarded it as part of her responsibilities and she was concerned to comply with the terms of her redundancy and the settlement agreement, which she understood meant that she was to keep things going through the transition period.

62.2 Vicky Wallas' admission that she did not think the Claimant was actually carrying out the HS2 role, despite her email indicating she was.

62.3 The lack of evidence that someone else took over the Principal EHO role or the Noise Management role which the Claimant had been covering in the relevant period. I note that on being questioned about it, Mr Akinola

suggested that his sense was that other staff, in the relevant teams, were dealing with those matters but there is no direct evidence that some one took over those duties.

62.4 The Claimant's diary entries for the relevant period. The diary entry for June as been colour marked to show time on annual leave, time working on HS2 and time working on the noise and pollution work. While there are clearly some HS2 meetings, (e.g. on 5 June, 8 June, 12 June, 14-15 June, 18-19 June, 29 June, 9 August, 4-5 September, 20 September and 27 September), there were a significant number of entries for the noise and pollution work as well.

62.5 HS2 did not pay for a full time HS2 officer during the period in question. I was not provided with copies of the communications between HS2 and the Respondent over the post, but there is documentary evidence that shows that, when the HS2 funding was reinstated, it was provided for a "half full time equivalent post", not for a full-time post. An undated document simply called "Chart" puts the Claimant down as both HS2 Community EHO and Pollution Principal Officer, indicating against both that the correct cost centre is for half full time equivalent. Against HS2 this is noted as "for July".

62.6 I asked the Claimant to review the HS2 role job description which had been supplied in the bundle and to explain what activities she undertook while she was working on that project. Having considered it carefully there were a number of things she did not do at all such as liaising with support officers, leading on performance measurement and preparation of performance reports for the role or reporting quarterly to HS2. She did not recall any interpretation of independent assessors' reports and environmental statement impacts. She did not recall assisting and resolving any complaints from the community about environmental health issues connected with the scheme. She did not recall doing any mitigation packages. She did not particularly investigate any of the complex case matters relating to residents affected. She did accept she provided some advice and guidance to colleagues related to HS2 related to environmental health matters and liaised with HS2 officers on community issues. I am satisfied from her evidence what she did was in practice the urgent matters which were essential, rather than fulfilling the role in a complete and thorough way.

63 My conclusion is that the evidence points to the Claimant perhaps spending between a third and up to half her time on HS2 matters, while still performing her other roles.

64 The Claimant did some handover notes after her employment ended. She appears to have taken a document prepared by someone called Peter, which could be Peter Rodham, and then added to it. It was suggested that this showed her only doing some HS2 work but I am not satisfied I can interpret it that way or that those notes assist either way.

65 Another factor which is relevant in determining this factual dispute is that the Respondent's evidence was limited to two of the Respondent's staff members who had no direct knowledge of the situation. Miss Greening, as HR representative, had no direct knowledge of what the Claimant was doing but assumed that HR had taken the date of 25 June from information supplied to them. She did not know what that information was, nor did she know where the date came from. She expected it would have been in an email. No email in the bundle referred to that as a start date at all. Under the circumstances Miss Greening was not able to give any direct evidence about the situation. Mr Akinola again had no direct knowledge about the situation. He could not recall a date when he sat down with the Claimant to have a meeting at which he could definitely say that they discussed what she was doing and she confirmed to him that she was doing the new HS2 role. He assumed he would have had such a meeting but had no recollection of it. His evidence was given on the basis of assumptions drawn from not seeing the Claimant at times he thought he might have seen her, but he had no specific dates or times in mind.

66 In contrast the Claimant's evidence was her personal evidence about the work that she was doing and her time commitments. Additionally, the evidence of Vicky Wallas who managed the Claimant for much for the time confirmed that it was her belief and understanding that the Claimant was only doing urgent work on HS2.

67 I do accept the Claimant's evidence that her work on HS2 was consistent with her responsibilities to cooperate throughout the transition period and was not consistent with her having commenced the new HS2 role in pursuance of any offer made to her verbally by the Respondent, through Vicky Wallas, on 22 June or indeed following the later offer letter and draft contract dated 7 September. For the reasons given above, I am satisfied that the Claimant was not doing the full-time role that the Respondent relies upon.

68 I am also satisfied that, to the extent the Claimant was doing any part of the new HS2 role, it was because of her agreement to assist with the transitioning consistent with the redundancy documentation which she believed was applicable to her. I have no doubt that because she expected to take on the HS2 role she would have paid careful attention to the urgent matters that arose in that area, but she simply did not start the fulltime role that was envisaged. It was responsible and sensible for the Claimant to cover urgent work in relation to

matters about which she was the most informed member of management, when no one else was in place to undertake the role and she had undertaken through the end of her employment leading up to her redundancy to assist fully with the transition.

The Law

69 This is a case where the Respondent did not deny that the Claimant had initially been made redundant. Even though the Claimant had obtained voluntary redundancy. The Respondent agreed that for all intents and purposes the Claimant's redundancy should be treated as a valid redundancy. However, they argued that Section138(1) applied.

70 Section 138 (1) provides as follows:

(1) Where-
(a) an employee's contract for 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 purpose of this Part as dismissed by his employer by reason of the ending of his employment under the previous contract.

(2) Subsection 1 does not apply if -
(a) the provisions of the contract as renewed, or of the new contract, as to –
(i) the capacity and place in which the employee is employed, and
(ii) the other terms and conditions of his employment contract, `
differ (wholly in part) from the corresponding provisions of the previous contract, and
(b) during the period specified in subsection (3) –
(i) the employee (for whatever reason) terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated, or …
(3) The period referred to in subsection (2)(b) is the period that –
(a) beginning at the end of the employee's employment under the previous contract, and
(b) ending with –
(i) the period of four weeks beginning with the date on which

the employee starts work under the renewed or new contract, or

(ii) such longer period as maybe agreed in accordance with subsection 6 for the purposes of retraining the employee for employment under that contract;

and is in this part referred to as the "trial period".

(4) Where subsection (2) applies, for the purposes of this Part-

(a) the employee shall be regarded as dismissed on the date on which his employment under the previous contract (or, if there has been more than one trial period, the original contract) ended, and

(b) the reason for the dismissal shall be taken to be the reasons for which the employee was then dismissed, or would have been dismissed had the offer or original offer of renewed or new employment not been made, or the reason which resulted in that offer being made.

Submissions

Respondents Submissions

71 The Respondent submitted that the Claimant had accepted the HS2 role thereby becoming re-employed by the Respondent. The Respondent said on 22 June 2018 there was an offer by Darren Wilsher and Vicky Wallas, which was accepted by the Claimant, subject to the formalising of the terms and conditions set out on 19 June 2018. The Respondent argued there was an intention to create legal relations and sufficient certainty as to what that role entailed so that a contract was formed.

72 The Respondent also argues that the Claimant was doing sufficient in relation to the role to be carrying it out in practice.

73 The Respondent rejected the Claimant's argument that the fact that she was doing other work indicated that she was not in practice doing the HS2 role. The Respondent said simply because the Claimant was doing her other transition work alongside the HS2 role had no bearing on whether she had started performing under that contract or not.

74 The Respondent urged me to prefer the evidence of its witnesses and to find as a fact that the Claimant undertook the HS2 role. I was pointed to various mattes including the wording in the ET1 and the witness statements where the Respondent suggested I should read the position as supporting the Respondent's contention.

75 I was referred to the fact that Vicky Wallas sought and obtained funding for the HS2 role on the strength of the Claimant carrying out the work on a half time basis.

76 In consequence the Respondent argued that the notice of redundancy dated 24 April 2018 ceased to be effective because the Claimant was entitled to a statutory trial period of four weeks after which she was taken to affirm the contract and her redundancy notice ceased to be effective.

77 The Respondent also argued that there no significant differences between the HS2 contract and the previous contract. In relation to the formal terms sent to the Claimant on 7 September the Respondent argued that that was not material as nothing changed. The Claimant was still covering other transitional posts at that time so the Respondent says there was no change. The Respondent argued that insofar as there was a change of end date from March 2019 to October 219, various emails showed the Claimant had accepted this.

Claimant's Submissions

78 The Claimant submitted that she had conditionally accepted the offer orally on 22 June 2018 but the conditions she required were that she continued to be paid her acting up salary, she received a new signed settlement agreement as soon as possible and she had the same terms and conditions as her current contract and that any changes to her end date would be mutually agreed.

79 The Claimant said that the acting up rate was not effectively confirmed by the Respondent till at least 14 August and the purported starting date of 25 June simply could not be correct.

80 Additionally, the Respondent expected the Claimant to work under the new terms and conditions, which provided for a 36-hour week instead of 35. Those terms were reflected in the new documentation they sent to her on 7 September.

81 The Claimant submitted that all that happened on 22 June was the terms and agreements were agreed in principle but needed to be clarified subsequently. The Claimant referred to Vicky Wallas' evidence where she referred to the discussion as an agreement in principle and her words that it required clarification.

82 The Claimant relied on the wording in the 19 June email as meaning that the redundancy situation and the HS2 role were part of the same agreement as before and the Claimant wanted to be able to review the terms and conditions and see them in legal document and no such document was provided to her until 7 September. The Claimant had an overarching condition which was that she

wanted formal confirmation of her position under a new contract of employment so that she knew where she stood, but that was not clear until 20 September 2018.

83 The Claimant relied on the fact that no starting date was ever agreed. The Claimant said that while it might be possible to backdate a contract, for the purposes of assessing the position under the legislation in s.138, it was not possible to backdate when the re-engagement actually took effect. In the Claimant's case there was never any re-engagement under the HS2 contract and that the only thing that happened was dialogue about the prospect of the role. The Claimant did not sign the contract which set out the terms of the offer and there was no formal acceptance of the offer.

84 In terms of the functions the Claimant was actual performing, the Claimant argued that she was simply continuing to assist with the transition and in effect only carrying out the urgent tasks of the HS2 role. In the alternative the Claimant argued that if it was treated as her having accepted the offer either on 7 September or at the meeting on 20 September, when she left employment on 28 September it was within the trial period.

Conclusions

85 The issues which were identified were in effect repetitive and were an effort to try to accommodate the parties' comments on this matter. It was not in dispute that the Claimant' had initially had the right to a redundancy payment because she was dismissed by the employer by reason of redundancy. The Claimant would have received that redundancy payment pursuant to the letter of 24 April, had it not been for later events. The question which then arose was whether s.138 was applicable so as to remove her right to that redundancy payment.

Did the Claimant accept and start the HS2 role so that she was re-engaged by the Respondent?

86 The first question was therefore whether the Claimant had accepted the HS2 role and had effectively been re-engaged under a new contract of employment in pursuance of an offer which was made before the end of her employment under her previous contract. The parties both agreed the Claimant had not had her contract renewed and this was a question of re-engagement.

87 The Respondent's position was that there had been a verbal offer made at the meeting on 22 June which the Claimant had effectively accepted and the terms were sufficiently certain so that she had therefore been re-engaged under that new contract of employment. Additionally, the Respondent did not think it

mattered that the Claimant had not worked full time on this post. The Respondent also argued there was an intention to create legal relations and sufficient certainty as to what that role entailed so that a contract was formed.

88 For the reasons set out under the heading "facts" above, I do not consider that the Claimant had been re-engaged by the Respondent on the full-time role.

89 The discussion between Ms Wallace and the Claimant and Mr Wilsher was not an offer which was capable of acceptance. I do not accept that there was an intention to create legal relations. First, both parties present who gave evidence referred to it as an agreement in principle and recognised that it was subject to more. The additional requirement was referred to at times as clarification on terms that concerned the Claimant and at other times as a formal agreement. The Claimant's own email dated 11 July said "there are conditions to be agreed. These have been set out and agreed in principle as per the email attached but need to be formally confirmed as part of the job contract and Settlement agreement.". The Respondent is a large organisation and it is clear from Ms Greenings evidence and various emails that there were always formal procedures to be followed, for example the requirement for a business case regarding the salary. Ms Wallas and the Claimant would never have expected that they were allowed to create legal relations without following though with HR and it was not their intention. The Claimant made it clear that she required a formal offer with satisfactory terms before she would be satisfied and this was not achieved. It was what is sometimes called "an agreement to agree".

90 The Claimant referred to the position as a conditional agreement, with the condition being the requirement for formal terms and conditions to be prepared which were satisfactory to both parties. The fact that those terms would have to incorporate a number of matters that had already been raised was not sufficient to amount to an agreement without the full formal terms being agreed. I agree with that analysis of the situation.

91 As for the work that the Claimant was doing on HS2, this was consistent with her carrying out the transitional role and assisting the Respondent through a difficult period when they were having major structural and staff changes. I do not accept the Respondent's argument that even if the Claimant was only working for 50 per cent of her time on that role and still fulfilling other transition work, that was still still a re-engagement on a new role for the purposes of section 138(1). The Claimant was responsible, as a manager, to cover urgent matters within her sphere of operation, about which she was knowledgeable and this would include matters in relation to a subordinate's vacant role. The redundancy letter required the Claimant to continue to meet all contractual obligations to the Respondent and specifically listed fulfilling the requirements of the post and a satisfactory handover. Her original contract required her to carry

out any reasonable duties appropriate to her grade or level. Working on urgent HS2 matters would fall within this. She was only carrying out the role envisaged by Mr Dunphy when he agreed her voluntary redundancy.

<u>What was the Claimant doing between 25 June and 30 September (i.e. was she carrying out the HS2 role)?</u>

92 The reason for this issue being identified was that the Respondent suggested initially that the Claimant had accepted the HS2 post by conduct and had been effectively carrying out the role. Since there was only a verbal discussion prior to 7 September and the 7 September documentation was never signed, there was a possibility that the Claimant might in practice have been re-engaged either her own verbal agreement or her conduct.

93 I am satisfied that between 25 June and 30 September the Claimant was carrying out a normal transitional role. I have no doubt that she expected to take over the HS2 role in due course and would have kept a careful eye on the position, but she was not able to do more than urgent work because she remained responsible for all of the other noise and environmental work which had been under her remit previously and while new staff were being recruited and new arrangements being entered into, she had undertaken to support the transition. Her diary entries show that she continued to have significant input into the noise and environmental role.

94 I reject Mr Akinola's evidence that he did not see the Claimant sufficiently to believe that she was doing the noise and environmental role. Mr Akinola was initially very new to the position. Miss Greening gave evidence that he had been sharing the role as he became more familiar with it with Vicky Wallas and with Darren Wilshire and that Vicky Wallas continued to be very much responsible for the Claimant until she left in mid-August. Therefore, for much of the time, and certainly for the period through the end of June, the whole of July and up to the middle of August, it was clear that Vicky Wallas was the person most involved with the Claimant. As Vicky Wallas left in August, there was little time when Mr Akinola was responsible for her. In fact, it was only a period of time in late August for much of which the Claimant was on holiday. Between 4 September and 20 September, they were arranging a meeting, after which it was clear that the situation was such that the Claimant intended to leave on 28 September.

95 In those circumstances there was little time for Mr Akinola to be really aware of the Claimant's role. The mere fact that she was not always visible to him was not indictive of the fact that she was not carrying out that role.

<u>If the Claimant was carrying out the HS2 role, did the notice of redundancy given on 24 April cease to be effective?</u>

Alternatively, had the Claimant been re-employed into the HS2 role within the meaning of s 138(1)?

96 The third and fourth questions both related to whether the Claimant had been carrying out the HS2 role so that the notice of redundancy ceased to be effective. Both related to the provision in s.138(1) which applied if she had been re-engaged. In practice my finding is that that was not the case. The notice of redundancy remained effective.

What was the reason for the Claimant's employment ending? Was it redundancy as alleged by the Claimant or as the Respondent says, in practice a resignation?

97 The next question was essentially the same as the questions above. The Claimant's employment would have ended, as the Respondent says, by reason of resignation if her redundancy was not effective because this had been substituted by the negotiations and discussion or her behaviour in taking up the HS2 role.

98 I should note that the Respondent did not suggest and never sought to argue that the HS2 role was a suitable alternative role. It was clear from the outset that that was not their argument. I clarified this with the Respondent at the beginning of the case and again in the course of submissions. Indeed, it was always clear that the Respondent did not seek to say that the Claimant ceased to be redundant because of that offer.

99 The notice of redundancy was never withdrawn or revoked by the Respondent, who relies solely on the application of section 138(1) to the situation. I note that the redundancy letter states you will not be entitled to redundancy payment if you enter into further employment with an organisation listed in the Redundancy Payments Modification Order 1983 within four weeks of leaving Camden. While that might have been targeted at other organisations that fell within the Redundancy Payments Modification Order, it would clearly have encompassed another job within the Respondent itself.

100 The process envisaged by the parties was that as the Claimant was accepted for voluntary redundancy, the Respondent was not required to look for suitable alternative employment for her or indeed any alternative employment and thus she was to be excluded from the selection for posts in the new structure.

101 It must be right and consistent with the Employment Rights Act s.138 to say that if the Claimant had taken up further employment within the Respondent

prior to her employment ending she could not have retained any right to the redundancy payment by virtue of the statutory provisions.

102 However, that did not in fact occur despite the discussions and negotiations that took place, for the reasons I have set out in this judgment. The Claimant had been given notice of redundancy with a final working date of 28 September 2018. Her employment came to an end on that date by reason of redundancy, unless section 138 (1) was triggered. I have explained in detail why I conclude that section 138 (1) was not triggered and in that scenario, the Claimant cannot be said to have resigned.

<u>Were the provisions of the HS2 contract different from the Claimant's previous terms and conditions? If yes, and if the Claimant did resign, did she do so within four weeks of starting work under the new contract s that s 138(1) did not apply?</u>

103 The parties agreed that in certain circumstances, the provisions of section 138(2) could be triggered. In other words, if it could be said that the Claimant was on a trial period, there was a question of the length of that trial period, i.e. when it started. If the Claimant terminated within the four weeks allowed for a trial period, for any reason, by virtue of the legislation, her employment would be deemed to end by reason of redundancy as previously intended.

104 The role was different. Therefore, the first requirement the parties argued would have to apply for section 138(2) to be applicable was that other terms and conditions of the employment were different, at least in part. The Claimant said they were and the Respondent said they were effectively the same terms. There seems to be no doubt that the terms differed in relation to the number of hours of work required per week. I do not regard the fact that the contract required the Claimant to work additional hours under the flexibility clause or the fact that the Claimant may well have undertaken more than her contractual hours in the past as undermining this position. I was not told of any threshold, or de minimis requirement. In my view, the terms differed in part, so that the Claimant was entitled to terminate for whatever reason, provided she did so within the trial period.

105 Secondly, for this provision to be applicable the Claimant had to end her employment within the four-week trial period. Her employment ended on 30 September 2018, with her last working day being 28 September. Her trial period of four weeks had to fall between 3 September 2018 and the end date. Nothing happened in September prior to the offer letter dated 7 September. Therefore, if it were the fact that the Claimant had in fact started work under a new contract in relation to HS2 which commenced on or after 7 September, i.e. within the last four weeks of her employment, she was entitled to the trial period and during that trial period for any whatever reason she could terminate the contract without

losing the entitlement to her redundancy payment. However, I cannot see that there was any situation which was different after the offer letter was sent out. There was no evidence that something changed at that point. I have already found the Claimant did not start work under the HS2 contract and the fact that the formal offer letter was sent out, does not in my view change the position. She did not accept that offer. My conclusion is that she did not start the role and therefore the question of the trial period is not applicable.

106 In conclusion, I am satisfied that the Claimant is entitled to statutory redundancy payment and that payment was agreed by the parties as £12,446.

Employment Judge Walker

Dated: 15 January 2020

Sent to the parties on:

23 January 2020

For the Tribunal Office