EMPLOYMENT TRIBUNALS

Claimant: Ms K Alcock

Respondent: ABM Aviation UK Limited

Heard at: Manchester (by CVP) **On:** 18 December 2020

Before: Employment Judge Whittaker

REPRESENTATION:

Claimant: In person
Respondent: Mr O'Neill, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant, by consent, was unfairly dismissed by the respondent.

2. The Tribunal makes no award of either a basic or compensatory award of compensation to the claimant for being unfairly dismissed. Compensation was the only remedy requested by the claimant.

3. The application for costs made by the claimant against the respondent is dismissed.

4. The respondent's application for costs against the claimant is adjourned to be heard by video hearing on **Monday 1 February 2021** at **10.00am**.

REASONS

1. The effective date of termination of the claimant's contract of employment with the respondent was agreed as being 31 May 2019. The claimant was, however, paid in lieu of her notice period of one month and so it was agreed that the claimant had no financial losses up to and including 30 June 2019 other than the value of the employer's pension contributions which ought to have been made in connection with her payment in lieu of notice. It was agreed that the value of the employer pension

contributions between 31 May and 30 June was £118.41. That represented the value of employer pension contributions.

2. The claimant started a new job with Water Plus as an HR Adviser. She started work on 24 June 2019. That was therefore some six days before the value and relevant period covered by the payment in lieu of notice paid to the claimant by the respondent expired. The judgment of the Tribunal is that the wages and benefits enjoyed by the claimant between 24 June and 30 June as a result of her employment with Water Plus should not be taken into account in respect of the calculation of any compensatory award. It is a recognised principle of employment law practice that employers should be encouraged to make payments in lieu of notice, and where employees succeed in finding alternative employment during what would otherwise have been their period of notice, including their contractual notice, the Tribunal does not believe that it would be just and equitable, or in accordance with good industrial practice, for the benefits earned by the claimant between 24 June and 30 June to be taken into account.

3. During discussion with the claimant and the respondent the claimant agreed that the net value of her wages and other benefits whilst employed with the respondent was £479.86 per week. By contrast it was also agreed with the claimant that the net value of her weekly pay and benefits with Water Plus when she began work on 1 July 2019 was £414.20. The claimant was therefore £65.66 per week worse off.

4. The employment of the claimant with Water Plus came to an end on 31 October 2019. She worked for them for 18 weeks. At a weekly loss of £65.66 the total losses over those 18 weeks amounted to £1,181.88.

5. The employment of the claimant with Water Plus came to an end “by mutual agreement” as reflected in the terms of a Settlement Agreement which the claimant reached with her employer, Water Plus. In return for agreeing to the terms of a Compromise Agreement, including the fact that her employment came to an end by mutual agreement and not by dismissal, the claimant was paid a tax free termination payment of £2,650.

6. The judgment of the Tribunal is that it is not just or equitable for the claimant to be entitled to claim any losses as from 1 November 2019 because those losses were not attributable to action taken by the respondent employer in accordance with section 123 of the Employment Rights Act 1996. The claimant told the Tribunal that she believed that if she had not signed the Settlement Agreement she would have been dismissed. However, that obviously told the Tribunal that the claimant had a choice. She could have refused to sign the Settlement Agreement and Water Plus would then have had to make a decision as to whether or not to dismiss the claimant. For perfectly understandable reasons the claimant agreed to sign the Settlement Agreement in which it is recorded, after having received independent legal advice, that her employment terminated by mutual agreement and not by any dismissal on the part of her then employer, Water Plus. Any ongoing losses due to the termination of her employment with Water Plus were therefore as a result of the employee/claimant agreeing that her employment should come to an end. Any ongoing losses were therefore as a result of that agreement and not, in the opinion of the Tribunal, “attributable” to action taken by the respondent employer. The judgment of the Tribunal, therefore, is that it is not just or equitable for the value of

any compensatory award to reflect any losses incurred by the claimant after 31 October 2019.

7. The claimant, in view of the concession made by the respondent, was unfairly dismissed. The respondent conceded, therefore, that the claimant should be awarded £500 for loss of statutory rights. The respondent also conceded that the claimant should be awarded £118.41 to represent loss of the value of employer pension contributions which ought to have been paid to the claimant following the termination of her employment on 31 May 2019.

The total value, therefore, of the compensatory award was £500 for loss of statutory rights, £118.41 for loss of employer pension contributions and loss of wages in the sum of £1,181.88.

8. However, the Tribunal considered that it was just and equitable for the termination payment of £2,650 which was received by the claimant to be taken into account when considering the value of the losses incurred by the claimant. This was obviously a payment which was made to the claimant because of and in connection with her contract of employment with Water Plus. It was made under the terms of a Settlement Agreement. The Settlement Agreement dealt with a number of employment related issues which arose directly as a result of the terms of the contract of employment between the claimant and Water Plus. In those circumstances, when ascertaining the value of any compensatory award, that payment of £2,650 had to be taken into account by the Employment Tribunal. The total value of the compensatory award as set out above was therefore exhausted, in full, by the value of the termination payment which the claimant received under her Settlement Agreement. To have ignored the value of the termination payment would have ensured that the claimant was significantly better off than she would have been had she still remained in employment with the respondent. The Tribunal emphasised that when considering the value of a compensatory award that under section 123 of the Employment Rights Act 1996 the Tribunal must take into account the value of "loss sustained in consequence of the dismissal". The Tribunal identified the losses incurred by the claimant but it determined that it was just and equitable to equally take into account the value of the termination payment which had been received by the claimant. That exhausted the value of the compensatory award and the judgment of the Tribunal, therefore, is that the claimant should not receive any compensatory award.

9. It was agreed, by consent, that the claimant was not entitled to a basic award of compensation having received a redundancy payment from the respondent which was of the same value as a basic award.

Claimant's Application for Costs

10. At the conclusion of the hearing the claimant applied for costs against the respondent. The claim of the claimant had been set down for a hearing over four days but very recently the respondent, having ascertained what they thought was the reasonable value of the compensatory award of the claimant, told the tribunal and the claimant that it was conceding unfair dismissal in order to avoid the costs associated with a liability hearing. Today's hearing therefore took place only as a remedy hearing. The claimant told the Tribunal that she believed that this concession ought to have been made in connection with liability a long time ago and

that that would have saved her costs and significant amounts of time which she had taken in preparing the claim. The claimant also said that this case "could have been settled" much sooner than the hearing today. The claimant therefore told the Tribunal that this conduct on the part of the respondent amounted to unreasonable conduct and that the Tribunal ought therefore to exercise its discretion to award costs against the respondent in view of their conduct of the proceedings.

11. The Tribunal, however, rejected the application of the claimant. Whether a case could or could not have been settled on terms which were acceptable to the claimant is irrelevant to the conduct of proceedings. That principle would apply to every single case in an Employment Tribunal, and failing to agree terms which are acceptable to a claimant cannot in any circumstances be considered as unreasonable conduct.

12. Furthermore, in the view of the Tribunal the late concession made by the respondent in connection with liability was not unreasonable. It is understandable that approaching the cost of a four day hearing that a respondent might, even at this late stage, reflect on the cost of that hearing, particularly in circumstances where they did not believe that the value of any compensatory award which might be awarded to the claimant could, in the opinion of the respondent, be very considerably less than the legal costs that they would incur in paying solicitors to defend the merits of the claim. The respondents themselves told the Tribunal that they had made a number of what they believed to be reasonable attempts to settle the claims of the claimant, but when those attempts had been unsuccessful that it was at that stage that they reflected, perfectly reasonably in the opinion of the Tribunal, on the costs which would be incurred in defending on liability the claims of the claimant.

13. The Tribunal therefore concluded that there were no grounds to consider the conduct of the respondent in these proceedings to be unreasonable. In any event, the Tribunal would have retained a discretion as to whether or not an award of costs should be made. The conclusion of the Tribunal, therefore, was that it was not appropriate to award the claimant costs.

Respondent's Application for Costs

14. Mr O'Neill then indicated that he wished to make an application for costs on behalf of the respondent. He indicated that he had prepared a separate bundle of documents relating to this application, but he conceded that that bundle had never been sent to the claimant in advance of the hearing and neither had it been sent to the Tribunal. The Tribunal was of the view that this bundle ought at the very least to have been sent to the claimant, and a separate application for costs in writing should have been sent to the claimant cross referencing the pages of the "costs bundle" in order that the claimant, who at all times has been unrepresented, would have a proper period of time in which to reflect on the detail of the costs application and the detail of the documents which were being referred to.

15. Neither of these steps had been taken and in those circumstances the Tribunal did not consider it to be fair for the claimant to, in effect, be ambushed in this way by an application for costs which might be considerable. No schedule of costs had been sent to the Tribunal for consideration. Mr O'Neill on behalf of the respondent indicated that he had withheld sending that documentation in advance because some of that correspondence was marked "without prejudice". The view of

the Tribunal is that that documentation could and should have been sent to the Tribunal and the Employment Judge could have been alerted to the fact that a separate costs application and separate costs bundle had been sent, but that it should not be considered until the outcome of the remedy hearing. Those steps had not been taken.

16. In order to ensure that the claimant had a proper opportunity to consider, reflect on and most importantly reply to the application for costs, it was adjourned today part-heard and will be considered by Employment Judge Whittaker sitting alone at a further video hearing which will take place at **10.00am** on **Monday 10 February 2021**.

ORDER

1. By no later than **Wednesday 6 January 2021** the respondent will prepare and serve on the claimant their full application in connection with any application for costs. That application must include a full explanation of the grounds of the application and equally a full explanation of the amount of costs which is being sought and how that amount has been calculated. The respondent must also ensure that they prepare a separate costs bundle, properly paginated, and that the application for costs is cross referenced, where appropriate, to page numbers in the bundle.

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Employment Judge Whittaker

Date: 21st December 2020

JUDGMENT, REASONS AND ORDER
SENT TO THE PARTIES ON

28 January 2021

FOR THE TRIBUNAL OFFICE