

**POSSO v. N.A.A.F.I.**

SUPREME COURT (Schofield, C.J.): January 23rd, 1998

*Employment—redundancy—statutory redundancy payment—payment under Employment (Retail Distributive Trade) Order, 1981, para. 9 is “similar benefit” to leaving gratuity paid on redundancy if calculated in same way and would result in double compensation for termination*

The plaintiff brought an action to recover a statutory redundancy payment from her former employer.

The plaintiff was employed for 24 years by the defendant under a contract of employment which provided for the payment of a leaving gratuity, *inter alia*, upon redundancy. The contract provided that where a similar statutory benefit existed, the employee would receive only the gratuity, unless the statutory benefit amounted to more than the gratuity. When she was made redundant, she was paid a gratuity, but claimed that she was also entitled to receive a redundancy payment under para. 9 of the Employment (Retail Distributive Trade) Order 1981, since a statutory redundancy payment was not a “similar benefit” to a leaving gratuity within the meaning of her contract.

She submitted that (a) her employer did not regard the gratuity as being “similar” to a redundancy payment, since it had not said so in response to other claims for “redundancy compensation” from her union and had, in fact, paid both the gratuity and redundancy money to other employees; (b) as a reward for long service to compensate employees for the absence of a pension scheme, the gratuity was an emolument deferred until termination of service, whereas the statutory payment was compensation for early termination, which was not provided for in her contract; and (c) accordingly, she was entitled to both under the terms of her contract.

The defendant submitted in reply that (a) the leaving gratuity payable on redundancy and the statutory redundancy payment were “similar” payments under the plaintiff’s contract; (b) where both had been paid in the past, the payment had been made in error and did not reflect the company’s legal position; and (c) the leaving gratuity was not a deferred emolument in a redundancy situation, since, on the plaintiff’s argument, an employee made redundant shortly before retirement age would receive twice what a retiring colleague would receive, which could not have been in the parties’ contemplation when the contract was signed.

**Held**, giving judgment for the defendant:

The statutory redundancy payment was a “similar benefit” within the meaning of the plaintiff’s contract and she was therefore entitled only to

the greater benefit, the leaving gratuity. The court would take a common sense approach when construing the contract, since there was no evidence of the parties' intentions regarding redundancy legislation at the time of its commencement. The two benefits were both calculated according to length of service so as to produce a similar result and accrued on the occurrence of the same event. Furthermore, the example given by the defendant showed clearly that if the two payments were not treated as similar benefits, an employee in a genuine redundancy situation who would otherwise soon have retired would be compensated twice, which was illogical and unfair. Since the parties' words or deeds after the signing of a contract could not be used in aid of construction, the company's later conduct in relation to other employees was irrelevant (page 228, line 43 – page 229, line 28; page 230, line 13 – page 231, line 6).

**Cases cited:**

- (1) *Mairs (Inspector of Taxes) v. Haughey*, [1994] 1 A.C. 303; [1993] 3 All E.R. 801, *dicta* of Lord Woolf applied.
- (2) *Miller (James) & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.*, [1970] A.C. 583; [1970] 1 All E.R. 796, *dicta* of Lord Reid applied.

**Legislation construed:**

Employment (Retail Distributive Trade) Order, 1981, para. 9(1), as added by the Employment (Retail Distributive Trade) (Amendment) Orders 1990, para. 4 and 1992, para. 2(b): The relevant terms of this paragraph are set out at page 227, line 41 – page 228, line 10.

*T.G. Phillips* for the plaintiff;  
*M.W. Isola* for the defendant.

**SCHOFIELD, C.J.:** Mrs. Frances Posso, the plaintiff, worked for the defendant at its offices and supermarket in Gibraltar. She had worked for the defendant for about 24 years when, in June 1994, she received notice that she and others in the defendant's employment were to have their services terminated in a situation of redundancy. In January 1995 the plaintiff was duly made redundant. This case involves a decision on what payments the plaintiff was entitled to receive from the defendant on termination of her employment.

On September 13th, 1973, an agreement was reached between the Gibraltar branch of the Transport & General Workers' Union and the defendant on the terms and conditions of service which would apply to the defendant's employees. I shall refer to that agreement as "the agreement." These terms and conditions, particularly with regard to pay, have been varied from time to time. The agreement, as so varied, is the contract of employment under which the plaintiff was employed. Clause 22 of the agreement provides that a leaving gratuity should be paid to

employees leaving the defendant's employment in certain circumstances. The relevant portion of that agreement reads:

*"Retirement Benefits and Gratuities on Termination of the Employment*

5 An employee whose service with the corporation comes to an end for any of the reasons set out in the next paragraph who has served a minimum of one year's reckonable service shall be paid on termination of such service a leaving gratuity computed at the leaving rate of pay on the following basis:

10 For each of the first 20 years of reckonable service – two weeks' basic pay

For each of the next 10 years of reckonable service – three weeks' basic pay

For each year in excess of 30 years' reckonable service – four weeks' basic pay.

15 Reckonable service for the purpose of this clause shall mean the period of the employee's continuous service in or based on Gibraltar since last engaged by the corporation.

The following are the reasons which will qualify for payment of a leaving gratuity (hereinafter called the qualifying reasons):

20 (a) Retirement on attainment of the normal age limit for retirement of 60 years for male employees and 55 years for female employees, or any extension of such limits (not exceeding a further five years) as at the request of the employee the corporation may from time to time in its absolute discretion agree, subject always to the employee satisfying the corporation's requirements as to medical fitness;

25 (b) Retirement by decision of the corporation before attainment of the normal age limit for retirement on account of injury to or ill-health of the employee;

30 (c) Redundancy for reasons outside the control of the employee."

It will be seen, therefore, that the plaintiff was entitled to a leaving gratuity on her employment being terminated by reason of redundancy. This leaving gratuity was calculated, in the case of the plaintiff, at £13,788.49. It is worthy of note that in the terms and conditions of service in force for the defendant's employees prior to the agreement coming into effect, no leaving gratuity was payable to an employee who was made redundant.

35 In 1981 the Employment (Retail Distributive Trade) Order ("the Order") came into effect. It was amended with effect from June 28th, 1990 by adding a new para. 9. Sub-para. (1) of para. 9, as further amended on June 1st, 1992, reads:

40 "Where an employee's employment is terminated by reason of redundancy, he shall be paid by his employer by way of compensation—

45 (a) for each of the first five completed years of service, two weeks' pay;

- (b) for each of the next five completed years of service, three weeks' pay;
- (c) for each additional completed year thereafter, four weeks' pay;
- (d) in respect of an employee aged 41 years and over, for each completed year of service after the age of 40 years, two weeks' pay

Provided that the total amount of the redundancy payment shall not exceed the amount of one year's pay and that no payment will be made to an employee who has not completed one year's service." 10

The above Order came into effect many years after the agreement under the terms of which the plaintiff was employed. It provided for the first time in Gibraltar for a statutory payment on the redundancy of an employee of an undertaking engaged in the retail distributive trade. It is accepted by both parties that the plaintiff was such an employee and fell within the provisions of the Order and, if it was calculated according to para. 9, her statutory redundancy payment would have been £13,339.56. 15

It is the plaintiff's case that on termination of her employment she was entitled to receive from her employer both the leaving gratuity under cl. 22 of the agreement and the statutory redundancy payment. Not so, says the defendant, who points to cl. 6 of the agreement, which reads: 20

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The corporation and the union agree that the benefits available under this agreement will not be additional to any similar benefits stipulated by the existing law or introduced by new legislation during the period within which this agreement will remain valid, provided always that an employee shall receive the benefit which is the more favourable to him.” 25

The defendant was and is of the opinion that the Order provided for “similar benefits” to those required to be paid to the plaintiff pursuant to cl. 22 of the agreement and therefore the plaintiff should not be paid both the leaving gratuity and the statutory redundancy payment. In accordance with cl. 6, the defendant calculated which was the benefit more favourable to the plaintiff—the leaving gratuity under cl. 22 or the statutory redundancy payment calculated under para. 9 of the Order—and paid the plaintiff the greater of the two amounts, £13,788.49. The plaintiff claims that the leaving gratuity and the statutory redundancy payment are not benefits similar to each other, and in this suit seeks judgment for the amount of the statutory redundancy payment of £13,339.56. The one point I have to decide is whether the statutory redundancy payment is a “similar benefit” to the leaving gratuity payable under cl. 22 of the agreement. 30 35 40

In construing the terms of a contract of employment, as in the construction of any other contract, one has to ascertain what the parties intended at the time the contract was entered into. No evidence was called 45

5 by either party as to that intention. The plaintiff's counsel has been through correspondence between the Transport & General Workers' Union and the defendant since the date of the agreement, to show how the union has consistently made claims for "redundancy compensation" to be payable to employees made redundant by the defendant. These claims have been rejected, but not, says counsel, in terms which demonstrate that the defendant considers that redundancy compensation is already payable pursuant to cl. 22. The replies of the defendant demonstrate, says counsel, that the defendant considers the leaving gratuity payable under cl. 22 to be something separate to redundancy compensation. Furthermore, the defendant has paid both the leaving gratuity and the statutory redundancy payment to some employees who have been made redundant. The defendant accepts that such payments have been made but argues that this was done in error and before it had appreciated the full legal situation.

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15 What is said and done by the parties after a contract is concluded cannot be prayed in aid of its construction. So much is clear from the following passage from the opinion of Lord Reid in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.* (2) ([1970] A.C. at 603):

20 "I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later."

25 This was the opinion too of Lord Hodson (*ibid.*, at 606), Viscount Dilhorne (*ibid.*, at 611) and Lord Wilberforce (*ibid.*, at 615). I think we can take it to be settled law.

30 The plaintiff's argument goes that although the leaving gratuity and the statutory redundancy payment are triggered by the same event, and although they are paid in the same circumstances, they are not "similar benefits." The leaving gratuity is a contractual entitlement paid by the employer as a reward for long service and to compensate the employee for the absence of a pension scheme. It is an emolument of service deferred until retirement. The statutory redundancy payment, on the other hand, is compensation to be paid to an employee for early termination of his employment. Counsel drew my attention to the following description of the nature of a redundancy payment in the judgment of Lord Woolf in *Mairs (Inspector of Taxes) v. Haughey* (1) ([1993] 3 All E.R. at 811):

40 "A redundancy payment has therefore a real element of compensating or relieving an employee for the consequences of his not being able to continue to earn a living in his former employment. The redundancy legislation reflects an appreciation that an employee who has remained in employment for the minimum time has a stake in his employment which justifies his receiving compensation if he

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loses that stake. It is distinct from the damages to which he would be entitled if his employment were terminated unlawfully. It is also unlike a deferred payment of wages in that the entitlement to a redundancy payment is never more than a contingent entitlement, which no doubt both the employer and employee normally hope will never accrue.” 5

Counsel for the plaintiff argues that this compensation was never provided for in the agreement and the employee, the plaintiff, has thus to fall back on the provisions of the Order for redundancy compensation.

The defendant argues that the leaving gratuity and the statutory redundancy payment are “similar benefits” and points to a number of similarities between them. 10

As I have noted there is no evidence before the court as to the intention of the parties to the agreement at the time it was entered into. The plaintiff has produced nothing to show that those negotiating the agreement had in mind the distinction she suggests exists between the leaving gratuity representing deferred emoluments and the redundancy payment compensating for loss of employment. In the absence of such evidence I would look at the matter in this way: Had the parties to the agreement been shown the provisions of para. 9 of the Order at the time they were negotiating, would they have said it provided “similar benefits” to those in cl. 22 of the agreement? In my judgment, the answer must be “Yes.” The benefits under both the agreement and the Order accrue on the occurrence of the same event, termination of employment by way of redundancy. They are calculated in both the agreement and the Order in similar ways, indeed, so similar that in the case of the plaintiff with some 24 years of service and a payment of over £13,000 the difference between the two calculations was some £450. 15 20 25

Counsel for the defendant gave a telling example. He said if an employee worked until retirement he would be entitled to just the leaving gratuity on retirement. If, on the other hand, the defendant was forced to make him redundant six months away from retirement, on the plaintiff’s argument he would be entitled to the leaving gratuity plus the statutory redundancy payment, in other words, approximately twice the entitlement he would receive if he worked the extra six months to retirement. If one had put that example to the parties as they negotiated cl. 22 and 6 of the agreement I do not think they could have agreed to the construction put forward by the plaintiff. 30 35

The plaintiff’s counsel has argued that redundancy is in the hands of the employer and in the example given the employer would simply keep the employee on until his retirement. But a reasonable employer does not make an employee redundant unless he is put in a position where he has no alternative, often for economic reasons. As was said by Lord Woolf in the passage from *Mairs v. Haughey* (1) quoted above, redundancy is a situation which no doubt both parties, employer and employee alike, 40 45

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normally hope will not occur. The example is a good one and, I suggest, persuasive against the plaintiff.

5 On the material before me, I consider that the statutory redundancy payment is a similar benefit to the leaving gratuity under qualifying reason (c) set out in cl. 22 of the agreement. Therefore the suit must fail with costs to the defendant.

*Order accordingly.*

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