Appeal No. UKEAT/0033/14/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 27 June 2014
Judgment handed down on 16 July 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

MR I EZEKIEL

MS G MILLS CBE

MR DAVID HERSHAW AND OTHERS APPELLANT

SHEFFIELD CITY COUNCIL RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR PAUL SMITH (of Counsel) Instructed by: Ironmonger Curtis LLP Solicitors 233 Edmund Road Sheffield S2 4EL
For the Respondent	MR DAMIAN BROWN QC & MR DAVID ROBINSON-YOUNG (of Counsel) Instructed by: Civil Litigation Team Sheffield City Council Moorfoot Sheffield S1 4PL

SUMMARY

CONTRACT OF EMPLOYMENT:

Damages for Breach of Contract

Implied Term Variation/Construction of Term

The Claimant Market Patrol Officers disputed the grade and consequent pay they were awarded following the implementation of a Single Status pay and grading review by their employer Sheffield Council. They appealed, but were never officially informed of the outcome until after they raised a grievance complaining they had not been told. The result of the grievance was that they were told (in a letter from the HR Consultant tasked with responding to it) that the Appeal Panel had decided they would be placed on Grade 5 (whereas they had previously been placed on Grade 3). They worked on in the expectation this would be honoured, but their pay did not change. The employer contended that the letter was mistaken, and reconvened the appeal panel to determine what it had actually decided (which was a lesser increase, to Grade 4). An EJ concluded that the letter was of no contractual effect, since it was written in response to a grievance, and its author had no actual nor ostensible authority to make decisions as to pay and grading. He thought he did not need to determine whether there had been mutual mistake, such as to vitiate any apparent contract. It was held on appeal that he was wrong: in context, the letter responded to a complaint that the employees had not been told what the decision as to their grade was, by telling them. It was written by someone who was authorised to tell them what had been decided, even if she was not authorised to decide questions of pay herself. The issue of mistake was critical, however, and this would be remitted to a fresh Tribunal. The judge also erred in his reasoning as to a subsidiary issue – the meaning given by the Respondents to "salary" in their pay and grading process, though it was unclear how this affected the result.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. For reasons delivered on 28th May 2013 Employment Judge Little, at Sheffield, dismissed the test case of Mr Smith, one of twelve Claimants in the same circumstances who were complaining that their employer had made an unauthorised deduction from wages contrary to Section 13 of the **Employment Rights Act 1996**.

2. The background facts are these. The Claimants were market patrol officers employed by Sheffield City Council ("the Council"). In 2009 the Council reviewed its pay and grading structure, and on 9th October 2009 offered a variation in respect of the pay the Claimants had previously enjoyed. On 26th January 2010 Mr Smith, accepted the varied terms "under duress", expressly reserving his rights. He argued that he should have been paid more. The matter went to appeal before a body authorised to make a decision. The Appeal Hearing was on 22nd March 2011. The appeal body reserved its decision. Rumour as to the result abounded: but although the market patrol officers heard from two or three sources that their appeal had been successful, the decision reached by the appeal body was not notified to the Claimant by the Council within the ten days for which the scheme under which it was made had provided. The employer maintained that a letter had been sent in May 2011 telling the relevant employees of the decision of the appeal body, but the Judge found as a fact that it had not been. The pay in Mr. Smith's pay packet did not alter. So in August 2011 Mr Smith and other Claimants issued a grievance. That was investigated by Ms Senior Wadsworth, an HR Consultant working in the Equal Pay Team of the Council. She had no authority herself to make a decision about pay, but was authorised to communicate the result of the grievance to the Claimants. In her letter of 10th October 2011, she recorded what the appeal body had decided in these terms:-

"To ensure the outcome is 100% clear, the outcome of your appeal is explained in full below…

Previous Allocation/Grade
CE2 + 55 Job Working Points – based on a Knowledge level 2
CE2 = Grade 3 + 55 Job Working Points = Grade 4

Paid at the top of the grade (scp 22) to reflect the previous earnings and the rules which were agreed to move people onto the new pay structure.

Allocation/Grade following appeal
CE3 + 55 Job Working Points – based on a Knowledge level 3
CE3 = Grade 4 + 55 Job Working Points = Grade 5

I hope this addresses your concerns and provides an explanation to the matters you have raised."

3. She was thus saying that the appeal body had decided that the Claimants should be placed on job profile CE3 at grade 5 whereas prior to that they had been on job profile CE2 at Grade 3. That explanation was echoed by a Ms Pellett, also an HR officer of the Council, on 10th January 2012. She set out what the regarding meant in terms of figures. She noted that the patrol staff would start at the bottom of Grade at 5 at spinal column point 22, the salary being £19,370.

4. Notwithstanding these apparently authoritative communications, the pay in the pay packet still did not alter. At some point, the Council realised a mistake had been made in Ms Senior Wadsworth's letter. Accordingly, the appeal panel was reconvened in order to make it clear what it had in fact decided. On 3rd May 2012 it decided that in March 2011 it had actually concluded that the appropriate job profile was CE2, but the scores were such that the grade should not be 3 as it had originally been. It should now be 4.

5. Whatever the grade was - whether it was CE2 Grade 4, as the Council said after May 2012, or CE3 Grade 5 as both Ms Senior Wadsworth and Ms Pellett had told the employees, there was a further question common to the pay and re-grading processes for the Council's staff generally as to the spinal column point to which the pay of the employees should be assimilated. That potentially depended upon what their "salary" was prior to the process of

assimilation. Although this was relevant to the case of many employees, we remain unclear whether it had any real relevance to the issues in the case before us.

6. The Judge decided that the letter of 10th October 2011 was not a contractual document, capable of recording the pay to which the Claimants would be entitled if, after receipt of the letter, they continued to work and/or forego any further grievance (see paragraph 7.2). Further, Ms Senior Wadsworth did not have ostensible authority to bind the Respondent to a variation of the contract of employment on pay: her remit as set out in her letter was "in terms to explain a decision taken by others, not to make a decision herself". He declined to consider whether a mistake had been made, and the extent to which the Claimants were aware of it: that would only be relevant if the letter of 10th October 2011 were regarded as a contractual document. Nor was it either a contractual offer or a contractual acceptance:

> **"…and so the doctrine of mistake in contract law is not applicable. Clearly there was a mistake, indeed a catalogue of mistakes, but only mistakes in a dictionary sense of that word."**

The contractual entitlement to pay was that decided at the stage 2 appeal which, after clarification over a year later by the same panel, was Grade 4 at Spinal Point 17 (a salary of £16,663.) As part of his judgment at paragraph 5.8, the Judge said this:

> **"It is necessary for me to make a finding as to what the term 'salary' means as used by the Respondent in its pay policy and especially in relation to the payment rates allocated to the various grades and spinal points as per the grading structure to which I have referred. Does 'salary' in this context mean basic pay? That is the Respondent's contention. Does it mean the overall gross annual payment, in other words basic and additional payments, which is the Claimants' contention? The Concise Oxford English dictionary defines 'salary' as "a fixed regular payment usually made on a monthly basis". To my way of thinking, in its ordinary usage, salary suggests one overall payment covering all work done in return for it. However, I find that the Respondent in the documents that are before me uses that term differently. There is no guide to definition or interpretation in the policies, however the oral evidence I have from the Respondent (Ms Senior-Wadsworth) is to the effect that salary in the Respondent's usage means basic pay, not pay for instance and overtime taken together. I am drawn to accept this evidence as it is supported by the interchangeable use of the terms 'basic pay' and 'basic salary' in the pay policy. For instance at page 176 which describes the protection of 'basic pay' by reference to the percentage drop in 'basic salary'."**

7. We are unclear precisely why the Judge thought it was necessary for him to decide (or the parties to contest) exactly what the term 'salary' meant. The context is that the Claimants received £21,057.24 per year before the pay and grading review occurred. That was composed of two parts: basic pay, approximately £12,234 per annum, together with a consolidated payment of just under £9,000 for the balance. The two sums were shown separately on pay slips. In April 2009, the Council published its policy in respect of revised pay terms and conditions of service and employment. It set out a new pay and grading structure. It provided for an assimilation of employees onto their new grade on the basis that where an employee had a spinal column point on the new grade at the same level as their existing spinal column point they should transfer across at the same level; where the minimum of the new grade was higher than the existing spinal column point, they should transfer across at the minimum of the new grade; but where the maximum of the new grade was lower than the existing spinal column point they would transfer across at the maximum of the new grade. In this last case, their pay would then be protected in accordance with a pay protection policy.

8. There were thus two linked, but separate, processes: assimilation, and pay protection.

9. It was expressly provided by appendix 7 to the scheme that the pay protection scheme would apply only to employees whose ***basic*** pay was due to decrease under the new pay structure: under the heading "Level of Protection" it was specified that pay protection would apply to basic pay only, all other payments specific to the job such as irregular working pattern allowances not being protected. The scheme in effect provided for pay in accordance with the new grading structure to catch up with the level at which it was protected before any increment would be made to the protected pay – it was a 'marking time' system.

Grounds of Appeal

10. There are four grounds of appeal. Grounds 3 and 4 argue that the effect of the letter of 10th October 2011 was to create an entitlement for the Claimants to be paid the sums cited in the letter, and that the Judge was wrong to conclude otherwise. This was described correctly by the Appellant as "the crux of the matter", and we shall deal with it first.

11. The Judge had two principal reasons for deciding that the letter of 10th October 2011 did not entitle the Claimants contractually to the pay they claimed. First, "in general terms the outcome of a grievance is not likely in principle to be regarded as a document having a contractual nature", and that in context it did not, because it was different from the form of another letter of which there was evidence which did effect a contractual variation. Second, the author of the letter did not have ostensible authority to grant a pay increase, merely to explain a decision taken by others.

12. Although in the Respondent's Answer, the first of these points was relied upon, the Judge's reasoning was rather to the effect that there had been no process of offer and acceptance so as to create a binding variation in pay which was favourable to the Claimants. Nothing had been done by the Claimants to demonstrate acceptance (or which would constitute consideration), and they did not do so merely by continuing to work in the job they had done before.

13. Mr Paul Smith for the Claimants argued that the letter was plainly of contractual effect taken in context. It was clear from **Lee v GEC Plessey Telecommunications** 1993 IRLR 383, as said in paragraph 118:

> **"Where, in the context of pay and negotiations increased remuneration is paid and employees continue to work as before, there is plainly consideration for the increase by reason of the settlement of the pay claim and the continuation of the same employee in the same employment."**

14. In **Selectron Scotland Ltd v Roper** [2004] IRLR 4 the Court was considering whether revised redundancy terms were to be taken as accepted by the employees by continuing to work without any complaint and without raising objection. When discussing that issue, the Appeal Tribunal (Elias J presiding) said at paragraph 30:

> **"The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if the employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, though doing so without prejudice to their contractual rights."**

These citations echoed the discussion by the Appeal Tribunal (Mr Justice Browne-Wilkinson presiding) in **Jones v Associated Tunnelling Co Ltd** [1981] IRLR 447 as to whether an employee might have impliedly agreed to a variation in terms where he had been provided with a statement of main terms and conditions of employment which differed from an earlier such statement. At paragraph 22 of the judgment the Appeal Tribunal observed:

> **"If the variation relates to a matter which has immediate practical application (e.g., the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g., his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed…"**

15. Mr Brown QC argued that continuing to work was not an unequivocal acceptance of new terms set out by the employer. An employee was not bound to take a pay increase: working on in a contract did not signify acceptance. The employees had been put on a higher grade, which might imply additional responsibilities, and it would be open to an employee to reject those responsibilities. It could not be assumed that he was entitled to the benefit without also taking the burden. He referred to **Farnsworth Ltd v Lacey** [2013] IRLR 198 (Hildyard J. in the High

Court), where an employee had had a promotion to a higher grade bringing with it a pay rise but also a new contract which contained post termination restrictive covenants as his earlier contract did not. He did not sign it, but nor did he express any objection to it. When he later resigned, an issue arose as to whether he was bound by the restrictive covenants, which he contended he had never accepted nor intended to accept. The fundamental question in the view of Hildyard J was whether the employee's conduct by continuing to work was only referable to his having accepted the new terms imposed by the employer. It was, so he was bound: he could not take the benefit without also bearing the burden of them.

16. He argued that if, contrary to these submissions, the Claimants working on could constitute acceptance of a pay rise in their favour, it could not do so in this case because Ms Senior Wadsworth was writing the letter as the answer to a grievance. She set out the concerns expressed in that grievance and answered each. Her authority was clearly limited: she described herself as an HR Consultant, and it was plainly not her function to determine matters of pay and grading.

17. Further, he asserted that the Claimants could not reasonably have understood the document as changing their terms and conditions of employment. It contained mistakes which must have been apparent to them. Thus they had never argued before the grading appeal panel that they should be placed at Grade 5. Their previous level was said to be Grade 4 which was simply not the case. The Claimants must have realised that the document was issued in error. Mr Brown QC drew attention to paragraph 7 of the judgment of HHJ Richard Seymour QC in **Costco Container Lines Company Ltd v Batchford and Scheller**,[2013] EWHC 840 (QB) where he directed himself by reference to the well known observations of Diplock LJ in **Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd** [1964] 2QB 480 at 505

to the effect that a person cannot rely upon an agent's own representation as to his actual authority.

18. In considering these submissions, it is clear to us that **Jones**, **Lee**, **Selectron** and **Farnsworth** all considered cases in which the issue was whether an employee had accepted a change to his detriment by continuing to work. None addressed directly the case where an employee is offered better terms. Since this appeal concerns pay practices and the nature and effect of communications between employer and employee, Lay Members were listed to sit on appeal as they were not below: and the judicial member considers this has been amply justified in the event. We are all clear - and they are especially emphatic - that where an additional benefit is offered for the foreseeable future to an employee, with no apparent downside, the parties will be taken to have agreed that thenceforth that is to be a term of the contract, and the employee will readily (and usually) be taken to have accepted it as such, merely by his continuing to work. Nothing formal is required by way of acceptance: for instance, it is completely artificial to suggest that if a pay rise (for instance) is offered to employees they remain bound to accept the previous lower pay, and the employer entitled to revert to it, unless and until the employee signifies formal acceptance of the new terms. Such a pay rise will take effect the moment that an employee with notification of it continues in the work he has been doing previously. The need for an exchange of letters or the like would impose a completely unnecessary and unrealistic burden on business or employees' organisations.

19. We accept that in some cases, where the rise is not simply one of pay but a change of grade, a new grade may bring with it new and greater responsibilities as a quid pro quo for the increased remuneration. In such a case, it may be that something more is required. That may also be true in the case of a restructure. Here, however, we can see no suggestion in the documents or judgment that the job to be performed by the Claimants was anything other than

the job each had performed previously: "grade" here represented a different salary scale, and a different approach to payments, but not additional or more onerous duties.

20. The Judge was in our view wrong to conclude that the letter of 10th October 2011 was incapable of having contractual effect. Though it did record the outcome of a grievance, regard has to be had to the context. The grievance was centrally about pay. As Mrs Mills observed during the course of argument, since the Claimants had simply not been told of the outcome of the appeal against their original pay and grading, to make a grievance was the only formal step they could take. They could not appeal further under the grading appeal system without knowing what the previous result was. Ms Senior Wadsworth did not purport to give her own view as to what the pay should be. If so, the point about her having no authority to do so would be a good one. But the complaint by way of grievance, seeking clarity as to pay, was made *to the employer*, not to her in any personal capacity. It was answered *by the employer*. The employer arranged for Ms Senior Wadsworth to be the person to give that answer. The answer was thus given by someone who was held out by the employer to provide an authoritative answer to the grievance. Though not authorised to determine pay, she was authorised to communicate what others had decided. If she had not been, the Council's appointment of her to deal with the grievance would have had no purpose, since it was the outcome of the pay appeal which was centrally in issue.

21. There may be many cases in which a communication from someone who is not a decision maker may nonetheless be treated as an authoritative record of that decision: it could hardly be said, for instance, that a letter written by the boss's secretary, on headed notepaper, recording an offer being made by him would not be capable of binding the company if accepted (subject only to something unusual in surrounding circumstances); the secretary to a committee may not be a decision maker, but plainly has authority to communicate the decision even if not to make

it. The critical principle, as we see it, is whether viewed objectively a communication is intended to set out what is being offered (or has been decided), and is from someone held out by the employer as authorised to make that communication.

22. Here, therefore, we have no doubt that the letter of 10th October 2011 was written by someone held out as authorised to make it. The effect of the letter was as if the employer had personally and directly told its employees of a pay rise, and they had continued to work in that knowledge.

23. The application of those principles has the result that subject only to resolving the issue of mistake there was a binding agreement that the Claimants should thenceforth be paid on Grade 5, starting at £19,370. As to the contractual doctrine of mistake, the Judge found that Ms Senior Wadsworth's letter was one of a number of what would in common parlance be viewed as mistakes made by the Council. Specifically, she wrongly set out what the previous allocation/grade had been. It gave the claimants more than they had actually been contending for, when before the Appeal panel in 2011, even if not necessarily beyond that for which the scheme provided. In the same way, the email from Ms Pellett of 12th January 2012, which 3 months after Ms Senior Wadsworth's letter was to the same effect, was also in error: it simply drew on Ms Senior Wadsworth's own conclusions. The employer thus communicated through Ms Senior Wadsworth that which was mistaken from its point of view. Mr Brown QC argued that this was no mere case of unilateral mistake, and that features of the letter of 10th October 2011 were such that the employees must have realised that a mistake had been made. In much the same way as if the secretary to the boss, in writing a letter recording a proposed pay rise had written in figures £4500 per month, rather than £450 per month, the recipient employee who had previously been receiving £400 per month would know that a simple error had occurred, so it was here.

24. We recognise that although the letter was written by a person ostensibly authorised to communicate that which the appeal panel had determined, and, having done so, that was sufficient to create a binding contract between the Council and its market patrol officers, this is so only if the Claimants neither recognised nor ought to have recognised that Ms Senior Wadsworth's letter was a mistake. We can see strong arguments for suggesting that it might not have seemed so; but powerful arguments (which we have briefly mentioned above) for coming to the opposite conclusion. A determination of fact needs to be made by a Tribunal as to the understanding of the Claimants, seen in the full context, and whether there was such a mistake as to vitiate the otherwise apparent agreement. It was precisely this issue which the Judge did not resolve, though invited to do so by the parties, because he did not regard it as necessary in the light of the conclusions he had come to as to whether the letter could be a contractual document and whether Ms Senior Wadsworth had authority to bind the Council. It is for the Tribunal as the fact-finding forum, and not for us, to make.

Grounds 1 and 2

25. What we have said is sufficient to deal with the appeal. However, we heard full argument in respect of the first two grounds of appeal, in which the Claimants argued that the Judge was mistaken in equating basic pay with salary. Mr Brown QC accepted that paragraph 5.8 of the judgment, as he put it, 'doesn't quite make sense'. The Judge there supported his view of what 'salary' meant by evidence as to the interchangeable use of the terms 'basic pay' and 'basic salary'. This drew him to the conclusion that salary equalled basic pay. There are two particular difficulties with this reasoning. First, Mr Brown QC was unable to point to any document in which the terms 'basic pay' and 'basic salary' had been used interchangeably. Second, if there were an interchangeable use of those terms, logically it would support the conclusion that 'salary' did not mean 'basic pay', rather than the opposite conclusion which is

that which the Judge drew from it. Both the nouns 'pay' and 'salary' have the adjective 'basic' qualifying them. Remove the word 'basic', and the words 'pay' and 'salary' become interchangeable – this would not be a case of 'basic pay' on the one hand, and 'salary' on the other. The Judge's acceptance of the evidence from Ms Senior Wadsworth was dependent upon his erroneous assumption that it was supported as he said, whereas logically he should have drawn the opposite conclusion. It therefore cannot stand.

26. Though the precise impact of the definition of 'salary' as used by the Respondent in its pay policy remains elusive to us, if it becomes a matter of significance to the Tribunal when it reconsiders what to make of the effect of Ms Senior Wadsworth's letter of October 2011, it will no doubt wish to consider whether the meaning of words in a document, expressed to the workforce as a pay policy to be applied to establish their grades and salary scales after 1st April 2010, was something to which the Respondents were entitled to apply their own subjective understanding, as opposed to an objective meaning which would be given to it if it were (as it might be argued to be) contractual. We express no concluded view of our own on this.

Conclusion

27. In conclusion, the letter of Ms Senior Wadsworth was capable of being a contractual document which, unless vitiated by obvious mistake, expressed terms and conditions which were acted on and accepted by the employees to whom it was addressed. It will be for a Tribunal on remission to consider whether mistake did vitiate the contractual effect which the document would otherwise have had. We remit that issue to a fresh Tribunal: since the Judge has expressed clear conclusions on the central issues it would be inappropriate in our view for it to be remitted to him, and neither Counsel has invited us to do so. The scope of the hearing will be to determine whether there was such a mistake as to render reliance upon the letter of Ms Senior Wadsworth ineffective, in at least insofar as concerned salaries and grading. If it is

relevant to determine that issue, the Tribunal may consider the meaning of 'salary' afresh, though not otherwise.

28. To that extent, this appeal is allowed. We add only in writing that which we expressed orally at the conclusion of the hearing, namely our gratitude to Counsel for their succinct, well-focused and well delivered submissions.