Appeal No. UKEAT/0315/13/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
on 20th February 2014
Judgment handed down on 25th March 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

PEACOCK STORES — APPELLANT

MR BRIAN PEREGRINE, MS JANET NORMAN
& MRS DOREEN MATTHEWS — RESPONDENTS

JUDGMENT

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APPEARANCES

For the Appellant	MS S KEOGH (of Counsel) Instructed by: Gateley LLP Ship Canal House 98 King St Manchester M2 4WU
For the Respondents	MS N NEWBEGIN (of Counsel) Instructed by: Berry Smith LLP Hayward House Dumfries Place Cardiff CF10 3GA

SUMMARY

CONTRACT OF EMPLOYMENT

DAMAGES FOR BREACH OF CONTRACT

IMPLIED TERM/VARIATION/CONSTRUCTION OF TERM; HOLIDAY PAY

From evidence before an Employment Judge showing that the consistent practice of the Respondent employer in a number of redundancies between the early 1980s and 2002 had been to make redundancy payments based on statutory terms but without a cap on either years of service or the amount of a weekly wage, and some evidence (though generalised) as to the position between 2002 and 2006, the Judge held that a contractual term that redundancy payments would be made without either cap, but otherwise on statutory terms could be inferred. The evidence as to the position between 2006 and 2012 (when the redundancies giving rise to the claims arose) was not so clear cut, and could be said to show an inconsistency of practice. An argument that the employees concerned were not entitled to enhanced redundancy payments (on statutory terms, without cap) was rejected by the Judge. On appeal his decision was upheld: by 2006 he thought a term to be agreed. Nothing since then showed that that term had lawfully been varied. On the evidence, the Judge was entitled to conclude as he did.

A cross-appeal relying on apparent inconsistency of result as between the claims of two Claimants said to be in identical circumstances, was rejected, since one could and did prove her entitlement to holiday pay to the Judge's satisfaction, whereas the evidence of the other was vague and uncertain and thought by him to be insufficient.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Employment Judge Beard at Cardiff Employment Tribunal, for reasons delivered on 27th March 2013, upheld the claim of three former employees of the Respondent ("Peacocks") to be contractually entitled to enhanced redundancy payments. Two of them also claimed entitlement to accrued holiday pay: Mrs Matthews succeeded, but Ms Norman failed. Peacocks appeal against the redundancy payment decision; Ms Norman cross appeals in respect of the decision as to her holiday pay.

The Appeal

2. Redundancy pay is subject to a statutory minimum worked out by multiplying a week's wages by full years of service, but is subject by statute to two caps – one as to the years of service which may count in the calculation, and the other as to the amount of weekly pay. Throughout the period of their employment (26 years in the case of Mrs Matthews, 27 for Ms Norman, and 14 for Mr Peregrine) express provision was made contractually for redundancy *procedures*, but there was no written provision stating whether a redundancy *payment* was to be restricted to the statutory scheme, applying the caps, or was to be calculated in some other way. There was no express agreement that any other scheme should operate, and the burden of proof fell on the Claimants to show that there was.

3. The Judge's conclusion that they had satisfied this burden was essentially one of fact –first as to the underlying facts, and second as to what was properly to be inferred from those facts. This is almost always the case when answering the question what terms have been agreed between employer and employee when none, or only some, of those terms have been set out sufficiently in writing.

4. A particular feature of this case is that the evidence of underlying fact could be seen as falling into 4 periods: (1) from 1971-1996; (2) 1996-2002; (3) 2002- 2006, and (4) 2006 to September and October 2012 when the claimants' contracts ended by reason of redundancy.

5. The first redundancies, in what had hitherto been a rapidly expanding business, occurred in the early 1980s. The evidence before the Judge as to periods (1) and (2) was threefold. First was that of the former head of HR at Peacocks, a Mr Thomas, whose evidence the Judge entirely accepted. It was that there were a number of redundancy exercises before 1996. In every case the policy of the Respondent was to pay individuals on the basis of the full number of years they had worked and their actual wage, rather than applying the statutory cap in respect of either. When asked by Counsel for Peacocks whether anything had been written in the contracts as to the calculation of redundancy payments, he said "no": but when then asked whether the payment remained discretionary, he replied "no, most definitely custom and practice." Second, Doreen Matthews and, third, Brian Peregrine also gave evidence, which the Judge accepted, to the same effect. His evidence, and that of Doreen Matthews and Brian Peregrine, covered the period from 1996 – 2006, though Mr Thomas ceased to be head of HR in 1996 and was himself dismissed by reason of redundancy in 2002.

6. As to Period (2), Mr Thomas gave evidence as to his own redundancy, upon which he received a payment without either cap being applied, and two other redundancies of persons he knew as to which he confessed he could not be absolutely certain that they received redundancy pay without the caps but was "90% sure" of it. Mr Peregrine who worked in the HR department during this period also gave evidence (which the Judge accepted) that he was told by his manager that the redundancy policy was based on enhancements to the statutory scheme, such that he would receive a redundancy payment based on his actual salary and the actual number of years employed.

7. The Judge concluded, on the basis of this material:

> **"There was therefore a consistently applied and well understood policy of enhanced redundancy payments up to 1996, and in my judgment it is probable that remained the situation until 2002 when Mr Thomas was made redundant."**

There was no evidence to the contrary. No document was produced, nor did any witness give evidence that this was not the position.

8. This finding is challenged by Ground 2 of the Notice of Appeal. It is said the conclusion was unsupported by evidence, and perverse. It is said that the Judge noted the evidence of Mr Thomas incorrectly, because it did not qualify Mr Thomas's evidence as to the two redundancies of which he was aware between 1996 and 2002 by noting that he was not 100% sure. Nor, it is said, did the Judge appear to take into account the absence of evidence as to the position of Mr Peregrine's manager, who might have had a vested interest in saying as he did. The argument on Ground 2 is developed by reference to two points, at paragraphs 20 (b) (ii) and (iii) which do not obviously relate to this specific period at all, but which on their face deal with a rather later period as to which a different point arises. So far as Mr Peregrine's manager was concerned, it was material to consider his position since there was evidence that when Peacocks fell into administration, and the undertaking was transferred under the Transfer of Undertakings (Protection of Employment) Regulations to new owners, members of the HR Department were themselves liable to be made redundant, and had then overstated the position as to payment calculation when responding to enquiries by the new owners made in the course of prior due diligence searches.

9. Since the challenge here is perversity, absence and misapprehension of evidence, it is appropriate to refer to this evidence in some detail. It is that in February 2012, an email on behalf of the intending new owners noted that a schedule of head office employees with which they had been supplied indicated that neither the statutory cap on a week's pay nor the cap on

service had been applied. In the light of that the author asked to know how redundancy pay had been calculated by Peacocks. The answer which came back on 16th February was:

> **"We do not have any formalised redundancy policy, but as a matter of practice we tend to do the following things – 1) we do not cap redundancy pay to the statutory weekly limit 2) we tend not to apply the maximum number of week's payment… 3) quite often redundancies are born as a result of restructures and therefore we may pay an ex gratia sum as an integral part of the final compromise agreement – often an extra half week's pay per year of service… this is as far as established discretionary practices really goes."**

10. That led to a query, commenting that the expression "tend not to apply" would suggest that at least insofar as service was concerned Peacocks believed they had a discretion whether to apply the cap. Specific questions were then asked. So far as material, the questions and answers were these:

> **"1. Whether they have always used actual weekly earnings when calculating redundancy pay even where these were over the cap at the time?**
> **A:** ***Yes***
>
> **2. How often this has happened over say the last three years?**
> **A:** ***We have used actual weekly earnings on every single occasion.***
>
> **3. In what proportion of redundancies over the last three years have they not applied the service cap where it would have been applicable?**
> **A:** ***The service cap has never been applied.***
>
> **4. Has a specific decision been taken on what the pay on each occasion?**
> **A:** ***No the same formula for redundancy calculations is applied every time.***
>
> **5. What has been communicated to staff about redundancy pay?**
> **A:** ***We have a general redundancy policy… which does not include specifics about the redundancy calculations. This is provided at the time of a potential redundancy situation and… is always based on actual earnings and with no service cap.***
>
> **6. In their view is the company free to offer only statutory redundancy?**
> **A:** ***No***
>
> **7. Is any limit applied to the enhanced redundancy payment e.g. it cannot exceed 6 months or a year's pay?**
> **A:** ***No"***

On the following day a specific answer was sought to the question how often that redundancy formula had been used over the last three years: was it two or three occasions or dozens? The answer came back, "*dozens*".

11. Also in evidence was a list, described as a sample of colleagues made redundant under the "Peacocks Group Redundancy Scheme", compiled by Mr Peregrine. When that was presented in June 2012 by him, in the course of a grievance about the level of his own proposed redundancy payment, HR were asked to consider it. Jane Griffiths, an HR advisor said that of the 36 people he named there was no information about six. Six had made compromise agreements. Of the remaining 24, her enquiries showed that twelve would not have been entitled to an enhanced redundancy payment under the claimants' formula, and (as Ms Newbegin, who appeared for the Claimants, emphasised) the 12 others received at least their statutory entitlement without a cap as to service or weekly pay. Ms Newbegin claimed this showed that 100% of those entitled by service or pay to an enhancement received one.

12. However, a computer print out was also produced to the ET, from data held by Peacocks. It purported to show by reference to named individuals the date of their redundancy, the amount of their redundancy payment, their statutory entitlement, and any enhancement applied. Ms Keogh (who appeared below when Ms Lippold, for Peacocks) argued that this data set could be analysed as showing five classes – two of which could be ignored for present purposes: those who had been paid in accordance with the statutory formula, and those who had been paid less than the statutory formula, to whose cases could be added those who had made compromise agreements, all of whom it had been agreed below could not assist the argument before the Judge either way. That however left the cases of employees who appeared to have been paid without a cap (for ease of reference, Group B), those who had been paid more than simply ignoring the caps would provide i.e. more than the formula for which the Claimants contended as a minimum

(Group C), and those that had been paid more than the statute would provide but less than would be provided by adopting the term contended for (Group D). Ms Keogh pointed out on the basis of this material that although the vast majority of employees had been paid over the statutory amount there was no consistent pattern. It demonstrated the exercise of individual discretion rather than settled practice – and in evidence Mr Simpson had said that he suspected on the basis of it that the human resources department had been self-serving in its answers during the due diligence process. His evidence to that effect had not been directly challenged.

13. Further, Ms Keogh argued that members of the HR team had been present at consultation and grievance meetings relating to redundancy, and had not then said that the company felt bound to pay on statutory terms without either cap. Further, a number of senior employees were made redundant at the time who stood to gain from enhanced redundancy payments yet did not assert such an entitlement. These undisputed facts argued both against there being any general practice such as the claimants alleged, and against there being a general understanding that such a practice operated.

14. Ms Keogh contended that because Mr Peregrine's understanding did not fully correspond with the data print-out it had been shown to be incorrect – she also noted that in one answer in cross-examination he accepted that it could be incorrect, since he did not have personal access to financial details for the individuals concerned – such that the Judge should not have placed the reliance upon his evidence which he did. In relation to ground 2, he should not have placed weight upon what Mr Peregrine recalled his manager saying, particularly since it might not be accurate and the manager might have had a personal interest in portraying the position more favourably to employees than was the case.

15. These points are made in support of an argument that the Judge was not entitled to reach the conclusion he did with respect to the period up to 2002. I reject it. In my judgment, the Employment Judge was fully entitled to come to the conclusion he did at paragraph 12 which betrays no clear error of fact. It is true that he could have descended into detail as to whether Mr Peregrine's list in, and the evidence relating to the position in, 2012 showed that he was not to be relied on in respect of the period between 1996 and 2002. But it is trite law that a Tribunal does not have to set out every criticism of every witness, nor detail the facts beyond those which are strictly necessary for its decision. Insofar as the challenge is one of perversity (which is central), the short answer is that the Judge saw the witnesses and heard the evidence; there was evidence upon which he could rely, and which he thought reliable; that evidence could not be said to be demonstrably wrong, and in any event he was aware of the possibility that employees in the HR Department might have an interest (at paragraph 14 he referred to the suspicions of Mr Simpson that information he was given in 2012 might not be accurate, because of a vested interest). There was material to support the Judge's conclusion, no evidence to contradict it, and it was not inherently unreasonable.

16. As to misapprehension of fact, none is stated in paragraph 12, nor leading up to it: it was not inaccurate for the judge to say that Mr. Thomas referred to two other people he "knew" to have had redundancy payments calculated in the same way as was his, when his evidence was that he was 90% sure of it, simply because the minor uncertainty inherent in that description was not referred to. To the contrary, Ms Newbegin said with some force that Mr Thomas' answer to the question "Was it discretionary?", saying that it was not, was compelling evidence to the contrary: it came from no less than a former head of HR, who was so throughout most of the relevant period, and was a witness whom the Judge thought entirely reliable.

17. Ms Keogh argues that the questions and answers which immediately followed the apparently unequivocal answer that the practice of paying without cap was not discretionary should materially have affected what the Judge should have made of his evidence:

> **"Q: Never any collective consultation agreement?**
> **A:** ***No***
> **Q: Unions never insisted on any formal policy?**
> **A:** ***May have asked for it, don't think would have got it."***

Though she submits that this was to the effect that the employers would not have agreed in writing to the "no cap" policy, there is simply insufficient in that record of question and answer to show even that the policy referred to was in respect of redundancy pay – it is agreed that obvious follow-up questions were simply not asked. I see nothing in that record necessarily to show that the Judge could not and should not have concluded as he did at paragraph 12.

18. The period from 2002 to 2006 was one in respect of which the judge thought that there was a "dearth of specific information". However, this was "apart from generalised evidence from the Claimants". Accordingly, there was evidence, even if not particularly specific, which covered this period. I have anxiously considered whether the Judge was entitled to conclude that until 2006 the payments that were made were made automatically without applying either a cap on service or a cap on earnings. That this was the conclusion he reached was plain at paragraphs 24, and 28.2: it is what led him to the conclusion upon which he based his final analysis that "at the very least there was a contractual term implied into the Claimants' contracts up to 2006," a point he reiterated at paragraph 29.

19. It might be argued that the evidence as to the period after 2006 illuminated the period between 2002 and 2006 in which there was only generalised evidence. However, remembering that the conclusion is one of fact, there is no perversity in the Judge's conclusion. It was based on evidence, even if sparse for the latter period before 2006. Accordingly, there was a solid

foundation for his approach in respect of the period up to 2006. His view of the evidence was that there was none which was inconsistent with the proposed term (at the earliest, such evidence arose only after 2006, if indeed conduct after that date could truly be said to be inconsistent with the proposed term). Accordingly, I do not consider that he was required to reach any different a conclusion as to the period up to and including 2006 from that which he did, by reference to evidence of that which happened in a later period.

20. Since the judge made his decision, the Court of Appeal has considered the question whether a practice, followed without exception for a period of time may lead to the inference that a contractual term to that effect has been agreed between the parties. The first, and leading, recent authority is that of **Park Cakes Ltd v Shumba and others** [2013] EWCA Civ 974. The employer operated a policy under which redundancy payments of double the statutory amount, without either a cap on service or weekly pay were made in the event of redundancy. Underhill LJ, with whose judgment Rimer and Moore-Bick L.JJ. agreed, reviewed the recent authorities, from **Duke v Reliance Systems Ltd** [1982] ICR 449, through **Quinn v Calder Industrial Materials Ltd** [1996] IRLR 126 to the more recent cases before the Court of Appeal. In respect of **Quinn v Calder**, Underhill LJ noted that the reference to the employer's intention to which Lord Coulsfield made reference was to his intention as objectively shown – whether his conduct, by word or deed, was such viewed objectively as to convey to his employees that the employer intended to be bound. He noted that **Albion Automotive v Walker** [2002] EWCA Civ 946 contains check list of relevant factors (a list which it must be noted is inclusive, not exclusive) which is useful but no more than that. From **Garratt v Mirror Group Newspapers** [2011] ICR 880, he drew the principle that the essential object of the Tribunal's enquiry is to ascertain what the parties must have or must be taken to have understood from each other's conduct and words, applying ordinary contractual principles. Accordingly, Underhill LJ said at paragraph 35 that:-

> **"Taking that approach, the essential question in a case of the present kind must be whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy that benefit as of right. If so, the benefit forms part of the remuneration which is offered to the employee for his work (or, perhaps more accurately in most cases, his willingness to work) and the employee works on that basis. (The analysis by reference to offer and acceptance may seem rather artificial, as it sometimes does in this field, but it was not argued before us that if the employer had indeed sufficiently conveyed an intention to afford the benefits claimed as a matter of contract, he would not thereby be bound.) It follows that the focus must be what the employer has communicated to the employees. What he may have personally understood or intended is irrelevant except to the extent that the employees are, or should reasonably have been, aware of it."**

The reference to "communicated" plainly covers both communication by word, but perhaps more particularly in this form of case, by conduct. Typical considerations were set out by Underhill LJ at paragraph 36 – on how many occasions and over how long a period the benefits had been paid; whether the benefits were always the same; the extent to which the enhanced benefits were publicised generally; how the terms were described; what was said in the express contract (i.e. if that contradicted the supposed inferred term, there could be no room for it); and "equivocalness".

21. Ms Keogh focussed upon the last of those points – that the burden of establishing that a practice has become contractual is on the employee, and he will not be able to discharge it if the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation.

22. In a still more recent case, **CSC Computer Sciences Ltd v McAlinden and others** [2013] EWCA Civ 1435, the Court of Appeal re-emphasised the principles set out in **Shumba**.

23. None of this law was in dispute. It leads to the conclusion that the question is whether an employer has, objectively viewed, so conducted himself by word or deed that it is to be inferred that a term has been agreed between the parties. This was what the Judge concluded. He was

entitled on the material before him, to do so. It is not suggested that he applied the law wrongly, but rather that he did not fully appreciate the force of some of the facts. This is question of weight: procedural irregularity apart, such questions are quintessentially matters of assessment by the fact-finding tribunal and do not give rise to an error of law, save only if the heights of perversity are scaled. That is not the case here. He was not required to decide that "equivocalness" applied where he was of the view that the evidence clearly supported his conclusion, in effect holding that on balance it justified the inference he drew.

24. Once the position was reached that a term was to be inferred, a departure from that term by the employer would represent a breach, unless knowingly agreed to by the employees affected – though it is to be noted that the employer could, as an exercise of discretion, exceed the contractual redundancy payment should it wish, and it would be entirely unrealistic to expect employees to complain about that.

25. The dispute between the parties as to what happened after 2006 contrasts Ms Newbegin's argument that the minimum payable was paid to all those who in accordance with the apparent policy were paid – consistent with the approach I have just stated – and that of Ms Keogh that it showed a variation in practice, such that inconsistency was established. The Judge recognised that there was a variation in practice; but concluded on entirely permissible grounds at paragraph 29 that that variable practice did not amount to a variation of the term.

26. Once the Judge's conclusion to the effect that it was to be inferred from the conduct of the parties that at least by 2006 a term had been agreed between employer and employees to the effect alleged by the Claimants, then that term would continue to apply unless there was some reason why it should not: in particular, whether it was varied by agreement, whether actual or itself to be inferred. There were no circumstances, as the Judge held, from which he could

properly infer that what had been agreed had been superseded. Nor in the circumstances, does it seem realistic to suppose that there would have been. There was certainly no evidence of any oral agreement to that effect; Ms Keogh's own argument precluded there being any such consistent practice as might lead to it being inferred that a variation of contract had been agreed.

27. It follows that in my view the Judge was fully entitled to come to the conclusion he did. Despite the careful and detailed arguments advanced by Ms Keogh, the Appeal must be and is dismissed.

The Cross-Appeal

28. The Cross-Appeal in effect asserts inconsistency between the Tribunal's decision in allowing Mrs Matthew's claim of failure to pay her accrued holiday pay, but rejecting that of Ms Norman. The Employment Judge considered the holiday pay claims at paragraph 9 of the Reasons. There were two issues for the Judge to determine: first, whether the employees (both Mrs Matthews and Ms Norman) were right in their interpretation of contractual arrangements which applied to holidays, or whether Mr Thomas was. The Judge concluded that on this issue Mr Thomas's view was less logical and, on that basis, preferred the contentions of the Claimants. The second issue, however, was as to the individual position of the employee concerned. As to that, he set out Mrs Mattew's position at paragraph 9.5.2, and plainly accepted it: but so far as Ms Norman was concerned said:-

> **"9.6 I did not accept that Ms Norman had any genuine recollection of the details of this period. Ms Norman was vague in her responses and was muddled when she was asked why, if she had known she was entitled to holiday pay, she did not raise it as a grievance.**
> **9.7 There is some unattributed documentation at the end of the bundle which was said to support Mrs Matthews and Ms Norman's position on holiday pay. This was a series of tables with handwritten titles. I know not how or when or from what database they were extracted and for what purpose. The columns simply identify individuals, their length of service, and whether they were paid holiday pay on leaving employment. I did not find these documents helpful.**

> **9.8 I am of the view that Mrs Matthews has demonstrated to me that she was entitled to be paid for holiday pay accrued in the 1980s and held over by agreement to termination…**
> **9.9 I do not accept that Ms Norman has established this…"**

29. Accordingly, the distinction the Judge drew was that one Claimant had proved entitlement to holiday pay as a matter of evidence but, the other had not.

30. It is for an employee claiming arrears of holiday pay to show on the balance of probabilities that she is entitled to be paid it. Accordingly, unless Ms Norman can establish that the view to which the Judge came was simply perverse and that, contrary to his view, she had unequivocally established an entitlement to holiday pay, her appeal is certain to fail.

31. The submissions of Ms Newbegin accept that perversity must be shown, (see paragraph 101, skeleton argument). She argued that Ms Norman enjoyed the right. It does not, however, convince me that she had established the facts as to her own personal position which showed that given the now accepted operation of the scheme she was entitled to an exercise of that right in her favour. She would have to show that she complied with the contractual requirements if she were to do so. Ms Keogh put it succinctly in her skeleton argument at paragraph 86:

> **"The question for the Judge was whether Mrs Matthews and/or Ms Norman fell among the category of employees who still had accrued holiday pay outstanding". As there was no documentary evidence on the point (this having been destroyed), this was entirely down to the credibility of the evidence of each witness. The Judge found Mrs Matthews to be credible on this point, but found Ms Norman was not credible.**
> **87. The decision was plainly supported by evidence, and given it was based on the credibility of Ms Norman in giving live evidence, this is not a matter which the EAT should readily interfere with."**

32. I agree. On that basis, the cross-appeal is dismissed.

Conclusion

33. Both the appeal and cross-appeal are dismissed.