Appeal No. UKEAT/0178/14/KN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 November 2014
Handed down on 26 November 14

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR LEE GOLDWATER et al — APPELLANTS

SELLAFIELD LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	ANGHARAD DAVIES (of Counsel) Instructed by: Thompson Solicitors LLP St Nicholas Building St Nicholas Street Newcastle Upon Tyne NE1 1TH
For the Respondents	BRUCE CARR QC (of Counsel) Instructed by: Messrs Eversheds Solicitors Eversheds House 70 Great Bridgewater Street Manchester M1 5ES

SUMMARY

CONTRACT OF EMPLOYMENT – implied term/variation/construction of term

By a rule relating to transfer and promotion ("the six week rule") introduced into their contracts of employment by collective agreement in a new form in 2000 it was provided that Respondent's employees would "… receive the pay and conditions of the new post when they move to it, but in any case, no later than six weeks after being informed of the selection".

There was an issue of construction as to whether the phrase "pay and conditions" in the six week rule included certain supplements introduced in 1999.

Taking account of all the relevant background material in accordance with **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 All ER 98 the proper construction was that it did include those supplements, contrary to the finding of the Employment Judge.

HIS HONOUR JUDGE SHANKS

Introduction

1. The Claimants are employees of Sellafield Ltd at their nuclear plant in Cumbria. Employment Judge Holmes found in his judgment sent out on 17 December 2013 that in each of their contracts of employment there was incorporated a term that in the event of promotion or transfer to a new post they would:

> **… receive the pay and conditions of the new post when they move to it, but in any case, no later than six weeks after being informed of selection.**

The Claimants say that for the purposes of this so-called "six week rule" the words "pay and conditions of the new post" include not only basic pay but also any "shift supplements" and "contact area supplements" which go with the new post. The Judge agreed with Sellafield that as a matter of construction of the term those supplements were not included. The Claimants have appealed to this Tribunal in relation to this construction issue.

2. By the time of the hearing before the Judge there were 16 Claimants still in play but specific evidence was only provided in relation to three of them (Messrs Riach, Whitefield and Dixon), who were treated as test cases. The Judge rejected their claims for unlawful deductions from wages on the basis of his decision on the construction issue but, with the single exception of Mr Whitefield's claim in respect of shift supplements, he also rejected them on the basis of the specific wording of the letters they were each sent offering them new jobs. There is no appeal against the decision on the offer letters but it is accepted by Mr Carr QC for Sellafield that there is no material distinction between the two types of supplement in relation to the construction issue and that a decision in relation to Mr Whitefield's entitlement in respect of shift entitlements will therefore serve to resolve the construction issue for all the remaining Claimants. It was also common ground that there was no question that if I decided that the

Judge had made an error on the construction issue it was open to me to decide that issue myself on the basis of all the material before me.

Background facts

3. The two types of supplement and the "six week rule" (in its current form) were the product of collective agreements resulting from work done in 1999 and 2000 as part of an exercise of unifying the contractual terms of Sellafield's industrial and non-industrial staff. The supplements came in as part of new contract terms introduced in June 1999 and the new "six week rule" applying to both industrial and non-industrial staff was introduced in November 2000 as part of the product of other work specifically on post-filling and promotion. All the relevant provisions were contained in a new unified Employee Handbook first issued in 2002

4. The relevant provisions as to shift supplements are set out by the Judge at paras 4.15 to 4.17 of his reasons. Certain shift rotas are approved for general use. The provisions continue:

> **The shift supplement is a comprehensive regular payment, paid at the same frequency as normal pay to compensate shift workers for … [a series of generic aspects of shift work]**
>
> **The standard shift payment will be a fixed sum paid for disturbances due to rostered and non-rostered shifts and will not be enhanced for any additional banked hours.**
>
> **…**
>
> **The shift supplement will only be paid for attendances and paid absences. There will be no enhancement to this supplement for working additional hours.**

The amounts of the supplements are fixed by reference to the type of shift as a fixed annual sum ranging between £5,025 and £10,467.

5. "Contact area supplements" (also referred to as "level allowances") are dealt with at para 4.17 of the reasons. They are payable to "… Band 4 and 5 Employees who work in contact areas …". Three levels of supplement are described for Sellafield:

> **Level 1 – A flat rate pensionable supplement payable monthly to all Band 4 and Band 5 employees permanently based in the Controlled Area – Contamination.**

> **Level 2 – An additional flat rate pensionable supplement payable monthly to all Band 5 Employees permanently based in the Controlled Areas – Contamination …**
>
> **Level 3 – An additional non-pensionable supplement payable monthly to all Band 4 and Band 5 Employees based permanently in the B30 complex.**

I note, though the judgment does not record, that the June 1999 New Contract document to which Mr Carr referred me contains the following in the section headed "ALLOWANCES":

> **Summary**
>
> **In future, payment will be made for the whole job as far as possible, and will be reflected in normal pay providing stable levels of income.**
>
> **…**
>
> **In many cases, allowances will be replaced by supplements**
>
> **….**
>
> **Sellafield Inner Zone, Abnormal Conditions and Irksome Clothing Allowances**
>
> **With effect from 4.9.99 these allowances will be replaced by a new, much simpler pay structure …**
>
> **[Levels 1, 2 and 3 are then set out in broadly the same terms as above].**

6. Before 2000 the "six week rule" applied only to non-industrial staff but it was in rather different terms:

> **The employee will receive the higher rate of pay from the date when the new duties are taken up. If, for management reasons, an employee is unable to start the new job for some time, the higher rate will be paid six weeks after the date on which the promotion or career development move to the higher pay spine range was notified to him/her**

The Judge recorded (at para 24 of his reasons) that the intention of the rule was "doubtless … to encourage movement and promotion in the workforce, and … as an incentive both to employees to seek such progression, and to management not to delay giving effect to successful applications." He also found that at no time during the operation of the rule had any employee been paid anything more than the appropriate increase in basic pay between the expiry of the six week period and taking up a new post and that no complaint had been raised about this until 2012.

7. Mr Whitefield, who had worked for Sellafield since 2007, received his new job offer on 13 February 2012. The offer letter said:

> **… you have been selected for a job change to a Process Operator on 5 Cycle shifts at Band 5 Zone A (£27,359), Broad Role Number 5/011. Your appointment will be within B30, Decommissioning.**
>
> **Your official date of job change will be agreed between your current and future Line Manager.**
>
> **Although the appointment will initially be on shifts, you are reminded that shift work cannot be guaranteed indefinitely and that shift workers remain liable to transfer to day work at management discretion.**
>
> **You are currently in receipt of Level 1 and 2 allowance payments. As a result of this job change, you will now be entitled to Level 1, 2 and 3 allowance payments. You are reminded that these payments remain payable subject to meeting the laid down requirements for Level allowances.**
>
> **All other conditions of your Contract of Employment will remain unchanged.**

He was not transferred to his new post until 6 July 2012. In the intervening period he was not paid the shift and contact area supplements which he would have been paid if he had started in his new role.

The law

8. There is no dispute that the relevant law as to the construction of a contractual term like the "six week rule" contained in the Employee Handbook is set out in the speech of Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98 and in particular the five principles he identifies at pp114/5. Adapting Lord Hoffmann's words somewhat, the task is to ascertain the meaning which the words of the rule would convey to a reasonable person with all the relevant background knowledge available at the time it was introduced. The relevant background includes absolutely anything which would have affected the way in which the language of the rule would have been understood by a reasonable man, excluding previous negotiations and declarations of subjective intent. The fifth principle identified by Lord Hoffmann is this:

> **The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the**

> **law does not require judges to attribute to the parties an intention which they plainly could not have had.**

The judge's decision

9. It appears to have been common ground before the Judge that the word "pay" in the new version of the "six week rule" referred only to "basic pay." The Claimants therefore submitted that the supplements came within the newly introduced words " … and conditions". The Judge noted that the added words created what he described as a "conundrum" as to what, if anything, they might mean in their context and said that there was little or no evidence to cast light on what the parties in fact intended by their addition, but that he must nevertheless attempt to discern a meaning if possible. He continued:

> **[35] … the claimants' claims amount to claims not only for the conditions of the new roles, but for payments to be made as if they had actually commenced work in those roles, so as to trigger the additional payments, ie on the basis they had satisfied those conditions.**
>
> **[36] Therein, in my view lies the fallacy of these claims. The shift payments and Level allowances are not merely methods of calculation of salary in a new post, they are specific entitlements dependent upon the shifts and locations actually worked. These claims, therefore are not merely for the terms and conditions of the new posts, but go a step further, in that they are claims for the claimants to be treated as if the conditions within those terms themselves, for payment of those additional payments, were actually triggered, when in fact they were not. In short, the claims seek to create a fiction, that the employees had started in their new roles when they had not. The key point is, however, that those conditions require the employees to meet the requirements which trigger the payments, namely working the shift patterns, or at the locations, which are stipulated. Applying the conditions, therefore, of the new roles does not in fact create any additional entitlement.**
>
> **[37] … a construction which additionally would entitle the claimants to additional specific payments in circumstances where they had done nothing to earn them, is one which seems unlikely to have been the intention of the parties. To that end the Tribunal would require some persuasion that this was truly what the parties intended …**

On that basis the Judge decided that the Claimants' contention was an "unwarranted extension of the term, and an improbable construction" and rejected it. At para 38 of his reasons, he also suggested an alternative approach to construing the term which would give the same result: that the word "appropriate" should be implied before the word "conditions" and that the payment of the supplements before an actual job move would not be "appropriate". Mr Carr, rightly in my view, did not seek to support that approach.

10. It seems to me, with respect to the Judge, that his first approach was also unsupportable and that the "fallacy" he identified was no such thing. It is clear from the provisions set out above at paras 4, 5, and 7 that the shift pattern and location of work were intrinsic to the new post Mr Whitefield was being offered and that his entitlement to the supplements was not, as the Judge said, "… dependent on shifts and locations *actually* worked" (my emphasis) but would automatically be paid as part of his monthly remuneration in the same way as basic pay. I recognise that the offer letter warns that shift work cannot be guaranteed indefinitely and that shift workers can be transferred to day work but the simple answer to that point is that there has been no suggestion that any such transfer was ever contemplated or notified in fact in this case.

11. The reasons for the Judge's conclusion cannot therefore stand and I turn to consider myself the proper construction of the "six week rule" in the light of Lord Hoffmann's principles and the relevant background facts.

Discussion and conclusion on proper construction

12. The starting point in my view must be the "natural and ordinary meaning" of the words of the rule themselves in the context of the other provisions in the Employee Handbook. As Ms Davies pointed out there are two limbs to the "six week rule": the first is that the successful candidate "will receive the pay and conditions of the new post when they move to it"; as she says, the phrase "pay and conditions" in that limb of the rule can only refer to and include all the monthly remuneration to which the employee would be entitled once he had moved (whether by way of basic pay or supplements); the second limb, which deals with what happens six weeks after selection, states in effect that the candidate should receive the same after six weeks as he will in due course receive once he has moved: that logically must include such supplements.

13. Mr Carr stressed that it was common ground that before 2000 the "six week rule" only referred to basic pay and submitted, as he did before the Judge, that it cannot have been intended that the "six week rule" should have been extended to cover not only industrial workers but also the two types of supplement. I am not at all persuaded that I should, in effect, conclude from the background that, in Lord Hoffmann's words, "something must have gone wrong with the language" used by those who framed the rule. On the contrary, it seems to me that Mr Carr's submission overlooks two important points which point the other way: first, that the supplements had been introduced as part of the industrial workers' "pay package" some months before the change in the wording of the "six week rule" so that, if it was intended to exclude the supplements, that could easily have been expressly stated; and, second, that the wording of the old and the new rules is in fact markedly different: not only were the otherwise inexplicable words "… and conditions" introduced in the new version, but there was no reference in the new version to a "rate of pay" or "pay spine range" which appear in the old version and which are words more obviously referable to basic pay. Further, the "natural and ordinary meaning" of the rule as I have found it to be is entirely consistent with the purposes of the rule, in particular that of encouraging management not to delay giving effect to successful applications.

14. It was not entirely clear to me if Mr Carr was suggesting that by virtue of some kind of "custom and practice" the new version of the rule had to be interpreted as covering only basic pay. If he was I do not think that such an argument could succeed. There was, as far as I can see, no finding as to any "custom and practice" by the Judge and the mere fact that no-one had been paid supplements pending a move or complained about it until 2012 could not, in my view, possibly give rise to such a finding without evidence about all the circumstances relating to the operation of the rule between 2000 and 2012.

Disposal

15. I therefore conclude that on the proper construction of the "six week rule" the words "pay and conditions of the new post" include, where appropriate, shift and contact area supplements. Mr Whitefield was therefore entitled to succeed on his complaint under section 23 of the Employment Rights Act 1996 in relation to the shift supplements he would have received if he had been moved to his new post six weeks after 13 February 2012 and the appeal must be allowed to that extent. I am not sure it was appropriate for the Judge to make a determination under section 11 of the Act in this case as he did at para 2 of the Judgment so, having been assured that my decision on Mr Whitefield's claim for shift supplements in effect resolves all the outstanding issues between the parties, I will simply set para 2 aside.