Appeal No. UKEATS/0013/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH EH3 7HF

At the Tribunal
On 8 August 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR STUART DUNCAN APPELLANT

STOCKLAND DEVELOPMENTS (UK) LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR STEPHEN MILLER (Solicitor) Simpson & Marwick 144 West George Street Glasgow G2 2HG
For the Respondent	MR BRIAN NAPIER (One of Her Majesty's Counsel) Instructed by: Morrison & Foerster (UK) LLP CityPoint 1 Ropemaker Street London EC2Y 9AW

SUMMARY

CONTRACT OF EMPLOYMENT

Whether established

Implied term/variation/construction of term

REDUNDANCY

An email between senior managers suggested that where key people were to be made redundant, they would be entitled to the same redundancy terms as had been offered in previous redundancies would apply. This was forwarded to the Claimant when he expressed concern about his position. He took it as reassurance, and argued he had accepted the offer which in these circumstances was implicitly contained within it by remaining in post. When then made redundant he sought payment of the 4 weeks pay for each year of service he understood to have been offered to him by this passage of events, rather than the 3 he was paid.

The EJ rejected this on four grounds. It was argued on appeal that one of these was irrelevant, and the other three grounds were materially inconsistent with the findings in fact. These arguments were rejected, it being held that although the judgment was not free from matters of concern, the reasoning was sufficiently clear for the appeal to be dismissed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This appeal, against a decision reached by Employment Judge Macleod at Glasgow on 9 January 2013 when he dismissed the claim made by the Claimant, raises a question that on the face of it is deceptively simple. The question was whether there was a contract that entitled the Claimant to be paid four weeks' pay for each year of service in the event that he was made redundant or whether he should receive only three. He was paid the latter; he claimed the former. Part of the problem in determining at an appellate level whether a Judge's findings are permissible or whether they betray an error of law is that it is all too easy for Judges who are familiar with assessing the rights and wrongs of the workplace to forget that the test of whether a contract has been breached depends centrally not upon the subjective views or the intentions, good or bad, of the parties but upon the objective view that the court must take.

2. That view was expressed simply and, in my view, correctly by Mr Napier QC in the submissions that he is recorded as having made to the Employment Judge. There he submitted that the test (paragraph 94) was what the reasonable man would conclude in possession of knowledge of all the circumstances, including the history of how the parties had behaved towards each other. He would add, and accept – and I would emphasise – that the objective observer will take into account not what reasonable people would have concluded was the meaning of an agreement or indeed whether they had entered into an agreement but whether, knowing what is known about the individuals concerned, these individuals, in their particular employment context, had done so. At the conclusion of the argument I do not understand that proposition to be disputed, but the central feature of it is that it requires an objective approach. This has frequently been emphasised by appellate courts, most recently in the case of **Park Cakes Ltd v Shumba and Ors** [2013] EWCA Civ 974, a Judgment of 31 July 2013.

Underhill LJ at paragraph 29 referred back to an earlier authority, that of **Quinn v Calder Industrial Materials Ltd** [1996] IRLR 126, a decision of the Appeal Tribunal chaired by Lord Coulsfield, to draw attention to the fact that it might – and if so, it would be erroneously – be taken to suggest that the subjective intentions of the parties were relevant directly in determining whether they had become contractually bound. Thus specifically he pointed out (paragraph 29.1):

> **There may be room for misunderstanding of his statement at the end of para 7, but the crucial question is whether the circumstances support the inference that the employer intended to be contractually bound. Although on a proper reading I think this is clear, it is nevertheless worth spelling out that the reference to the employer's intention must be to his intention as objectively evinced; that is, the question is whether the employer's conduct (including anything said by him) was such, viewed objectively, as to convey to the employees that he intended to be so bound. On ordinary contractual principles, what matters must be not what an offeror actually intends but what intention his words or conduct would communicate to the reasonable offeree."**

3. As I have indicated, the parties here accept that that is the offeree in the position of and with the attributes of the particular offeree under consideration.

4. It is thus incumbent upon a Tribunal, if an issue arises of whether a contract has been entered into at all, or, if it has, what terms have been agreed, to approach the issue not on the basis of that which the parties have understood to have happened but upon the basis of that which objectively has occurred. I would observe that this is not to say that the intentions of the parties and their actions both before and after have no relevance. For instance, an agreement, in order to be a valid contract in English law – and it is, by agreement, English law that applies to this appeal – must be one in the making of which there has been a process that may be defined as offer and acceptance, with there being consideration and intent to create legal relations, and sufficient certainty of its terms, quite apart from the need that it should not be unlawful.

5. The process of offer *and* – I emphasise that word in the current context, for reasons that will become apparent – acceptance are objectively to be assessed, but as Hoffmann LJ observed towards the end of his speech in **Carmichael v National Power** [1999] ICR 1226 at 1235:

> **"The evidence of a party as to what terms he understood the agreement being is some evidence tending to show that those terms in an objective sense were agreed."**

6. He noted in the same paragraph that evidence of subsequent conduct may be admissible to support an argument that terms have been varied or enlarged to found an estoppel. If, let us suppose, a party is unclear as to what has been agreed, where he propounds an agreement to have been made, the fact of his lack of clarity may be some evidence that tends to illuminate the objective question of whether there has indeed been an agreement, for one would normally expect any agreement reached to have been clear and precise in its terms, and uncertainty about what was agreed may therefore indicate that the facts are such that there was no agreement.

7. With that introduction, but for one further comment, I turn to the facts. That further comment is that in this case I have been fortunate to have had from both parties, through Mr Stephen Miller, solicitor, for the Claimant and Mr Napier QC for the Respondent, arguments that are of the highest quality. It has been a somewhat rare treat for me.

The facts

8. The Claimant was employed as company secretary of a UK company from 3 December 2001 until 30 June 2012. He was then dismissed purportedly by reason of redundancy. The company was wholly owned by an Australian corporation. The contract of employment contained, so the Judge found, no provision for any enhanced payment in the event of redundancy, until on 8 October 2010 an offer to vary the policy on redundancy was

published. Prior to that, and therefore at a time when there was no contractual redundancy policy applying generally to staff, it became apparent that the UK company would have to withdraw from its operations. The Claimant was understandably concerned about his position. Together with another, whose main concern was finance, they spoke to the finance director of the UK company, a Mr Harkin. It was within that context that later on the same day Mr Harkin disclosed part of a confidential email that had been sent to the chief executive officer of the UK company and to him, Mr Harkin, by the chief executive officer of the Australian corporation. Mr Harkin forwarded part, but part only, of that email to Mr Dick, the other person with whom he had had the conversation, and the Claimant. It read (see paragraph 37):

> **"Ken/Mark**
>
> **It may be appropriate to offer some form of retention to the key people, but we did hear from the Recruitment Consultant that the job market in the property sector is still dire. Our redundancy package offered to previous people already made redundant will apply to any future redundancies, and this in itself provides a financial incentive for some of the people to stay, particularly those not based in London as job prospects in the regions are very poor. You should discuss this with Rilla.**
>
> **I hope I've covered everything, but let me know if I haven't.**
>
> **Regards,**
>
> **Matthew."**

9. Ken is the first name of the CEO of the UK company, Mark the first name of Mr Harkin. Accordingly, this email, viewed objectively, was a management communication that was not intended to be directed to the Claimant. It was, however, forwarded to him by Mr Harkin, in circumstances in which he had been looking for reassurance as to his position in the event of redundancy. The question for the Tribunal was whether the email of 16 February 2010 consisted of a "definitive undertaking" by the Respondent to the Claimant that he would receive four weeks' pay per year of service. A second issue did not in the event arise, namely whether it had been superseded by the introduction of the avowedly general and contractual policy of October 2010 (see paragraph 16).

10. The Tribunal Judge before whom the same advocates appeared set out findings of fact in which he made frequent reference to the intentions or understandings of the parties. When he came to make what he termed observations on the evidence, he concluded as between paragraphs 114 and 117 that the Claimant had no reliable understanding of what had been paid in previous redundancies. He observed (paragraph 117) that it was crucial in the case to be able to identify precisely what the Claimant understood was the binding undertaking made to him, and he was left unconvinced, he said, that he had a particularly clear knowledge of the previous cases that would enable him to be reassured that the email of 16 February meant what he said it meant. Mr Miller points out that this is difficult to reconcile with what is said at paragraph 38, in which there appears to be a clear finding that the Claimant's view of what had happened and understanding of the meaning of it was that he would receive four weeks' pay based upon his "knowledge at the time" that the 2009 redundancies (in England) had been calculated on this basis.

11. The question of whether it was crucial to know when the Claimant had the understanding he claimed was returned to at the end of paragraph 120:

> **"When he knew that information is crucial in this case and his evidence about this insufficiently clear to establish the matter with any probability."**

12. Having made those observations, the Judge turned to his decision. He considered first the events surrounding the sending of the email on 16 February. He referred to a dispute in the evidence between Mr Harkin, who claimed that he was intending the Claimant to know that matters of potential redundancy entitlement were being discussed at the highest level, and that

of the Claimant, which was that he understood he had been given a clear reassurance that he would be paid. What he said was this:

> **"131. Mr Harkin sent the email to the claimant and Mr Dick for their reassurance, according to his evidence. He wanted them to know that matters were being discussed at the highest level. I had some difficulty with this evidence. If that is what he wanted to reassure the Claimant, he could have said so.**
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> **132. In my judgment, the terms of the email, which was forwarded to the claimant without qualification or embellishment, were intended to give reassurance to him by confirming that he would be paid the same package on redundancy as those who had previously been made redundant. That is the plain meaning of that statement.**
>
> **133. Mr Harkin's evidence that he intended this for reassurance but that the reassurance was that the matter was being discussed at a high level of management, I found entirely unconvincing. It would provide a senior manager such as the claimant with no reassurance whatever to be told that his situation was the subject of discussion at a high level. That would add nothing to his knowledge. I considered that if, as Mr Harkin said, the email was sent to reassure the claimant, that would only mean that the respondents would pay his redundancy package on the same basis as those who had gone before."**

13. He then began the next part of his Judgment at paragraph 135, immediately following therefore those to which I have just referred. It and following read:

> **"135. However, notwithstanding any reservations the Tribunal may have with the intentions of Mr Harkin as expressed in early 2010 and at the hearing, there remain four difficulties, in my judgment, which confront the claimant.**
>
> **136. Firstly, the form of the email is not consistent with the communication of a clear variation of contract. It is clearly labelled as an extract from a larger communication. Mr Harkin made no suggestion either at the meeting in February or in this email, that this amounted to an offer or a contractual commitment, and it is clear from his evidence that he did not intend it to amount to either. Mr Harkin was sharing an internal management communication. It is not, in form or content, the variation of a contractual term. It said nothing about the precise calculation to be applied to the claimant. In what appears to have been informal discussions, Mr Harkin told the claimant at an unspecified time that the previous redundancies in 2009 were paid at four weeks per year of service, but the message itself does not make this unambiguously clear.**
>
> **137. There is no offer made in the email. There is no indication that it amounts to a specific variation of the contract of employment between the respondents and the claimant. It was known to be an extract from an internal management document which was being disclosed to the claimant and Mr Dick by Mr Harkin on a confidential basis. It was characteristic of the working relationship between the claimant and Mr Harkin that confidential management information was shared in this way. The email amounts to no more than the sharing of a statement of intent by the senior management of the respondents as at that date. In my judgment the respondents did not intend to create a contractual variation by sending that email.**
>
> **138. Secondly, it is quite unclear to the Tribunal precisely what the claimant at the time took from this email. He was clearly reassured, but in his own evidence he said that he did not know what previous employees who had been made redundant had in fact been paid, and that he made an assumption that it would include two additional weeks per half year. That assumption was clearly wrong. As a result, since the claimant's understanding of the meaning of the email cannot be relied upon, there can be no clear basis for a finding that the parties have effectually [sic] varied the terms and conditions upon which they have contracted.**

139. Thirdly, the claimant's position before the Tribunal has altered, as Mr Napier pointed out. His claim in the ET1 was largely, though not entirely, based on the assertion that the Australian redundancy policy applied and that was the reason for his being entitled to 42 weeks rather than 30. It appears to have been accepted that the claimant has not succeeding [sic] in demonstrating that the Australian redundancy policy in fact applied to him, and in my judgment that is correct. This is of importance in considering the precise nature of the claim before the Tribunal, which is for 42 weeks. The email of 16 February provides no detail as to the quantification of the previous claims but the claimant read it, now admittedly incorrectly, to mean that the Australian policy would apply. On any view, that was a misunderstanding. His original claim has not, therefore, been proved.

140. Fourthly, at no stage prior to the date of termination of his employment did the claimant raise with the respondents his intention to rely upon the terms of the email. This is inconsistent with what the claimant asserts to have been his understanding of the meaning of the email. I did not accept the claimant's evidence that he did not raise the matter prior to termination because he thought it would be likely to have a detrimental effect on his position. There was no basis in fact for that assertion. In any event, by the time of the consultation meetings, the claimant's employment was clearly coming to an end. From the outset it was made clear to him that he was to receive an enhanced redundancy payment. If he truly believed that the email gave him a contractual right to a redundancy payment based on four weeks' pay per year of service, it is inconceivable that he would not have mentioned that at one of the meetings leading to his dismissal, but he did not. The only conclusion which can be drawn is that he was not certain as to the meaning of the email."

14. The Judge went on to note that without the variation that the Claimant asserted had been rendered by the email there was no contractual right to any enhanced redundancy payment, and he concluded (paragraph 142) that the email did not amount to an offer to vary, or a variation of, the terms and conditions upon which the Claimant was employed and that therefore the claim failed. He did not deal, therefore, with other matters that, should this appeal succeed, remain outstanding.

The appeal

15. The appeal correctly, in my view, identifies the single question as being the legal effect, if any, of the communication of 16 February 2010. The appellant argued that on the basis that the sender of the email had ostensible authority to bind the Respondent, a matter that is not now in dispute, if it ever was, the Judge had effectively concluded by the terms of paragraph 132 facts from which it ineluctably followed that there was such an agreement. Having concluded that the email confirmed to him that he would be paid the same as those previously made redundant, and the whole purpose of sending it was to offer an undertaking to that effect by the

Respondent which the Claimant needed to do little more than remain in post to accept, there was an inconsistency between the statement in paragraph 132 and what was said at paragraphs 136 and 137. The Judge therefore had demonstrated factual inconsistency in matters material to his judgment such that it could not stand.

16. Next, he argued that there was no basis for what was said at paragraph 138, which was inconsistent in any event with what was said at paragraph 38. To suggest that the Claimant had been unsure what he took from the email may have repeated what was said in paragraphs 116, 117 and 120, but it was inconsistent with what appeared to be a clear finding of fact that he had a clear understanding as to what the agreement actually was (paragraph 38). Besides, the understanding of the parties has in this context only a tangential relevance to whether there has been a contract. That must objectively be assessed.

17. Third, at paragraph 139 the judge regarded as unproven the original claim which the Claimant made to the effect that the reference within its terms was to the Australian redundancy policy, and took this as a reason for rejecting the Claimant's case that the email constituted a contractual commitment. That, Mr Miller submitted, was irrelevant. The fact that a litigant has not proved one claim is on the fact of it irrelevant to whether they have or have not proved another, unless the claims are interdependent. I would observe here that in any event if the issue was, as it appears to be, whether the contract was entered into at all, in the words constituted by the email, an argument about what those words meant in the circumstances is beside the point.

18. The fourth difficulty, as the Judge put it, was that the Claimant had not asserted his rights under the email in earlier discussions with the employer. Here, again, Mr Miller argued that

there was an inconsistency, in this case with what was said in paragraph 50 in the findings in fact. There, the Judge had noted that the Claimant had questioned Mr Harkin during the course of consultation meetings prior to his redundancy, arguing that the employer had deviated from the Australian stated policy of paying four weeks per year. Mr Napier having responded that the Judge's conclusion at paragraph 140 is factually correct, that there was no reference to the email as giving rise to any rights, this was in reply accepted by Mr Miller; but he still seeks to argue that there remains an unhappy tension between the two paragraphs.

19. Accordingly, he submits, there had here been a promise that in context was made to a man concerned about his position. It was not simply to the effect that the matter would be discussed subsequently at board level, but was intended as a reassurance. Viewed objectively, therefore, this had to be an offer, or promise capable of acceptance, with an intention that it should be honoured in the event, therefore fulfilling the requirements of offer, acceptance and intent to create legal relations.

20. Mr Napier's response was essentially to argue that the question was whether the company intended to create a contractual right to enhanced redundancy payment in order to, and as part of a deliberate plan to, encourage key people to remain as employees and by its actions confer a contractual right on the Claimant. He submits that there is no inconsistency, properly understood, between what is said in paragraph 137 and what is said at 132. At paragraph 132 the Judge was dealing with arguments which on the one hand could be taken to intend only that the subject of redundancy would be discussed at very senior level; on the other hand, the Claimant was saying that he intended a binding commitment. The Judge in paragraph 132 was not resolving the second of those, but he was rejecting the evidence that he had been given by Mr Harkin that the letter had not been intended as a reassurance of the

position on redundancy. He pointed out that that was made clear by paragraph 135, which showed that the paragraphs immediately preceding that related to the question of Mr Harkin's intention and did not resolve the issue of whether on the facts before the Tribunal, properly assessed, a contractually binding commitment had been entered into. He submitted that the lack of clarity to which is referred in paragraph 138 was relevant. It seems to me that he is right in that submission to this extent. If a party is unclear about what precisely has been "agreed", that uncertainty and lack of precision may be some material that will assist a Tribunal in concluding that, objectively viewed, there had in fact been no agreement at all.

21. Secondly, he argued that there were two aspects: the offer with which paragraph 137 dealt and the response to the offer with which 138 dealt. Unless there was a meeting of minds, objectively viewed, there could be no binding contract. That, he submitted, was the purpose of the Tribunal's observations at 138.

22. At paragraph 139, he submitted, the Employment Judge had not erred in making the point that the claim as originally formulated had not been proved, in circumstances where the Claimant's understanding had been affected throughout by it. He submitted that in any event paragraphs 137, 138 and 140 raised difficulties that, taken separately, had the effect that the claim could not succeed. The point at paragraph 140 was, he submitted, relevant extraneous evidence that the Judge was entitled to take into account both for the purposes of identifying the terms of the contract and in deciding whether there had been any variation of those terms.

Discussion and conclusion

23. It is critical for me to remember that this is a Judgment of an Employment Judge which one cannot expect to be drafted to the highest standards of legal draughtsmanship. It has often

and correctly been said that such a Judgment may well contain infelicities, awkwardness of expression and apparent inconsistencies that derive from the pressures under which Tribunals operate. It is trite that a Judgment must be taken overall and viewed as a whole. Here, as it seems to me, the Judge was ultimately clear as to that which he was deciding. The matter that has given me the greatest pause has been the absence of a clear statement by the Judge, although he had set out Mr Napier's submissions on the law, which acknowledged that he was engaged in resolving objectively whether there had been an agreement between the parties that was to be of binding contractual force. Understandably, perhaps, the Judgment is shot through with findings about the intentions or understandings of the parties. They are frequently of little assistance, as I pointed out at the outset of this Judgment, but they do have some tangential relevance. If the Judge had said in terms that the reason why the second and fourth points were difficulties for the Claimant was that the lack of certainty made it less likely objectively that an agreement had been entered into, upon the basis that if parties agree generalities, they cannot normally be expected to be agreeing to specific, binding terms but, rather, are giving voice to common intentions rather than reciprocal obligations, he would have set out the relevance of the extraneous evidence. I do not understand that view of the law to be dissented from by Mr Miller. If, therefore, that is what the Tribunal Judge was doing here, then he was entitled to take into account the second and fourth points, subject to the argument about inconsistency in respect of paragraph 138.

24. In colloquial terms, the fourth point is perhaps an obvious one, in the context of employer/employee. If there has been an agreement by offer and acceptance, an important matter, reached a year and a bit earlier by parties who were concerned about their position, then, if a binding commitment, it is likely that it would have been referred to subsequently as such. If not openly understood as a binding commitment, that would be some evidence from

which a court could conclude that the circumstances at the time were not such as to give rise to one. But the matter that centrally concerns me is the finding at paragraph 132 and the potential inconsistency with 137. The expression between managers that a redundancy package "will apply to any future redundancies" is capable of giving reassurance, if it is circulated to those whom it might affect. Here in effect it was.

25. In the event, I have been persuaded by Mr Napier's submissions that the Judge was not in paragraph 132 stating that the email was objectively meant to be relied upon as contractually binding the Respondent, even though, given Mr Harkin's position, it might have done so. The Reasons set out at paragraphs 136 and 137 are clear and do not need repetition. I should add, however, for completeness that although the offer, if it were an offer, was not addressed to the Claimant save only by Mr Harkin's actions, if so construed, and was of its nature an email between high-level employees, it did not necessarily identify him as a key person, nor did he "discuss the matter with Rilla", the parties do not found their arguments on either of these points.

26. The finding at paragraph 137 is to the effect that there was no offer. It is somewhat artificial to analyse employment contractual relationships in the terms of offer and acceptance, which might be thought more appropriate to the exchange of correspondence in respect of commercial contracts. But there has to be, nonetheless, an agreement between the parties. The Tribunal was, as I have observed, entitled to think that an additional reason for holding there was not one here was that the "agreement" lacked clarity so far as the Claimant was concerned and in respect of his subsequent behaviour, shedding some light upon whether he had objectively to be viewed as having agreed what was either a variation to or an addition to, or a contract collateral to, his existing employment contract.

27. It seems to me that the third matter to which the Judge drew attention was irrelevant. It had, in my view, no real place in the reasoning if the Judge relied upon it in coming to the conclusion he did. But though I have come to that view, this does not detract from the fact that the terms of paragraphs 137, 138 and 140 are sufficiently explained by Mr Napier's submissions such that I can regard them as part and parcel of a cohesive Judgment that, despite its very obvious infelicities, comes to a permissible conclusion for reasons that are clearly expressed in respect of whether there was an offer, whether there was an agreement and whether objectively there was an intent to create legal relations.

28. The inconsistencies that Mr Miller quite rightly draws attention to between paragraph 38 and what follows in paragraphs 114-120 and 138 would, if the matter stood upon its own, have been sufficient for me to think that if that had been the only decisive point in the appeal, I would have remitted the matter for further consideration, but it is not. Although, as I have indicated, I have been concerned about aspects of the approach and determination, taking the approach that I should to the determination of the Employment Judge, I have concluded that this appeal, beautifully presented though it has been, must, and does, fail.