Appeal No. UKEAT/0252/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2012

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MS V BRANNEY

MR J R RIVERS CBE

CSC COMPUTER SCIENCES LTD APPELLANT

MR B MCALINDEN AND OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON GORTON (One of Her Majesty's Counsel) Instructed by: Clyde & Co Solicitors 1 Stoke Road Guildford Surrey GU1 4HW
For the Respondents	MS NICOLA NEWBEGIN (of Counsel) Instructed by: Thompsons Solicitors 22-24 Worple Road Wimbledon London SW19 4DD

SUMMARY

CONTRACT OF EMPLOYMENT- Implied term/variation/construction of term

An ET found that employees had established a right to an annual pay increase in line with RPI by custom and practice. The employees concerned were a group whose employment had transformed under TUPE to the Appellant employer in 2000. The Judge had said he would not have been prepared to find that a customary right had crystallised by then. The employer however believed there was such a right, originating before 2000, and behaved accordingly, *inter alia* attempting to buy out individual right to the increase in 2008 and to negotiate it away with what it (wrongly) thought was the appropriate Union. Each of 6 grounds of appeal was rejected: in particular, finding that the employer "believed" there was such a right did not mean there was not; the fact that some employees had not been paid the award was capable of being contemplated by the alleged custom; it was not uncertain because amounts of pay award could vary; it was not inherently unreasonable; it was apt for incorporation and not merely aspirational; and specific evidential points were rejected.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. This appeal concerns 23 claims made by employees that their employer had failed to pay them at a rate incorporating the Retail Price Index (RPI) and had thereby caused them to suffer an unlawful deduction from their wage. Because of the hour we shall express our reasons shortly. We do not intend thereby any disrespect to the detail and comprehensive nature of counsel's submissions for both parties.

2. The case involves considering both matters of procedure and the circumstances in which a Tribunal can rightly come to a conclusion that custom and practice has been such that a contractual term may be inferred.

3. The essential facts are these. The Claimants were employed by the Respondent (CSC, as we shall call it) from 1 April 2000 following a transfer under the **Transfer of Undertakings (Protection of Employment) Regulations** (TUPE) from an earlier employment with ITS. We should emphasise that legally the contract is one contract which continues despite the change of identity of the employer. It was perhaps inevitable that much of the evidence that could be called before the Tribunal by CSC could not touch readily upon matters that would have been known to the management of ITS, but the contract must be viewed as a seamless whole beginning in the case of each Claimant with their first date of employment until the time of the Tribunal.

4. The contract of each with ITS included two paragraphs set out at paragraph 11 of the Tribunal decision. Paragraph 2.4, headed "Remuneration", said this:

> **"Your starting salary is £[X] per annum (or such other sum as may be subsequently determined by annual or ad-hoc salary reviews, after which the company will notify you in writing) […]."**

Clause 36.9 was headed "Salary Progression/Review". It read:

> **"Company rates of pay will be reviewed annually by the executive of the company in consultation with representatives of the staff (the JCC). New pay rates will normally come into effect from 1 April each year. Annual salary increases will be in the form of an award comprising a global component applicable to all employees and a selective merit award reflecting the individual job-holder's performance and skills."**

5. The case primarily advanced by the Claimants was that that latter clause entitled each to an annual salary increase and that the global component would necessarily be, in the circumstances, RPI. The claim based upon express contractual term was rejected by the Tribunal; there is no appeal against that finding.

6. The Tribunal had evidence that was sketchy in respect of the way in which money had been paid to the Claimants each year when engaged by ITS. Each of the Claimants gave evidence particular to his own case that he had always received an increase in line with RPI. The principal evidence considered by the Tribunal, however, related to the period of time after 2000. That evidence was reviewed (see page 7 of the Judgment), and in particular at paragraph 31 the Tribunal set out what a spreadsheet that had been prepared showed as to the detail of pay awards since 2001. Having considered that evidence, the Tribunal came to these significant conclusions.

7. The first was that it should apply the principles established by the Court of Appeal in the case of **Garratt v Mirror Group Newspapers** [2011] IRLR 91 and **Albion Automotive v Walker** [2002] EWCA Civ 946. No suggestion is made that the Tribunal applied the wrong principles in seeking assistance from those cases. At paragraphs 83-85 the Judgment says this:

> **"83. I have sought to apply these principles to these cases and I have reached the following conclusions. No single factor has been decisive and I have arrived at my decision from the evidence as a whole.**
>
> **84. In 2004, 2005, 2006 and 2007, the pay award made to the vast majority of the group of employees including the claimants, namely the ex-ITS employees, was exactly or almost exactly the RPI increase. This cannot in my view be mere coincidence. Except for the six employees in 2007 whom I consider below, no employee in these years received less; only a few received more; in 2004 the difference between the rate of RPI and the pay award was 0.1%; in 2005, 2006 and 2007 the figures were identical.**
>
> **85. I have accepted that the reason the six employees (out of 70) received no increase in 2007 was that they had received out-of-cycle increases upon promotion and I have accepted Mr McAlinden's evidence that for the three employees he was aware of, this was specifically agreed with them. I regard these in the circumstances as anomalous; I have said that all other employees in 2007 received exactly the RPI increase."**

8. Second, at paragraph 91 the Tribunal found that the Respondent's management believed that the ex-ITS employees were contractually entitled to a guaranteed minimum RPI annual pay increase. The Judge set out several detailed reasons for coming to that conclusion. Some of those reasons have a resonance in the Tribunal's findings in other respects. They include that in the Respondent's own 2008 pay review management briefing, disseminated to line management, it was stated that there was such an entitlement. Indeed, the document we have been shown says that although it is not CSC policy to award cost-of-living increases there is an exception, and that is:

> **"[…] the ex-ITS group who are not on CSC terms and conditions and for whom a guaranteed minimum increase is awarded (subject to individual performance)".**

9. Thirdly, the Tribunal concluded that the Respondent's HR officer had communicated expression of the same belief to employees in an email in 2005. That document, also before the Tribunal, read, so far as material, as follows:

> **"[…] As discussed today, please find salary info […].**
>
> **By signing a CSC contract, you would no longer receive a guaranteed RPI pay rise annually as per your current ITS contract. […]"**

A second email, in 2006, said, to an unknown recipient:

> **"I have been advised that the RPI global element of the pay award for people on ITS terms and conditions is the "all-items retail prices index" over the first three months of the calendar year which was 2.4%."**

10. The reference to "signing a CSC contract" was examined in the evidence. The employer sought to encourage employees to enter into the standard-form contract given to other CSC employees and, in short, attempted a buy-out of the "guaranteed RPI pay rise annually" as it so described it.

11. It has been particularly useful in the course of preparing this Judgment to have had the advantage of the lay members' joint industrial experience from their knowledge of their respective sides of industry. Both are clear that the expression "guarantee" or "guaranteed" is a critical one for an employer to use in the course of any pay negotiation; they both emphasise that it implies recognition of being bound, and it would never be used normally without the consequence that it would be seen as such. The Tribunal in their view was therefore fully entitled to draw the conclusion it did in respect of that email.

12. Next, the Tribunal pointed out that the Respondent's 2008 pay review documents to which we have already referred identified an ITS minimum increase and described an attempt to negotiate away the right to the "guaranteed increase" with a trade union that it believed was recognised by the relevant staff; as it happened, it was not. Thus by paragraph 98 the Tribunal had concluded that there was no doubt that the Respondent's management believed that the right to the RPI increase had transferred with the ex-ITS employees in April 2000.

13. At paragraphs 100-107 the Tribunal made other important findings, which deserve to be set out in full:

> **"100. Whilst I would not have been prepared to find a policy amounting to an implied contract term existed pre-transfer on this material, I believe that the fact that post-transfer the respondent's management believed it existed, and consistently followed a pay policy which was not only different from the policy it applied to its other employees, but was manifestly**

disadvantageous to it (it resulted in pay awards in excess of budget in several years) supports a conclusion that the policy was well-established at transfer to the extent that the respondent believed that it was obliged to follow it.

101. I find, therefore, that first, the respondent consistently followed the policy of awarding ex-ITS employees at least the RPI increase for a substantial period of time from 2001 to 2007. It ceased the practice in 2008 only because it mistakenly believed it had negotiated different terms with the relevant trade union.

102. Second, I find that the respondent acted in the belief that it was legally obliged under the contracts of employment of the ex-ITS employees to award at least the RPI increase. This was not a matter of mere policy; it reflected what the respondent believed was a legal obligation.

103. Third, I find that the policy was communicated to employees and understood by them. I have referred to Ms Anderson's emails in 2005 and 2006 and the Pay Review Management Briefing document. Mr McAlinden's evidence was clear that he believed from long usage that the RPI increase was awarded every year and this is supported by the grievance letters in the bundle.

104. I find nothing in the written contract of employment which is inconsistent with the existence of the right. Clause 36.9 is silent as to how the global component will be calculated; there is nothing in it which precludes the existence of the implied term.

105. I accept that the policy was subject to satisfactory performance. I find, however, that it was extremely rare for an increase not to be awarded on such basis and as I have said, in any event it is not the respondent's case that it withheld any RPI increases for the claimants for performance reasons.

106. I regard it as immaterial whether the respondent's management were correct in believing the policy was a contractual right. On the evidence before me, I simply do not know whether they were right or not. However, they followed it consistently for a substantial period in the belief it was a legal entitlement. In my judgment, they followed it in a way which leads me to conclude that the payment of the RPI increase as a minimum each year had crystallised into a contractual right whether or not in the beginning the respondent's belief was wrongly held.

107. In all the circumstances, therefore, I have concluded that the claimants were entitled to the RPI increase from 1 April 2010 as a matter of contract.. The respondent made unauthorised deductions from the claimants' wages by failing to pay the increase from 1 April 2010. […]"

14. It is said on this appeal by Mr Gorton QC that in those last eight paragraphs the Tribunal, though it had directed itself properly in accordance with the case law, had nonetheless erred in law.

The case law

15. We have been cited a plethora of authority. One case that we were not cited but that was raised by the Tribunal during argument, however, has much to say about the general context. We must remember that this case is a case that deals with the relationship between an employer and an employee. The decision made rests upon a contractual term having been inferred. As

will be seen, much of the law on which Mr Gorton relies derives from commercial contracts. Mummery LJ in the case of **Commerzbank AG v Keen** [2006] EWCA Civ 1536 at paragraph 43 gave a timely reminder that the employment relationship contains duties:

> **"[…] which do not normally feature in commercial contracts sued on by business men in the Commercial Court or in the exercise of public law discretions challenged by citizens in the Administrative Court. Employment is a personal relationship. Its dynamics differ significantly from those of business deals and of State treatment of its citizens."**

16. He was talking principally about the implied term of trust and confidence, which has no reflection in the case before us, but it is right to remember that the contract is, as Lord Steyn has described it in the past, a relational one. It is not therefore surprising in any case to see the contractual agreement that has been reached between the parties being identified from evidence which does not necessarily identify a precise moment of offer or acceptance but which demonstrates objectively that there has been an agreement which may thereafter be relied upon. It is this approach that underpins, in our view, the authorities that deal with the way in which a contractual term may be identified by custom and practice. Thus in **Walker** the Court of Appeal in a Judgment by Peter Gibson LJ, with which Potter LJ and Sir Murray Stuart-Smith agreed, summarised earlier case law relating to custom and practice by accepting submissions that had been made to it by counsel for the Respondent's employees. He submitted (paragraph 15):

> **"[…] in the light of Duke [**v Reliance Systems Ltd [1982] ICR 449**] and Quinn [**v Calder Industrial Materials Ltd [1996] IRLR 126**] there are likely to be a number of factors important in assessing whether a policy originally produced by management unilaterally has acquired contractual status. [Mr Brennan] suggests that in the present case the relevant factors included:**
>
> **(a) whether the policy was drawn to the attention of employees;**
>
> **(b) whether it was followed without exception for a substantial period;**
>
> **(c) the number of occasions on which it was followed;**
>
> **(d) whether payments were made automatically;**
>
> **(e) whether the nature of communication of the policy supported the inference that the employers intended to be contractually bound;**
>
> **(f) whether the policy was adopted by agreement;**
>
> **(g) whether employees had a reasonable expectation that the enhanced payment would be made;**

(h) whether terms were incorporated in a written agreement;

(i) whether the terms were consistently applied."

17. In **Garratt** Leveson LJ, with whom Pitchford and Ward LJJ agreed, said at paragraph 35, with specific reference to **Walker**:

> **"For my part, without seeking to rationalise the language of the authorities, I prefer to focus on the broader question of what was agreed between the employers and the employees (as a group), either expressly or by clear implication because, in reality, the factors mentioned by Peter Gibson LJ to which I have referred all go to that issue. Thus, the length of time, frequency and extent to which a practice was followed in every case as a matter of routine are encompassed by (b), (c), (d) and (i); the understanding and knowledge both of employer and employees by (a), (e) and (g) and what was in writing by (f) and (h). Notoriety and certainty are certainly established by similar indicia; whether terms are reasonable may go somewhat further but may equally need no more than a consideration of the other factors on the basis that if, as between the parties, the court considers a term to be unreasonable, it is highly unlikely (at least in the light of modern employment practices) that it will be possible to infer agreement."**

18. We make some observations. First, in talking of notoriety, certainty and what was reasonable, Leveson LJ had in mind a test articulated in **Devonald v Rosser** [1906] 2 KB 728 per Farwell LJ at 743. It was a test satisfied in the well-known case (one might almost say notorious) of **Sagar v Ridehalgh** [1931] 1 Ch 310, a case in which the phrase occurs, "Every weaver in Lancashire knows […]". Plainly, Leveson LJ was reconciling that line of authority with **Walker** such that he saw no material difference between them in their application.

19. Secondly, Leveson LJ speaks both of clear implication at the start of paragraph 35 and inferring agreement at the end of the paragraph. It seems to us that the process of identifying a term by custom and practice is not implying a term, properly so described, but of inferring it from the available evidence; that is, that from the evidence it can be concluded as a matter of inference that there has been an agreement in the appropriate respect. Thus one can talk of, and the cases refer to, crystallising of custom and practice as a contractual term. That is a reference to a point beyond which it may be recognised that the evidence is such that the existence of that contractual agreement between the parties may be inferred. Mr Gorton accepts that it is

preferable to speak of inference rather than implication, since the process does not fit easily with the accepted categories of circumstances in which terms may be regarded as implied. Thus it may well be that a term derived or inferred from custom and practice is actually an express term; it is just that no one now remembers the precise words used or the precise occasion when they were but concludes from the evidence that at some point they must have been.

20. The third point is that in the extract from **Walker** Mr Brennan, whose submissions were adopted, did not purport to set out a comprehensive list of all the evidential factors that might give rise to the inference. His list was an inclusive one; it was not a conclusive and exclusive one.

21. We note, however, that he referred to the origin of the contract being in a policy originally produced by management unilaterally. That was the context in which the remarks were made and adopted.

The grounds

22. Mr Gorton raises six grounds upon which to suggest that the Tribunal was in error. First, he argued that the Tribunal had reached its decision on a basis that had not been argued by the parties. He submitted that the Claimants' case was that custom and practice had crystallised into a contractual term during the Claimants' employment with ITS. The Tribunal, however, said at paragraph 99 that:

> **"[…] I would not for myself have been prepared to find the right existed from the evidence I have heard about the policy in practice about pay increases pre-transfer."**

23. The Judge went on to identify four specific matters, all of which pointed very much in the direction of there having been such a custom and practice, albeit that it had not, in his judgment, been sufficient to show that the right had by then crystallised. That formed the basis of what he said at paragraph 100. He regarded it (see the last sentence) as supportive of a conclusion that the policy was well established at transfer; that is, by 2000. Accordingly, the context within which he was to go on to find that there was a custom and practice that had crystallised into a right, was set many years earlier, possibly during the employment of the Claimants when their employment was with ITS as the employer. It was of course the same employment as continued, though the employer became CSC.

24. When we invited Mr Gorton QC to show us how the Claimants put their case such that their claim was restricted to arguing that the custom and practice created a right prior to 2000 and rendered it unfair for the Tribunal to conclude as a matter of assessment, judgment or fact that it arose after that date, he took us to the ET1, which, in our view, does not bear out his contentions. He took us to the Further and Better Particulars that had been given at page 68 of our bundle, in which the contractual term was referred to as an express term that was a TUPE-transferred right dating back to 2000. The Particulars, however, also relied upon the continuing compliance with the term up to and including 2009 by CSC and, secondly, on the fact that when employees were offered CSC contracts the company specified that the right to an RPI award would be relinquished. We saw no particular assistance to his argument from that.

25. The skeleton argument advanced at opening on behalf of the Claimants ran a number of cases. It argued an express contractual term, at paragraph 5 as a background fact, argued implied terms generally (by which it meant inferred terms), the possibility of a variation, and at paragraphs 20 and 21 said there was a clear contractual entitlement to an annual global award

that was an express contractual entitlement to an annual pay increase that was preserved by TUPE. That was an argument on construction of the contract. Then it argued (see paragraphs 22 and 23) that pay increases would be made annually in line with RPI and that entitlement had become an implied term by virtue of custom and practice; this is plainly an alternative case. There is nothing there that suggested any particular date upon which the entitlement crystallised.

26. The closing submissions responded to by the Respondent gave rise to a further written submission in response to the Respondent's closing submissions. That said, at paragraph 7:

> **"The R suggests (para 8.7) that it is not clear when the custom and practice first arose. However it is clear that the Cs case is that it arose *prior to* the TUPE transfer in 2000 […]."**

27. This is at the very end of the fact-finding exercise the clearest statement we have been shown of the Claimants' tying their case to the custom and practice arising prior to the TUPE transfer. Although the words do not say a right inferred from the custom and practice, this may very well be what the words mean. A custom and practice, on the findings we have reported, appears to have been accepted to have existed by the Employment Judge prior to 2000 even if the evidence was not such at that stage that, applying **Walker**, he would have felt for himself able to say that there was then a crystallised right. If, however, it was the latter that probably was meant by paragraph 7, then it goes some way towards bearing out the necessary starting point for Mr Gorton's argument that the Tribunal in finding as it did was adopting a position that was not contended for directly by either party.

28. He then argues that **Chapman v Simon** [1994] IRLR 124 CA makes it clear that it is an error of law for a Tribunal to decide a case that has not been advanced by either party before it. In that case the Tribunal, when considering allegations that particular acts of discrimination had

been committed against the Claimant, found they had not but that another act in respect of which there had been no claim had been committed. It did so without any reference to the parties. Such a case plainly is one in which the appeal had to be allowed; it could not be right for any party to be condemned in respect of a case that it had not had any opportunity to meet. He showed us two cases that might be thought in the result to tend in the opposite direction. The first was **Judge v Crown Leisure Ltd** [2005] EWCA Civ 571, IRLR 823. The facts of that case do not matter in particular because it is the principle for which a case stands rather than the facts that give rise to it that will be persuasive or binding upon this Tribunal. However, it was a case in which the Tribunal had made findings of fact that had not been contended for by either party and, it follows, that the party against whom the finding might be said to have been made had no proper opportunity to meet. The principle was expressed in this way:

> **"[…] as a general rule, employment tribunals should be careful to ensure that the parties have an opportunity to make submissions on any matter that might affect the outcome of the case. It is highly desirable that if a tribunal foresees that it might make a finding of fact which has not been contended for, that possible finding should be raised with the parties during closing submissions. If the tribunal does not realise what its findings of fact are likely to be until after the hearing has finished, it will usually be necessary to give the parties the opportunity to make further submissions, at least in writing, although not necessarily by oral argument.**
>
> **However, the giving of such an opportunity is not an invariable requirement. The Employment Tribunals Regulations give the employment tribunal a wide discretion on procedural matters [which] is wide enough to encompass a decision as to the appropriate course to take where this kind of situation arises. In any event, if the legal effect of the findings of fact that are to be made is obviously and unarguably clear, no injustice will be done if the decision is promulgated without giving that opportunity. Even if an opportunity should have been given and was not, an appellate court will set aside the decision [only] if the lower court's application of the law was wrong."**

29. That authority was followed in **Woodhouse School v Webster** [2009] EWCA Civ 91, ICR 818. Again, it was a case in which facts were found which the parties had not had an opportunity to debate with the fact-finder. At paragraphs 35 and 36 Mummery LJ, with whose decision Sullivan LJ agreed, though Rimer LJ dissented, said:

> **"35. Mr Norman accepted that, in principle, it is open to an employment tribunal, as the fact finding body, to take a view of the evidence that does not precisely coincide with the position contended for by either side and to make a finding for which neither side contended: see *Judge* […], a case in which the effect of the employment tribunal's finding was that the claimant failed to prove his case. It was distinguished by Mr Norman on the basis that in this case the finding for which neither side contended was used to grant a remedy to the claimant without**

an opportunity for the School to address that case. See also, on this aspect of fact finding in the ET, *Kuzel v. Roche Products Ltd* [2008] ICR 799, another case which Mr Norman said was distinguishable.

36. The teaching of experience is that in an adversarial contest neither side necessarily has a monopoly of the whole truth. An impartial tribunal may discern from the evidence, as it unfolds in the course of the hearing, that the truth on a particular issue probably lies somewhere between the positions of the parties. The adversarial nature of the proceedings tends to polarise the positions taken up by the parties in a way that may distort or disguise the truth."

30. If one wanted a common example, one could do worse than to look at a road traffic accident case in which the Claimant might allege that the Defendant's car was doing in excess of 50 miles per hour whilst the Defendant averred he was doing less than 30 miles per hour. It is not unknown for a court without any possible objection being taken to conclude that the true speed might have been somewhere nearer 40 miles per hour, yet neither side would have invited it to make that finding.

31. Mr Gorton argues that here the issue was not simply one of fact. This was a case much closer, although not identical, to **Chapman**. We asked Mr Gorton which of the bases put forward in the opening by Ms Newbegin, for the Claimants, he was unable to deal with; it was plain he was able to deal with each. Accordingly, he was dealing, as we see it, with a case in which, just as in the speeding example, he was concerned with a custom and practice that according to the authorities would crystallise at some point in time. The exact point in time is not generally material. The overall enquiry was, as Ms Newbegin submits and we accept, whether in 2010 there was a contractual obligation binding the employer to pay the Claimants at least the amount of RPI that year as an increase to salary. The focus was on the position by then, however much less clear it may have been earlier.

32. The point, as we see it, is essentially one of fairness. Was there a proper opportunity to meet the point being raised? We cannot see here that there was any significant unfairness to

Mr Gorton's clients if otherwise the Tribunal was correct in the legal approach that it took. Accordingly, we see no separate force in this first ground, and we reject it.

33. The second ground was that the Employment Tribunal's finding that a term was established by custom and practice after 2000 was in error. It failed to have grasped the fact that all that the evidence had shown was belief. The employer believed that it was bound to pay the employees the increase; the employees believed they were bound to receive it. The parties conducted their business upon the basis of that belief, but on the findings that showed that the employer was never in the position of doing that which Mr Brennan had identified in **Walker** of making a unilateral payment or expressing a policy, unilaterally derived, as an offer to the employees in the first place.

34. We wondered if these submissions came uncomfortably close to suggesting that CSC should properly be distinguished from ITS as employers when, as we have said, the employment is continuous. But they ask whether the fact that the employer has a belief that its employees are entitled to a payment, (which might be right or wrong, as the Judge expressed it) has the effect that no custom and practice can ever thereafter give rise to the inference of a term, because the fact is not that there was a right but only that one party believed that there was. This would have the rather curious consequence, as we pointed out in argument, that if an employer makes a payment not intending to be bound to continue to do so, and thereafter with frequency makes similar payments, in time he may be taken to be bound to make further such payments by custom and practice, even though he began with and ended with no belief that he was obliged to do so; yet if he believed that he was obliged to do so and the employees believed he was, then on the Appellant's case no custom and practice arises.

35. This position seems to us, and again I am grateful to the lay members of this Tribunal, to defy industrial reality. If looked at objectively, as the origins of contract have to be in traditional contract law, one would see the employer behaving as if there were a contractual term, and one would see the employee behaving as if there were that contractual term. There would objectively appear to be a meeting of minds to show that both parties believed there was a contractual term. The employer in this case would be asserting, as it did, that there was such a contractual term in its communications to the employees. Its behaviour in 2008 in seeking to buy out or negotiate away the term would have no other explanation. The use of the word "guarantee" would be critical. The fact that the employees declined to be bought out shows that they clearly understood both that they thought they had a right but also that they understood that the employer thought they had a right. Although the Tribunal itself did not rely upon the point, there seemed to the lay members of this Tribunal no other explanation for the refusal of the ITS ex-employees to be bought out than that they considered that their employer thought that they had such a right and had effectively communicated that belief to them.

36. Objectively viewed, therefore, there would here be the strongest of cases for showing that there was a term to be inferred from the behaviour of the parties. Ms Newbegin argues that there is no place for evidence of the subjective intentions of the parties in determining whether there is a contract. In general, she is right in that, though Mr Gorton points out that there is room for the intention of the parties to be given in evidence if the intention so displayed is contrary to the assertion being made in evidence in the case of that party before the court. That is not, however, of help here.

37. We, for our part, have to consider his further submission that the employer made no offer or had no policy that was originally unilateral that could be relied upon. That is to look at the

behaviour of CSC in isolation from that of ITS. The view of the Judge, as we read it in paragraph 100, is that when he was talking about the material relating to the period pre-transfer supporting a conclusion that the policy was well established at transfer, he was in fact accepting that there was such a well-established policy; that is the sense of it, and it must be borne in mind there is no suggestion of any evidence to the contrary. This is an impressive, carefully worded and carefully thought-out Judgment, and we read what the Judge says in that light. He did not consider that if he had had to apply the **Walker** tests in 2000 the evidence would then have established a right, but it sets the context for his conclusion as to what follows later. Whatever the origins of the original practice – and the lay members of this Tribunal point out that such may often be lost in the mists of time and differences of recollection particularly with shifting management – there is no basis for supposing that the origins of the custom and practice arose entirely after 2000. Accordingly, we do not see in this argument any proper ground for supposing that the Tribunal erred in law in its approach.

38. Mr Gorton's next ground was that the practice as found was not certain, as required by **Devonald**, because one part of the remuneration was to be assessed subjectively. There were examples of employees within the ITS cohort, as the Judge recognised, not being given the RPI award. Thus this alleged custom and practice could, he submitted, never give rise to a right. Here, again, I express my gratitude to the lay members of this Tribunal. Mr Rivers points out that a custom and practice derives from a belief or a practice; it is what it is. If the custom and practice is to make an award qualified by performance, then the established custom and practice is to make such an award qualified by performance. Alternatively, one might look at the position as contractually providing for a global award that, as we see it by definition, would be the same sum per person. There is nothing, we think, intrinsically wrong in concluding that that sum per person was to be awarded, and also regarding it as plain from the evidence put before

the Tribunal that it might be open to the employer to show that there was a justification in an individual case for paying less, though the employer would have to justify it. We note at this point that it is generally to be regarded as a sound principle for the probabilities of a case to be judged by the evidence that it is within the power of one party to produce and the other party to refute. No suggestion was made, points out Ms Newbegin, that there were performance reasons for not paying some employees an increase. We therefore reject the third ground put to us.

39. The fourth ground was that even if the Tribunal was right, the Tribunal's findings would produce a result that was so unreasonable that it could not be assumed that the parties would have agreed to it. Mr Gorton QC stressed, in his written submissions in particular, that an employer would not easily bind itself to pay RPI because of the financial consequences of such a conclusion. As we have pointed out, the use of the word "guaranteed" is generally one that is carefully avoided by employers in pay negotiations. But we bear in mind that in the context here, in which ITS and, latterly, CSC operated at the end of the 1990s and the beginning of the millennium, in this industry the companies were highly competitive. It is not unreasonable to think that there might have been very good reasons of retention or recruitment for making pay policies of the sort contended for here. This is not to say we make any such finding – we are in no position to do so – but simply that we do not see that this Tribunal ought without having been alerted to it to have made a conclusion that it should not find what it would otherwise have found as a right because it would be wholly unreasonable to assume that the employer would have agreed to it.

40. The fifth point that was made to us was that made by reliance upon that which was said in the case of **Malone v British Airways** [2011] IRLR 32 CA, [2010] EWCA Civ 1225. In that case, which rejected a suggestion that a collective agreement providing for a crew complement

of a specific number represented a contractual entitlement that in effect could have resulted in employees refusing to fly as otherwise contracted to do unless the full complement were available was apt for incorporation as a contractual term that could be relied upon as such, the decisive point was that the term was aspirational rather than contractual. We accept that a difference must be drawn between that which is aspirational and that which confers rights and demonstrates an intention to be bound. That which is aspirational does not show any intention to be bound, merely a wish that the world will be as one would like to see it.

41. We do not in this case see anything particularly aspirational about an agreement to make pay rises by reference to an index. It is not, in our view, of the same nature as that which was considered in **Malone**; it was not an error of law for the Tribunal to fail to have regard to it.

42. Finally, Mr Gorton argued that on key factual issues the Tribunal reached decisions to which it was not entitled to come. He raised the specific question of communication. The email in 2005 could not be shown on the evidence, he submitted, to have been a communication to those who were in the ITS group. It was addressed to an unknown recipient; it could not justify the weight that the Tribunal put upon it (see the decision at paragraphs 48 and 103).

43. This ignores the fact, first, that there is another copy, as it probably is, of the same email addressed to one of the Claimants. The email is plainly written to an employee because of its terms; the expression is clear.

44. The email of 2006 is perhaps less clear. Mr Gorton argues that the Tribunal could not conclude that it could rely on the pay review management briefing documents; they were internal documents, not for revelation to the employees. As to this we would merely observe

that it is plain from the terms to which we have already referred that the documents were intended for a purpose. The purpose was to enable management, as the Tribunal found, to handle employees during a pay negotiation. Accordingly, one would expect the substance, if not the very words, of what was in the briefing to be disseminated to the employees concerned. It is difficult to conceive any other purpose for the document; but, be that as it may, we have already pointed out that communication of the employer's view to the employees could be substantially supported by the evidence before the Tribunal, not only that upon which it relied. Ms Newbegin points out that there is a reference to this at paragraph 95. That refers to the 2008 attempts to negotiate away the entitlement. The Tribunal Judge commented, and in our view was entitled to, by saying, "if the respondent did not believe the employees had the right, why did they set about negotiating it away?" It is plain the Tribunal had that in mind as it did the rest of the context.

45. Finally, in some specific respects Mr Gorton argued that the Tribunal had permitted itself to speculate inadmissibly; see its findings at paragraphs 49, 50 and 85. Here the Tribunal accepted that six employees had received no increase in 2007. Was this, as it were, the exception that showed that there was no rule? The Tribunal found that it had no evidence in respect of three; in the cases of those that it did have evidence for it was satisfied there was a specific reason why they were excluded from what would otherwise have been a general position. It inferred that there would be, or might be, some similar reason for the other three. In the context of the decision as a whole, we cannot conclude that this was impermissible speculation such as to vitiate the decision and certainly not to render it perverse.

Conclusion

46. We have not found it necessary to resolve the cross-appeal, which sought to allege that the Tribunal should have found the custom and practice had crystallised as a right earlier than it did. We have, however, had a case in which it is plain from the evidence as found by the Tribunal that the employer and employee both believed that they had respective rights to RPI increases, they conducted themselves on that basis, there was no secret about it, the Tribunal applied the proper law, and it did not, in our view, make any error in doing so. Even if Mr Gorton had been in a position to advance the arguments before us that he did not below and would have done so had he appreciated that there might be another date chosen for the start of the custom and practice that was a little later in the continuous run of employment of these employees, we cannot see it would have made a difference. We apply the principles that he accepted set out in the cases of **Judge** and **Webster**. The appeals must be dismissed.