Appeal No. UKEAT/0072/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 8 August 2017
Judgment handed down on 6 September 2017

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

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(1) MRS E J LYNAM
(2) MR S ROONEY — APPELLANTS

BIRMINGHAM CITY COUNCIL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR COLIN BOURNE (of Counsel) Instructed by: Messrs Pickerings LLP Solicitors Etchell House Etchell Court Bonehill Road Tamworth Staffordshire B78 3HQ
For the Respondent	MR PATRICK KEITH (of Counsel) Instructed by: Birmingham City Council Legal and Democratic Services 10 Woodcock Street Birmingham West Midlands B2 2UP

SUMMARY

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

In December 2013 the Council announced on their intranet in a notice headed "Voluntary Redundancy (VR) Information and guidance for employees" that they had decided to undertake a process offering a generous VR package in 2014/15. The process was to cover "affected" employees identified as such in a section 188 notice, which included the Claimants. The notice stated that all eligible employees would be contacted and invited to make an application for VR. In September 2014 the Claimants were told that VR would not be available to them and they were made compulsorily redundant with effect from 30 April 2015. They claimed damages for breach of contract based on the Council's failure to allow them to apply for VR.

The Employment Judge decided that the Claimants had no contractual right to apply for VR because: (a) the Council had only offered an enhanced VR package in one previous year and it was unlikely to be repeated after 2014/15 so that there was no "policy" such as to give rise to a contractual right; (b) only employees invited to apply for VR would be eligible and have a contractual right to do so and, anyway, those who did apply had no right to receive VR; and (c) employees within a pool whose role was being deleted had no right to apply for VR.

In so doing she erred in law in that:

(a) was irrelevant: there was no claim based on a "policy" or "custom and practice"; the proper focus was on what the Council had communicated to its employees;

(b) was based on a misinterpretation of the notice: it was clear that "eligible" and "affected" employees were the same thing and the notice stated they would all be contacted and invited to apply for VR; the question whether VR would have been granted went to damages, not liability;

(c) there was no suggestion in any communication from the Council that there was such a restriction on the right to apply for VR and it was not possible to see the rationale for such a restriction or how it would have been framed.

The case would be remitted to the ET to decide whether, on a proper interpretation of the notice, there was a contractual right to apply for VR and, if so, what (if any) damages were suffered by the Claimants by not being afforded the opportunity to apply for VR.

HIS HONOUR JUDGE SHANKS

1. This is an appeal by the Claimants against a Judgment of the Employment Judge Dean, sitting in Birmingham sent out on 27 May 2016, in which she dismissed their complaints that Birmingham City Council had breached their contracts of employment by failing to offer them the opportunity to apply for a voluntary redundancy package before dismissing them.

Facts

2. The Claimants were employed by the Council in its Adult and Communities Division as Review and Monitoring Officers within the Assessment and Support Planning Team. They and their colleagues doing the same job, of whom there were about 159, were grade 4 and were not qualified as social workers.

3. On 9 December 2013 the Council issued a notice under section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992** relating to " … potential redundancies as a result of the proposed Council budget for 2014/15". It stated that the Council had begun a detailed programme of reviews looking at all their services and how they worked overall. The notice referred to mitigating actions which included inviting "affected" employees to apply for Voluntary Redundancy. There is no dispute that the Claimants and their colleagues were identified in the Notice as "affected" employees.

4. Following a report to the Council's Cabinet on 16 December 2013 a proposal for a "two phased … voluntary redundancy trawl" targeted at the employees identified as being at risk of redundancy in the section 188 notice was approved.

5. On the same day (I infer) the Council posted a document on its intranet for access by employees headed "Voluntary Redundancy (VR) Information and guidance for employees". The document contained the following statements which seem to me to be relevant to the issues the Employment Judge had to determine (though she only quoted a small part of it in her Judgment at paragraph 21):

> ***"Targeted Voluntary Redundancy 2014/15***
>
> **To support the Council in achieving significant financial savings in 2014-15, it has been decided to undertake a targeted voluntary redundancy (VR) trawl to reduce the need for compulsory redundancies.**
>
> **The VR process will be coordinated through nominated divisional representatives.**
>
> ***You do NOT need to contact HR - your divisional representative will contact you if you are eligible.***
>
> ***A phased approach to the VR process 2014/15 is being taken***
>
> …
>
> > ● ***Phase 1*** **- Will cover Corporate Resources except Property and Procurement – beginning in mid-December 2013;**
> >
> > …
> >
> > ● ***Phase 2*** **- will cover all other employees who have been identified in services across the Council that are under review in the Section 188 notice beginning in the spring of 2014. [I note here that the Claimants were in this Phase 2 group of employees.]**
>
> …
>
> ***Phase 1***
>
> …
>
> **Employees who work in the areas that have been identified for phase 1 as outlined in the Section 188 issued on 9th December, will be communicated with from 16th December 2013 about how to apply for VR. You will be provided with an expression of interest form which you will need to complete. In making a decision for VR, please consider the following:**
>
> > ● **All applications will be considered individually; submitting an application *does not mean* that your voluntary redundancy will be automatically approved**
> >
> > ● **The organisation will make the decision based on the business requirements of the service not the employee. There will be a governance process in place for the directorate for approving or rejecting applications.**
> >
> > …
>
> ***Redundancy Package***
>
> **This year in order to achieve early in year savings and minimise the need to make compulsory redundancies the Council is offering a generous VR package. It is envisaged that *this level of offer* is likely to be *unaffordable in future years*. Subject to eligibility the offer will be a maximum of twenty years redundancy payment based on the employee's last twenty years service, calculated on the following basis:**
>
> **The first ten years at 3 times actual weekly salary**

The next ten years based on … the statutory redundancy table but based on … actual weekly salary with no weekly limit.

…

Application process

1. Application form

If you wish to formally apply for VR, you will be required to complete a VR application form, which will be sent to you directly. … [You] will be advised … about the date the form needs to be returned by. Late applications will not be considered. …

2. Decision

When the application period has ended, your Head of Service will consider all submitted applications individually and make recommendations on the approval or rejection of those to the voluntary redundancy panel.

…

Phase 2

…

Employees who are eligible in the second phase will be invited to apply for VR in the spring of 2014. *Communications will go out to all affected employees via the divisional representatives for each service area.* Further details, including application deadlines will be available spring 2014.

FAQs

…

Is the voluntary redundancy package open council-wide?

No. The package will be targeted at those working in areas identified as being affected by service redesign. In those areas VR will be used as a way of mitigating against compulsory redundancy. A full list of areas affected can be found in the section 188 notice, issued on 9 December 2013

…

Can employees whose service areas are not on the section 188 notice apply for VR?

No. Only employees whose areas are listed on the section 188 notice can apply.

…

What will the VR process look like this year?

The VR process is open to all employees who are employed in services affected by service redesign; the total of affected employees is over 9000. This means that the process will require careful management.

In order to run the process efficiently, the VR scheme for 2014/15 will be split in two phases. Phase one will affect Corporate Resources … and some support services only and will begin on 16th December 2013; phase two will affect employees in the remaining areas and will begin in the spring of 2014.

…

How will I know that I can apply?

Each employee, if they are eligible to put in an application, will be contacted directly. You will not need to take action.

What do I need to do if I am interested in VR?

You don't need to do anything - If you are eligible, you will be contacted. Please do NOT contact Human Resources; this process will be run locally.

How does voluntary redundancy differ from compulsory redundancy?

Voluntary redundancy is available to eligible employees who have not as yet been selected for redundancy and wish to leave the employment of BCC on redundancy grounds. Where employees elect for voluntary redundancy their post will be deleted.

…

What kind of employee is the future council looking to retain?

… we are looking to retain skilled and ambitious individuals, who relish the challenge of being a part of a large transformation exercise. … if you are keen to get involved in the new ways of working, … the changing nature of the city council will provide you with many prospects to achieve this.

What is the new voluntary redundancy package?

Voluntary redundancy entitlement for all approved applications will be three weeks' pay for each complete year of continuous service for the first 10 years and statutory entitlement for each year of continuous service thereafter capped at a maximum of 20 years continuous service.

…

What is the approval process?

Managers will be required to collate a list of applicants and complete a business case overview for the service. An assessment of the applications will need to be made against factors contained within the business case. A meeting will then be held to sign off the business case for the affected service area.

What happens if the VR application is not approved?

You will not be able to reapply this year …"

6. As recorded in an email dated 18 February 2014 headed "Assessment and Support Planning Section 188 Notice for 2014/15 - Briefing Note for Staff" which was before the Employment Judge, the Council's review in relation to the Adult and Communities Division included a review of a number of jobs in the Assessment and Support Planning Team designed to make it more efficient and productive and to take account of forthcoming responsibilities in the Care Bill and other emerging demands, including the need to comply with the so-called *Cheshire* judgment. It appears from the email that the proposals in relation to this part of the overall review were to be the subject of a further section 188 notice which was to be sent out shortly after the email. The email stated that all the proposals would be the subject of consultation with trade unions, that any employee who may be eligible to apply for VR would

be advised as part of this process and that there was no need for staff to take any action in relation to VR at that stage. It also stated that further information on the 2014/15 VR could be found in the VR Information and Guidance document on the intranet to which I have referred.

7. There was an audio-visual presentation for staff on 16 May 2014; although not expressly stated in the Judgment it is implicit that those staff included the Claimants. In the slides were the following statements:

> ***"Mitigation Measures***
>
> …
>
> **● Prior to any selection process commencing i.e. more people in [the] ring fence than jobs that remain in [the] ring fence, the opportunity for affected staff to apply for Voluntary Redundancy (VR). The Council retains the right to reasonably refuse applications.**
>
> …
>
> ***Timeline***
>
> **The proposed timeline (subject to ongoing consultation):**
>
> …
>
> **● June - Any required Redundancy Selection process commences GR6 TL/LP [I was not given any indication as to the significance of these letters] <u>if insufficient applications for VR</u> [my emphasis]**
>
> …
>
> **● Beginning July - Any compulsory notices of redundancy issued (this will be a last resort after other mitigation options explored)"**

8. Following further review and consultation the Council decided in September 2014 that it no longer required grade 4 unqualified Review and Monitoring Officers; as I understand it this decision was in part at least a consequence of the Care Bill and/or the *Cheshire* case. The Claimants and their colleagues were offered a number of alternatives to redundancy, including the possibility of volunteering for a new role as a Social Care Facilitator on a lower grade, but they were told that voluntary redundancy would not be available because a whole job group was being "deleted" which involved compulsory redundancy and which was therefore not an opportunity for the offer of VR.

9. The alternative options offered to the Claimants did not come to anything and, following consultation, on 3 February and 27 January 2015 they were respectively given notice of dismissal on grounds of redundancy expiring on 30 April 2015. I take it that they were paid the somewhat enhanced statutory redundancy payments provided generally by the Council.

The ET Proceedings

10. The Claimants brought proceedings in the ET claiming that that they had been unfairly dismissed and that there had been a breach of contract in relation to the "voluntary redundancy package" because they were "affected" employees but were not given the opportunity to apply for voluntary redundancy. The Council responded to the latter claim by saying that there was no contractually binding offer of enhanced redundancy and that this was a "compulsory redundancy situation". The Employment Judge found that the Claimants were dismissed fairly for redundancy and rejected their breach of contract claim. The appeal relates only to the latter decision.

11. The Judgment is not the clearest (and unfortunately displays signs of having been dictated but not thoroughly checked before being sent out) but it seems that the Employment Judge's reasons for rejecting the contractual claim, which are set out in paragraphs 23 to 25 and 52 to 60 of the Judgment, can be summarised in this way:

(1) She recorded that there was no "express contractual right" to the enhanced terms (by which I take her to mean there was no right to apply for VR set out in their contracts of employment, which is undisputed) and said that she had therefore considered whether there was such a right implied by "custom and practice".

(2) She referred in this context to the **Park Cakes** case (**Park Cakes Ltd v Shumba** [2013] EWCA Civ 974) and noted at paragraph 56 that in that case the enhanced

redundancy terms had operated consistently over seven years; in this case, by contrast, she said that the VR enhanced scheme had only been applied in 2013/14 and 2014/15 to deal with a short term need to reduce headcount and save money; she went on to find that in these circumstances there was not enough to find that there was a "policy" that enhanced VR terms would always be offered such as to crystallise a contractual right.

(3) In paragraph 55 she stated that in the case before her "… *to the extent it was communicated to the employees* [my emphasis], enhanced VR was couched in a number of caveats: that the employees were to be notified that they were identified as relevant affected employees, that they were informed that they were eligible to apply for VR and, that if they applied for VR, the decision whether or not they would be accepted was in the gift of the employer". In paragraph 23 she expressly stated that "… the VR information and guide made it clear to employees that only those specifically invited to apply for VR would be eligible …" and in paragraph 57 she said that there was no contractual entitlement to volunteer for redundancy "… unless specifically invited to do so" and that there was no guarantee of acceptance as a volunteer by the Council.

(4) In paragraph 58 she said that there was no contractual right to apply for VR for employees who were within a pool of employees whose role was being deleted. That, she said would "… fundamentally defeat the stated intention of the 2014-15 exercise that [she had] found was to introduce monetary savings".

The Appeal

12. The Claimants' appeal was allowed to proceed by HH Judge Hand QC following a Rule 3(10) Hearing on 26 January 2017. The EAT Order sealed on 31 March 2017 records that the

appeal is to be set down for a Full Hearing on the "… Amended Notice of Appeal only; all other grounds be dismissed". The Amended Notice of Appeal at pages A to F in my bundle includes the whole of the original grounds with some additional words. It was faintly suggested by the Council that the Claimants were only entitled to rely on ground (i) since that was the only part of the original Notice of Appeal which had been amended; but this point was not raised in the Grounds of Resistance or made the subject of an application to challenge the amendment allowed by the EAT Order of 31 March 2017 and I do not consider it was therefore open to the Council to take this point at the hearing.

13. Turning to the appeal as argued, it was common ground that the Claimants did not rely on "custom and practice" as giving rise to any contractual obligation on the part of the Council before the Employment Judge. Although the **Park Cakes** case was cited to her by the Claimants and that case concerned a claim for enhanced redundancy payments based on "custom and practice", the judgment of Underhill LJ in the Court of Appeal included general statements about the law in this area which were clearly relevant to this case, in particular the following:

> **"29. … 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.**
>
> **…**
>
> **34. … the essential object 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: the terminology of "custom and practice" should not be allowed to obscure that enquiry.**
>
> **35. … It follows that the focus must be on 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.**
>
> **36. In considering what, objectively, employees should reasonably have understood about whether a particular benefit is conferred as of right, it is … necessary to take account of all the circumstances known, or which should reasonably have been known, to them. I do not propose to attempt a comprehensive list of the circumstances which may be relevant, but in a case concerning enhanced redundancy benefits they will typically include the following:**
>
> > **(a) *On how many occasions, and over how long a period, the benefits in question have been paid. …***
> >
> > **…**

> **(c)** ***The extent to which the enhanced benefits are publicised generally.*** **Where the availability of enhanced redundancy benefits is published to the workforce generally, that will tend to convey that they are to be paid as a matter of obligation, though I am not to be taken as saying that it is conclusive, and much will depend on the circumstances and on how the employer expresses himself. … Employment tribunals should be able to judge whether, as a matter of industrial reality, the employer has conducted himself so as to create … "widespread knowledge and understanding" on the part of employees that they are legally entitled to the enhanced benefits.**
>
> **(d)** ***How the terms are described.*** **…**
>
> **(f)** ***Equivocalness.*** **…"**

14. In this case, as I say, the Claimants were not relying on "custom and practice" or on what had happened in the past. They were relying on what had been communicated to them by the Council in relation to 2014/15. The number of times VR terms had been on offer in the past was therefore clearly irrelevant. The issue which needed to be focussed on was whether the Council's communications (and in particular, the VR Information and Guidance which was posted on the intranet) were, viewed objectively, such as to give rise to a reasonable understanding on the part of the Claimants and their colleagues who were "affected" employees that they had a contractual right to apply for VR in 2014/15. It is not entirely clear from the opening words of paragraph 55 of her Judgment whether or not the Employment Judge actually decided that the intranet posting and the way it was expressed was a communication which was in principle capable of giving rise to such a contractual obligation (that may be an issue to be resolved on a remittal) but in any event the focus of her decision and of this appeal has been the proper interpretation of what was communicated by the Council.

15. The main point relied on by the Employment Judge and the Council on the appeal was that, on a proper interpretation of the VR Information and Guidance, "affected" employees would only become eligible to apply for VR if they were specifically invited by the Council to apply. That does not seem to me a sustainable interpretation of what the Council were saying in the document. The document stresses in a number of places that the VR process was intended to be open to *all* the "affected" employees and that they would *all* be contacted and invited to

apply for VR in the spring of 2014. There is no suggestion of any eligibility criterion other than being an "affected" employee and I agree with the Claimants' submission that the word "eligible" is used as a synonym for "affected" in the document. In my judgment the Employment Judge was clearly mistaken in her interpretation of the document and made an error of law accordingly.

16. The Employment Judge was of course right to say that the Council did not guarantee that anyone who applied for VR would be granted it. But the Claimants' real complaint was that the Council had committed a breach of contract in failing to give them the opportunity to apply for VR; if that complaint is valid, the Tribunal will need to assess the damages which flowed from that failure. That assessment would obviously involve an assessment of the chances that the Claimants would in fact have applied for and been granted VR and would take into account that, if there was a contractual right to apply for VR, the Council would clearly have been under an implied obligation not to make their decision in response to such an application unreasonably (as implicitly recognised in the audio-visual presentation on 16 May 2014), and would take account of the criteria which they had indicated would apply.

17. The other main point relied on by the Employment Judge was that there was no contractual right to apply for VR on the part of any "affected" employee who was within a pool of employees whose role had been "deleted" (see her paragraph 58). There is no suggestion in the VR Information and Guidance document of any such restriction on a right to apply for VR. Furthermore, I do not understand what the rationale for such a restriction would have been or how it could have been sensibly framed. The stated purpose of the VR trawl was not in itself to save money but to reduce the need for compulsory redundancies; if the Claimants had volunteered and been granted VR they would not have had to be made compulsorily redundant

and the purpose of the exercise would have been achieved. There was in my view no sensible basis for the Employment Judge's decision on this point and it was also an error of law.

18. The Council in their skeleton argument at paragraph 33 put the point somewhat differently, saying "… it is difficult to see how such an application by the Claimants would be successful: as their positions were to be made compulsorily redundant, there would be no business case for offering enhanced terms where the whole rationale for VR was to save the [Council] money". Put that way the point would go to damages and not to liability. Although in my view it will therefore be open to the Council to raise it before the ET on remittal, I am bound to say it does not seem to me very meritorious: as I read it, the whole tenor of the Council's information and guidance was that the exercise was designed to avoid compulsory redundancies as far as possible and that applications for voluntary redundancy would only be turned down if the Council took the view that the requirements of the business were such that it was going to need to keep the applicant.

Conclusion

19. For the reasons set out in paragraphs 14 to 17 I am satisfied that the Employment Judge made a number of errors of law and that her decision cannot stand. The matter will have to be remitted to the ET to decide:

(1) whether, in the light of the Council's communications to its employees (and in particular the VR Information and Guidance document as properly construed in accordance with the EAT's Judgment), the Claimants had a contractual right to apply for voluntary redundancy on the enhanced terms set out therein in 2014/15;

(2) if so, what (if any) damages they have suffered by reason of the Council's failure to accord them that right.

20. It will be for the ET to decide what (if any) further evidence it requires in relation to issue (1). Given the nature of my decision on the appeal I think the case should be remitted to a different Employment Judge but the parties may apply within 14 days of this Judgment being handed down if they wish me to review that decision.