Case No: 2300832/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr M Farnan

Respondent: Glendale Golf Limited

Heard at: Ashford on 14 November 2017

Before: Employment Judge Pritchard

Representation
Claimant: Ms E Mitchell, counsel
Respondent: Mr J Middleton, solicitor

RESERVED JUDGMENT

The Respondent breached the Claimant's contract of employment. The Respondent is ordered to pay damages to the Claimant in the sum of £9,990.90.

REASONS

1. The Claimant claimed that the Respondent breached his contract of employment by failing to make an enhanced redundancy payment. The Respondent resisted the claim.

2. The Tribunal heard evidence from the Claimant and on his behalf from Gary Cummins (an employee of the London Borough of Lewisham and Branch Secretary of Unite the Union). On the Respondent's behalf the Tribunal heard evidence from Julie Rees (Senior HR Manager supporting the Respondent's business). The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing, the parties made oral submissions supported by pre-prepared written submissions and referred to a number of legal authorities.

<u>The issue</u>

3. This was agreed with the parties at the outset of the hearing. The issue to be determined was whether the Claimant could show, on the balance of probabilities, that by reason of custom and practice he had a contractual entitlement to a redundancy payment calculated by reference to a table dated April 2012.

4. The Respondent conceded that if there was such a contractual entitlement then, by application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), the Claimant would be contractually entitled to such payment from the Respondent. The Claimant would be entitled to the difference between the statutory redundancy payment he received and what should have been contractually payable. This difference was agreed in the sum of £9.990.90. Ms Mitchell told the Tribunal that the Claimant was not pressing for interest on that sum.

Relevant findings of fact

5. The Claimant commenced employment with the London Borough of Lewisham ("Lewisham") in April 2000 as Catering and Bar Supervisor at the Beckenham Park Golf Course.

6. Not least because of the corroborative evidence contained in the emails referred to below, the Tribunal accepts the thrust of Mr Cummins' evidence as follows.

    6.1. Local authorities in general, and Lewisham in particular, make contractual redundancy payments, over and above statutory payments, as a matter of course.

    6.2. In about April 2012, due to austerity measures, Lewisham changed the way in which enhanced redundancy payments were to be calculated in the future and issued a calculation table. This led to a reduction to the enhancement, but an enhancement over and above statutory formula nonetheless.

    6.3. The change would have been the subject of consultation with the relevant trade unions (although Mr Cummins was not involved in such consultations because he was not a union Branch Secretary at the time).

    6.4. The 2012 table that was issued was a topic of discussion with employees who were understandably concerned as to their future entitlement should they be made redundant: Mr Cummins described the discussions between employees as "water cooler talk". (Mr Cummins thought that employees must have been informed by a written notification in 2012 when the changes in the way redundancy calculations were to be made). Mr Cummins himself had calculated the redundancy payment he would receive by reference to the 2012 table if he were to be made redundant.

    6.5. Lewisham had cause to make a number of redundancies after the introduction of the 2012 table, both compulsory and voluntary.

    6.6. Although Mr Cummins could not say for certain that his members who were made redundant were paid enhanced redundancy payments, he had no cause to think that that Lewisham made redundancy payments on any other basis than by using the 2012 table; had Lewisham done so, as union Branch Secretary, he felt sure he would have heard about it. Given the corroboration in the emails below, the Tribunal finds that Lewisham made enhanced redundancy payments when making compulsory redundancies or granting requests for voluntary redundancy.

6.7. The 2012 redundancy table is available on Lewisham's intranet.

7. The table was put in evidence and shows:

> *This table applies to all employees aged under 55……*
>
> The provisions are varied for employees over the age of 55 who are members of the pension scheme.

8. The Tribunal was referred to an email exchange during February 2017 between Mr Cummins and Ellen Tsang, Employee Relations Manager at Lewisham, who confirmed that the 2012 table was Lewisham's current redundancy table. The Tribunal was also provided with an email from Posy Laryea, Human Resources Officer at Lewisham, to the Claimant's solicitor which confirms that:

> *"…the redundancy calculator has applied to all employees under the age of 55 since April 2012 regardless of their grade. There are no other policy or contractual documents. The weekly pay figure used by Lewisham is based on actual earnings".*

9. In an email dated 25 April 2017 to Julie Rees from John Thompson of Lewisham, the Claimant's former manager, Ms Rees is informed:

> *"I can confirm that the organisation making the employees redundant would be responsible for calculating the Redundancy Payments including, I believe, the decision to pay any enhancements"*

The Tribunal finds that Mr Thompson's view expressed in this email was nothing other than his personal opinion, in terms, as to whether a right to an enhanced redundancy payment might transfer under TUPE.

10. In November 2012, the Claimant signed a new written contract of employment with Lewisham which provides, among other things:

> *None of the Council's policies, procedures, guidelines, schemes or codes are part of your terms and conditions of employment except as expressly stated to be such in this Contract. The Council reserves the right to amend from time to time, after appropriate consultation with the trade unions recognised by the Council for collective bargaining purposes for your post, or discontinue at its discretion any of the policies, procedures, schemes, guidelines or codes referred to in this Contract, which are expressly stated to be part of your terms and conditions of employment.*

11. The written contract makes further reference to a number of policies, procedures, guidelines, schemes and codes, some of which are said to be treated as part of the terms and conditions of employment.

12. On 1 January 2013, the Claimant's employment transferred by operation of TUPE to the Respondent. In advance of the transfer, the Claimant was provided with a document by Lewisham setting out TUPE guidelines. This document was referred to by Lewisham during pre-transfer TUPE consultation with the Claimant. Although not referred to by the parties, the Tribunal has had regard to section 8 of that document which states: "Please see Appendix D for further

information on the terms and conditions of service which transfer". Appendix D of the document set out the terms and conditions which were local to Lewisham and which said to be were protected on TUPE transfer. One such term is expressed as "redundancy payment". The Claimant was assured by his manager, John Thompson, that his terms of employment would be protected.

13. Two of the Claimant's former managers told the Claimant that Lewisham made enhanced redundancy payments.

14. The Respondent was not provided with a copy of the 2012 table by Lewisham.

15. In June 2016, the Respondent notified the Claimant that he was at risk of redundancy because of the proposed closure of the golf club on 31 October 2016. The Claimant attended three consultation meetings. At either the first or second consultation meeting the Claimant questioned the Respondent's proposal that it would be paying only statutory redundancy pay and not applying the enhancement. By the time of the third consultation meeting, held with Julie Rees, the Claimant thought that any further discussion about the right to an enhanced payment would prove fruitless and he did not raise it.

16. By letter dated 9 August 2016, the Respondent informed the Claimant that his employment was to end and that:

> *As redundancy constitutes dismissal, you are entitled to appeal against this redundancy decision….*

17. The Claimant did not understand his entitlement to appeal against the redundancy decision might extend to a right to appeal against the decision to make only a statutory redundancy payment and he did not do so.

18. The Claimant's employment ended by reason of redundancy on 31 October 2016. The Respondent made a statutory redundancy payment to the Claimant which was not an enhanced payment calculated in accordance with the 2012 table.

Applicable law

19. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

20. Both parties referred to the case of Park Cakes Ltd v Shumba [2013] IRLR 800 in which the Court of Appeal observed that the list of factors set out in Albion Automotive Ltd v Walker [2002] EWCA Civ 946 was not unhelpful but should not be treated as the last word on the proper approach to cases concerning enhanced redundancy benefits, or applied without thought as a kind of definitive checklist. Lord Justice Underhill stated as follows (at paragraph 36):

> In considering what, objectively, employees should reasonably have understood about whether a particular benefit is conferred as of right, it is, as I have said, 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. Obviously, but subject to the other considerations identified below, the more often enhanced benefits have been paid, and the longer the period over which they have been paid, the more likely it is that employees will reasonably understand them to be being paid as of right.

(b) Whether the benefits are always the same. If, while an employer may invariably make enhanced redundancy payments, he nevertheless varies the amounts or the terms of payment, that is inconsistent with an acknowledgment of legal obligation; if there is a legal right it must in principle be certain. Of course a late departure from a practice which has already become contractual cannot affect legal rights (see Solectron); but any inconsistency during the period relied on as establishing the custom is likely to be fatal. It is, however, possible that in a particular case the evidence may show that the employer has bound himself to a minimum level of benefit even though he has from time to time paid more on a discretionary basis.

(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 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. It should also be borne in mind that "publication" may take many forms. In some circumstances publication to a trade union, or perhaps to a large group of employees, may constitute publication to the workforce as a whole. Employment tribunals should be able to judge whether, as a matter of industrial reality, the employer has conducted himself so as to create, in Leveson LJ's words, "widespread knowledge and understanding" on the part of employees that they are legally entitled to the enhanced benefits.

(d) How the terms are described. If an employer clearly and consistently describes his enhanced redundancy terms in language that makes clear that they are offered as a matter of discretion – e.g. by describing them as ex gratia – it is hard to see how the employees or their representatives could reasonably understand them to be contractual, however regularly they may be paid. A statement that the payments are made as a matter of "policy" may, though again much depends on the context, point in the same direction. Conversely, the language of "entitlement" points to legal obligation.

(e) What is said in the express contract. As a matter of ordinary contractual principles, no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary can be understood.

(f) Equivocalness. The burden of establishing that a practice has become contractual is on the employee, and he will not be able to discharge it if the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation. This is the point made by Elias J at para. 22 of his judgment in Solectron.

21. The Claimant also referred to:

21.1. Quinn v Calder Industrial Materials [1996] IRLR 126 and Albion Automotive Ltd v Walker [2002] EWCA Civ 946. These decisions were considered in Park Cakes and, in light of the guidance now set out in Park Cakes, the Tribunal finds it unnecessary to set out here the legal principles they describe.

21.2. Harlow v Artemis International Corporation Ltd [2008] IRLR 629 as authority for the proposition that there is no requirement for the Tribunal to find 100% consistency with the factors which had been set out Albion.

21.3. Allen v TRW Systems Ltd [2013] IRLR 699, a decision of the Employment Appeal Tribunal, in which Judge David Richardson said, among other things, that it is important to keep in mind that the fundamental question is whether the circumstances in which the enhanced redundancy package had been known supported the inference that the employers had intended to become contractually bound by it, a question which has to be determined not by an examination of the employer's private intentions, but by an objective examination of the circumstances.

21.4. Stores v Peregrine UKEAT/0315/13/SM as authority for the proposition that once a term had been inferred, subsequent departure would amount to a breach of contract.

22. The Respondent also referred to:

22.1. Irish Bank Resolution Ltd (in special liquidation) v Camden Market Holdings Corp and others [2017] EWCA Civ 7 at paragraph 41 where Lord Justice Beatson stated that "an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification". The Tribunal understands this statement simply to reflect the ordinary contractual principle referred to in Park Cakes, namely, that no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract.

22.2. Campbell v Union Carbide Ltd EAT/0341/01 in which it was held that the fact that a relevant payment was always made does not of itself give rise to the implication of a term of the contract by custom and practice; enhanced payments are often made as a matter of good industrial relations. The ultimate question is whether it can be inferred that both parties intended such payments to form part of the contract.

23. In reaching its conclusion in this case the Tribunal has also had regard to the words of Lord Neuberger in Arnold v Britton [2015] UKSC 36 in which he said:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'…That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

Conclusion

24. The Tribunal first considers whether the express term of the written contract referred to in paragraph 10 above should be construed such that any implied contractual right to an enhanced redundancy payment that might otherwise arise by reason of custom or practice would be overridden or negated by the express term.

25. In the Tribunal's judgment the express contractual clause does not operate so as to exclude an otherwise contractual right to an enhanced redundancy payment. All relevant provisions of the contract must be considered. It makes reference throughout to a number of policies, procedures, guidelines, schemes and codes. They are expressly referred to as such. The words relied on by the Respondent "*None of the Council's policies, procedures, guidelines, schemes or codes are part of your terms and conditions of employment except as expressly stated to be such in this Contract"* are qualified by the words in the next sentence in the same clause which refer the right to amend or discontinue any of the policies, procedures, schemes, guidelines or codes referred to in this Contract [emphasis added]. In the Tribunal's view, the natural and ordinary meaning of the words of the clause relied on by the Respondent refer to those policies, procedures, etc referenced in the written contract itself, not to those that might otherwise exist outside it. The purpose of the clause relied on by the Respondent was to avoid the policies, procedures etc referred to in the contract from having contractual effect unless expressly stated to be so. Further, the Tribunal finds it unlikely that Lewisham would have sought to circumscribe its employees' expectation of enhanced redundancy payments soon after the 2012 table had been discussed with the union and communicated to the workforce. The Tribunal concludes that this is what a reasonable person having all the background knowledge available to the parties would have understood the words to mean and to reflect the intention of the parties at the time the contract was entered into.

26. In any event, to the extent that the clause relied on is ambiguous, or there is doubt as to the meaning of the clause, it will be construed against the Respondent under the contra proferentum rule of contractual interpretation.

27. The Tribunal next considers whether the Claimant has shown that he has the contractual right to an enhanced redundancy payment by reason of custom and practice. The Tribunal concludes that he has done so and that he is contractually entitled to a redundancy payment calculated in accordance with the 2012 table. The Tribunal reaches this conclusion for the following reasons:

    27.1. Mr Cummins gave unchallenged evidence that local authorities make enhanced redundancy payments. Although Mr Cummins was unable to give evidence as to the precise number redundancies effected by Lewisham, he knew of at least two calls for voluntary redundancies and explained to the Tribunal that, excluding schools, the Lewisham workforce had halved in the past seven years. Given Mr Cummins' evidence that Lewisham has in the region of 7,000 employees, the Tribunal concludes that it has effected a large number of redundancies. Mr Cummins has been employed by Lewisham for approximately 10 or 11 years and has no reason to believe Lewisham has ever departed from making enhanced redundancy payments. The content of the emails referred to above support Mr Cummins' evidence, in particular in relation to redundancy payments made to "all employees" under the 2012 table and thus made consistently. Ms Rees told the Tribunal that one of the Respondent's employees who had similarly transferred from Lewisham had been made redundant and in respect of whom the Respondent had made a statutory redundancy payment only. This is of very limited, if any, evidential value and does not point to the absence of a contractual right: when not making enhanced payment, Ms Rees appears to have acted on the basis of Mr Thompson's opinion as to the effect of TUPE as described above. The Respondent could as easily have breached the contract of the individual in question given that any contractual right would have crystallised by that time.

    27.2. The 2012 table provides for an accurate and certain calculation. It has been used to calculate redundancy payments for all redundant employees made since its introduction.

    27.3. The way in which a redundancy payment was to be calculated was and is generally well known to the Lewisham workforce. Indeed, given that the 2012 table is published and can be accessed on Lewisham's intranet, it can be presumed that it is widely known and understood. The Tribunal also has Mr Cummins' reference to "water cooler talk" in mind; clearly, employees must have been notified of the 2012 Table for discussions about it to have ensued.

    27.4. The Tribunal is unable to accept Mr Middleton's submission that Appendix D was referring to a statutory redundancy payment; a statutory redundancy payment is not a contractual term subject to TUPE transfer but a statutory entitlement. It would have been unnecessary to include this as a notified protected term. The Tribunal has also had regard to section 8 of the TUPE guideline document which expressly refers to "terms and conditions of service which

transfer". The Tribunal concludes that Appendix D was referring to the enhanced redundancy payment provided for in the 2012 table. This was clearly communicated to the Claimant and shows that Lewisham considered the redundancy payment to be a term and condition of employment.

27.5. There was no evidence before the Tribunal to suggest that enhanced redundancy payments were referred to at any stage as being ex gratia. The weight of evidence suggests the contrary: that the payments were made as a matter of legal obligation. Mr Cummins understands the enhanced redundancy payment to be a legal obligation, as does the Claimant who was informed of such, in terms, in Appendix D.

27.6. Clearly, Mr Cummins, the Claimant and his former colleagues had a reasonable expectation that any redundancy pay would be calculated in accordance with the 2012 table. The Claimant's evidence as to why he did not question his redundancy pay calculation at the third consultation meeting and why he did not appeal is credible and understandable; it is not indicative of the absence of the expectation of an enhanced redundancy payment.

27.7. The only other explanation as to why enhanced payments were made was that advanced by Mr Middleton, namely that making enhanced redundancy payments could simply have been good industrial relations practice. However, there was no evidence to support this contention; as above the evidence points to the enhanced payments being made as a matter of legal obligation.

28. The Claimant has shown on the balance of probabilities and an objective examination of the circumstances must lead to the conclusion that Lewisham had intended to become contractually bound to make enhanced redundancy payments calculated by reference to the 2012 table. The liability to make such a payment transferred under TUPE to the Respondent.

29. Judgment is entered accordingly.

Employment Judge Pritchard

Date: 16 November 2017