Appeal No. UKEATS/0015/17/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 13 November 2018
At: 10:30

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

MR ROBERT S CAMPBELL — APPELLANT

BRITISH AIRWAYS PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Mr Gordon Bathgate, Solicitor Allan McDougall Solicitors 3 Coates Crescent EDINBURGH EH3 7AL
For the Respondent	Ms G Hirsch of Counsel Harrison Clark Rickerbys Thorpe House 29 Broad Street HEREFORD HR4 9AR

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

PRACTICE AND PROCEDURE – Reasons

CONTRACT OF EMPLOYMENT – Construction of Terms

The claimant raised a claim alleging unlawful deduction of wages. In response, the respondent raised issues of whether the relevant term of a collective agreement was still in force (and so incorporated into the current contract) and even if it was, whether the term could be construed as applicable to the claimant. The Tribunal dismissed the claim. On appeal, an amended ground of appeal by the claimant made a reasons challenge and in particular an alleged failure to comply with Rule 62(5) of the 2013 Rules

Held ;

(1) The Tribunal's judgment did not set out properly the issues for determination and some of its purported findings were simply a narration of evidence given rather than that accepted as established fact. However, reading the judgment as a whole, there was just sufficient to convey what material parts of the evidence had been relied on for the conclusion. The substance of the rule had been complied with and the claimant would know why he had lost. *Greenwood v NWF Retail Limited* 2011 ICR 896 applied.

(2) It was sufficient for the Tribunal's conclusion that the claimant had no contractual entitlement to the additional pay claimed. However, insofar as construction of the term under discussion was required, the tribunal had been entitled to take into account the overall purpose of the term – Arnold v Britton and others [2015] *2 WLR 1593.*

Appeal dismissed.

THE HONOURABLE LADY WISE

1. The claimant commenced employment with the respondent with effect from 17 August 1998 as a Material Supplier. In 2015 he was offered and accepted a promoted post of Logistics Co-ordinator. A dispute arose as to whether he was entitled to receive a "Personal Differential" (PD) in addition to his full increased salary on the basis of a term in a collective agreement known as the Glasgow Forum Agreement (GFA). In 2016 he raised a claim alleging unlawful deduction of wages in terms of section 13 of the Employment Rights Act 1996 (ERA 1996). The Employment Tribunal sitting in Glasgow (Employment Judge Garvie presiding over a full tribunal) dismissed the claim in a judgment dated 12 April 2017 and the claimant appeals that decision. He has been represented both before the tribunal and on appeal by Mr G Bathgate, Solicitor. The respondent has been represented on both occasions by Ms G Hirsch of Counsel. I will refer to the parties as claimant and respondent as they were in the tribunal below.

The Tribunal's Judgment

2. In paragraph 12-128 inclusive of the judgment the tribunal makes what are recorded as "essential facts" which it states were established or agreed. The submissions for both parties are then transcribed in full between paragraphs 129 and 187. Following a narration of part of the legislative provisions at paragraphs 188 and 189 and a single paragraph (190) containing observations on the witnesses, the deliberation and determination section is between paragraphs 191 and 196. The scheme of the judgment is the subject of criticism by the claimant because of the apparent conflation between the recording of evidence and findings in fact on disputed issues. At this stage it is sufficient to record the findings that have a material bearing on the issues under appeal. These are:

> **"20. In 2001 BAMG was responsible for the maintenance of two B737 aircraft lines one of which was being phased out. This left one maintenance line and therefore reduced the amount of work available in Glasgow. Since BAMG's staffing was under resourced at the time extra staff were taken on, albeit the future of BAMG was uncertain. BAMG needed to become more competitive in order to secure new work to replace the B737/200 maintenance work.**

21. The Glasgow Forum Agreement, (the GFA, (at page 290) explained that the purpose of this Agreement was to:

> ***"Enable ratification at Glasgow of locally agreed initiatives to improve the business competitiveness and environment ensuring their compatibility with Maintenance activities at Glasgow."***

22. There is reference to the Forum holding quarterly meetings and the various trade union officials and management whose representatives would attend were listed. This Agreement was to deal with two key phases of work which began in February 2000.

…

24. During discussions around Phase 2 it became apparent that the anticipated cost savings that BAMG needed to demonstrate for the purpose of its bid for the work would not be achieved without changes to the terms of existing BAMG employees going forward through recruitment and promotion. The GFA therefore was agreed so as to ensure BAMG's work was as competitive as possible to secure that work and avoid potential redundancies. The proposed changes were expressed to be contingent on that work being secured, (page 295).

…

27. As a result of the GFA implementation, more competitive pay rates were introduced and BAMG ultimately secured the maintenance work with the new Airbus fleet. By comparison, the respondent's maintenance base in Manchester closed shortly after BAMG secured the Airbus work as it (Manchester) was not sufficiently competitive.

28. The GFA did not amend all the terms of the Collective Agreements which continued to apply, as varied by GFA, but it introduced certain changes in respect of certain categories of staff at BAMG to make it more competitive. The most significant change introduced and on which most of consultation focused was the change to payscales for certain roles.

29. The GFA at page 5 of the Agreement, (page 293) set out Pay Scales under *"Existing rates"* and *"New rates"* which applied to Material Suppliers, Mechanics, Technicians, and Licensed Aircraft Engineers, (LAEs1 and LAEs2). These categories were covered by the T & G Agreement, the Craft Bargaining Unit Staff Agreement and the Non-Craft Bargaining Unit staff. The GFA amended pay rates were only for those based at BAMG, Glasgow.

30. At the foot of that page, (page 7 of the agreement), (page 293) states:

"All staff retain their existing grade and incremental scale. Promotions will be onto the new scale"

31. There is also reference to Lead Technicians and that a premium payment will be made to them.

32. At page 6 of the GFA, (page 294) the Existing (i.e. Original) rates and the new (BAMG only) rates which applied to A-Scale employees are set out.

33. At the foot of page 6 of GFA, (page 294) it states:

> ***"All staff retain their existing grade and incremental scale. Promotions will be onto the new scale***
>
> ***"Anyone in full time BA employment on 1st April 2000 who is promoted to A5 or A6 will carry the personal differential. Personal differential is pensionable and wage rises are applied to the combined sum. Overtime is calculated using the basic rate only."***

34. At the time of this Agreement being implemented in February 2001 the claimant remained a Material Supplier and so his then pay scale i.e. the existing and new rates where there was a change are as set out at page 293. So far as the claimant was concerned there was no change to his pay rates at that time since, as indicated above, he remained a Material Supplier.

35. **Mr Wallace's understanding was that an individual who was at the top of the regional A5 scale, (page 294) shown as having a pay rate at the time of £20,885 who was then promoted to a more senior A6 scale role after the introduction of the GFA would move to the new BAMG only A-Scale role rather than remaining on the old original pay scale which was £21,255.**

36. **The respondent realised that there was a potential issue for someone moving from the existing A-Scale role by being promoted to the higher role on the BAMG only A-Scale could be financially disadvantaged. This could amount to a potential to dis-incentivise current A-Scale employees seeking promotion. During the course of negotiations a Ms Morag Reed suggested that there could be a Personal differential introduced, (referred to as a PD).**

37. **This had been used previously in re-deployment as set out in various Collective Agreements, (pages 307-311). The intention there was to compensate staff for financial losses resulting from a moving to another area of the business on a lower salary as a result of re-deployment. Ms Reed's suggestion was that a similar PD might apply in this context on a transitional basis to provide some pay protection for those A-Scale employees who would otherwise be financially disadvantaged, following promotion. The respondent acknowledged the potential impact on A-Scale promotions and so when this PD was proposed it was agreed by management.**

38. **The GFA was negotiated and consulted on over a two year period from the initial phase through to the conclusion when it was signed on 23 February 2001, (page 295).**

39. **During the course of this consultation process Mr Wallace worked with representatives of the trade unions and had monthly consultations with Glasgow staff. Staff updates were provided on Notice Boards and emails and a final form of the GFA was presented to staff before a vote was taken and final agreement reached. Mr Wallace was clear that the presentation referred to discussion about the PD at which it was explained and the PD was applicable to (current) A-Scale staff, (see page 6 of the GFA at page 294 of the bundle) and was separate from Craft/Non-Craft Pay Scales set out at page 5 of the GFA, (page 293 of the Bundle).**

40. **Mr Wallace was also clear that the asterisk at page 6 of the GFA (page 294) of the Bundle) related only to the A-Scale roles listed on that page and to those who, at 1 April 2000 were in the respondent's employment and on the relevant payscales roles until they were then subsequently promoted within the A-Scales.**

41. **He pointed out there was no such asterisk for the other Pay Grades on page 5 of the GFA or any note referring to a PD to Grades on that page (see page 5 of the GFA at page 293 of the Bundle.)**

42. **Mr Wallace was not aware of conversations about the PD outside A-Scale pay rates because those governed by the Pay Scale on page 5, (at page 293 of the Bundle) would not be similarly disadvantaged if they were promoted.**

43. **With reference to calculations for the PD Pay Scales the figure on page 6 of the GFA, (at page 294 of the Bundle) show that an A5 promoted from the top of the A5 Pay Scale earning £20,885 and promoted to an A6 role, before the introduction of GFA would have expected to move to the next Pay Scale i.e. regional Pay Scale of £21,255 i.e. at the left hand column. The amount of the PD equated to the difference between the maximum earning potential of the existing A5/A6 Pay Scale under the new maximum earning potential in the new (BAMG only) rate which was £20,885 down to £15,996 for A5 employees and £24,563 (regional rate) down to £19,609 for A6 employees.**

44. **Therefore, someone on A5 who was on the maximum spinal point earning £20,885 moving to £15,996 (the new BAMG only rate) would earn £15,996 but with a PD of £4,899 that individual would continue to earn the original salary of £20,885 (£15,996 + £4,899 = £20,885).**

45. **The amount of the PD equated to the difference between the maximum earning potential on the existing A5/A6 scales and the new maximum earning potential for each new (BAMG only) rate.**

46. **The calculation was to protect the incremental scales for the existing A-Scale employees at the time and was done so as not to discourage them from seeking promotion to a higher grade.**

47. **By contrast, the PD has no correlation to the Pay Scales set out at page 5 of the GFA, (at page 293 of the Bundle). The claimant at the time was a Material Supplier and so he was on the Pay Scales applicable as set out in the GFA at page 5 (page 293 of the Bundle).**

48. **So far as Mr Wallace was concerned, the PD was always intended to be a transitional measure. His position was that this was removed in 2008 following consultation when new Pay Scales were introduced and so the claimant was never entitled to receive the PD following his promotion in March 2015, (see below). The PD was introduced to mitigate the immediate effect the amended Pay Scales had on employees and their salary expectations at the time in the early part of the decade from 2001 onwards.**

49. **Mr Wallace was clear that the Pay Scales within the GFA were amended in February 2008 and the PD was then removed completely, (pages 306A/306B).**

50. **Therefore, the claimant's contention that the wording of page 6 of the GFA, (page 294 of the Bundle) entitled him to a PD was made at a time when that Pay Scale was no longer applicable having ended in 2008. In any event the claimant was not on an A-Scale rate at the time of his promotion but remained on the Scale applicable for a Material Supplier.**

…

52. **Accordingly, Mr Wallace's view was that the applicability of the PD was only intended to operate in limited circumstances where an A-Scale employee would lose out, despite having been promoted which was not the position for the claimant since he received a pay rise following his promotion from a Material Supplier to a Logistics Coordinator.**

…

54. **There was an Addendum to the Glasgow Negotiating Forum as at 1 February 2008, (Addendum Ref no GF-005), (at pages 306A and 306B of the Bundle). This sets out the existing roles of Material Supplier, Mechanic, Technician, Lead Technician, LAE2, A4, A5 and A6. At the foot of that page which is headed, *"Clarification of page scales"* it states:**

> ***"The attached rates are correct at 1st February 2008. They are subject to amendment through the normal pay negotiations and agreements. The prevailing rates apply and are lodged with pay services."***

55. **The claimant applied for promotion in early 2015. He was successful and was appointed as a Logistics Co-Ordinator with effect from 1 March 2015 based at BAMG. The promotion offer was set out in a letter to him of 20 February 2015 which he signed on 24 February 2015 and the respondent's Manager Heavy Maintenance, a Mr Stuart McMahon also signed for the respondent, (pages 38/39). There is no reference in that offer letter to the GFA. It does refer to "the Single Modern Agreement (SMA)".**

The terms of the offer letter to the claimant relating to the post of Logistics Co-ordinator are set out at paragraph 56. Between paragraphs 57 and 102 the tribunal then sets out in detail the grievance process and the internal appeal that took place after the claimant suggested that he was entitled to payment of the PD. The claimant's evidence is summarised at paragraphs 115 – 121. The relevant passages include the following:

"116. The claimant accepted that he had chosen to be promoted from the role of Material Supplier but that with the PD not being applied to him, he has no realistic possibility of reaching the level of salary of £36,056. In his view, everyone else in the same role was fast approaching that level of salary.

117. The claimant disputed that Ms Reed had ever told him that he would not be eligible for a PD if he applied for promotion although he accepted that she had spoken to him and two other colleagues neither of whom had applied for promotion.

118. The claimant had not been in the habit of looking at collective agreements but his position was that everyone else who had been promoted had been paid, as he understood it, a Personal Differential.

119. He accepted that his offer letter set out the basic pay on promotion. He accepted there is no reference to PD in the offer letter. "

3. As already indicated the tribunal set out the parties' submissions in full. The observations of the witnesses and the deliberation and determination section are in the following terms:

"190. The Tribunal considered that the interpretation placed on the terms of the GFA both by Mr Wallace as well as by Mr Shearer was a reasonable one to reach in all the circumstances. Mr Shearer's analysis was straightforward and took account of the results of his detailed investigations. The Tribunal also noted that Mr Wallace had the added advantage of being involved in the GFA, having been one of the parties engaged in the negotiations with the respondent.

191. The Tribunal was very grateful to the representatives for their helpful closing submissions and for drawing attention to the various authorities on which they each relied. They are set out in full, in the order in which the representatives addressed the Tribunal at the end of the Hearing.

192. The Tribunal noted that the claimant received a 5% pay increase on his promotion to the post of Logistics Coordinator. The Tribunal concluded that the terms of the offer letter to the claimant dated 20 February 2015 were significant in that it clearly set out that with his move to a new role the claimant would receive a lower shift pay and there was to be a shift pay run down allowance over a phased period of 12 months. The claimant was moving from a Materials Supplier Role, (see page 5 of the GFA at page 293 of the bundle). The GFA sets out two foot notes at page 5/293 of the bundle while page 6 of the GFA at page 294 of the bundle has two different foot notes for the three roles set out on that page, these being A4, A5 and A6.

193. The Tribunal concluded that these two pages have to be read in the context of the GFA as a whole document. It was a document signed by the parties on 23 February 2001 and it was produced as the result of lengthy and detailed negotiations between the respondent's management team and the recognised trade unions. It therefore sets out a collective agreement between the contracting parties. The Tribunal also considered it was significant that, at the time the GFA was signed, the claimant was a Materials Supplier and so covered by page 5/293 of that Agreement. The claimant was not promoted to an A6 role until many years later in 2015. Mr Wallace was very clear that there were no conversations about the PD applying outside the A-Scale pay rates because those governed by the pay scales on page 5/293 of the GFA would not be similarly disadvantaged if they were promoted which is, of course, what happened many years later in 2015 with the claimant. Further, the PD was always intended to be a transitional measure. The Tribunal was satisfied that what happened in 2008 was that the need for the PD was no longer there. The minutes of the meetings refer to it being treated by the respondent as *"Closed"* and there was no evidence

to suggest that the union representatives who were involved in the meetings in 2008 dissented from that decision.

194. The Tribunal considered that it was important to note that there is no reference to the PD for A-Scale 4 employees, only A-Scale 5 and 6 on page 6/294. There is no reference at all to PD for employees such as the claimant on page 5/293. The offer letter to the claimant also made it clear that the claimant was to receive a pay increase so had he been entitled in addition to a PD that would have amounted to a supplement to his salary rather than pay protection. The Tribunal concluded that, in all the circumstances, the claimant failed to demonstrate that he had an entitlement to a PD on his promotion to the role of Logistics Coordinator.

195. The Tribunal noted that there did appear to be some inconsistencies as to how the PD had been applied in earlier cases and the respondent appeared to recognise this was what had happened. However, the Tribunal was not satisfied that this could be interpreted as entitling the claimant to a PD where he was promoted to the new role in 2015.

196. In all these circumstances, the Tribunal concluded that Ms Hirsch was correct in her submission that the claimant did not have a specific contractual entitlement to a PD and, while it noted that the claimant considered this was unfair to him, that is not the issue before the Tribunal. Accordingly, applying the law to the above findings of fact the Tribunal concluded that the claimant did not have a contractual entitlement to a PD and the claimant is therefore dismissed."

The claimant's arguments on appeal

4. The claimant advances two separate grounds of appeal, which Mr Bathgate supported in written and oral argument. His first ground challenges the format and aspects of the reasoning within the judgment. He contends that the tribunal failed to comply with the requirements **of Rule 62(5)** of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.** In particular, the tribunal failed so to comply in relation to making findings in fact on identified issues. A number of paragraphs purporting to be findings in fact were simply a narration of evidence led and not proper findings at all. Reference was made to a number of paragraphs, including 35, 39, 40, 41, 42, 48, 49, 51 – 52, 59 – 61, 110 and 115 as particular examples of this. It could be seen from those references that many of the purported findings in fact included language such as "so far as Mr Wallace was concerned" or "Mr Wallace's understanding was …." and "Mr Wallace was also clear ….". The inclusion of such expressions resulted in them not being findings in fact at all. Similarly, paragraphs 115 – 121 were a narration of what the claimant had said in evidence including what he disputed without findings as to what the tribunal had found in relation to such a dispute.

5. Mr Bathgate accepted that the tribunal was not required to produce a judgment that was a model of legal draftsmanship but he contended that at the very least there had to be findings in fact directed at the issues in dispute or the requirements of rule 62(5) would not be met. He accepted that the best formulation of the question to be posed about the Tribunal's judgment was whether the claimant was able to determine why he had lost, under reference to the well-known authority of **Meek v City of Birmingham District Council 1980 IRLR 250**. He submitted also, however, that while the relevant law was detailed at paragraphs 188 and 189 of the judgment there was no clear statement of how the law had been applied to the facts of the case. This argument was linked to the first in that in the absence of findings in fact on the central issue no proper application of the law could take place. There was simply no finding on the central issue of whether the claimant had been subjected to an unlawful deduction from wages. In any event, the primary argument on the reasons challenge was that it was simply not clear from the judgment the basis on which the claimant's application had failed. It was unclear whether the tribunal accepted the construction of the GFA put forward by the respondent or whether the rationale was that the claimant's interpretation of the GFA was accepted but that the tribunal concluded that the agreement had terminated in 2008. The respondent's position before the tribunal was that in order to qualify for the PD an employee had to be promoted from another "A grade". The tribunal does not specifically accept that contention and so the claimant simply could not work out what the tribunal's view on the central issue was. The failure to comply with rule 62(5) was fatal to the tribunal's decision and the case would require to be remitted for a fresh hearing.

6. The second ground of appeal relates to an alleged error on the part of the tribunal in its approach to construction of the contractual provisions on which the claim was based. In Mr Bathgate's submission there had been a failure to consider the unambiguous language of the provision in question namely:

"Anyone in full-time BA employment on 1 April 2000 who is promoted to A5 or A6 will carry the personal differential …"

The tribunal's task had been to identify what the parties had agreed, not what the tribunal members thought they should have agreed. Reference to the subjective intention of the parties to the GFA led to an error in approach. In particular, the tribunal's reliance on the interpretation placed on the GFA by two of the respondent's witnesses as "a reasonable one to reach in all the circumstances" (paragraph 190) was illustrative of this error. That the tribunal had based its decision on the witnesses' interpretation of the contract rather than the tribunal's own construction of the words used using the objective standard of the reasonable reader could also be seen from paragraph 193. There, the tribunal's references to the intention always being that the PD was a transitional measure and the reference to Minutes of Meetings supported the view that there had been a failure to focus on the actual terms of the Agreement.

7. The tribunal had not made any specific finding that the entitlement to a PD had been removed and so, in addition to not approaching construction of the relevant term correctly, it had failed to make findings as to when if at all the incorporated term had been removed by variation of the claimant's contract. This was a central issue for determination and the tribunal had not addressed it directly.

8. Mr Bathgate made reference to the decision of the UK Supreme Court in **Arnold v Britton and Others [2015] UKSC 36** and in particular to the emphasis given (at paragraph 17 thereof) to the importance of the language of the provision to be construed. The wording of the GFA should be given its normal, common sense meaning. It was clear and unambiguous and in the absence of any qualification in the contract to the two criteria for securing a PD (employment by BA on 1 April 2000 and separately promotion to A5 or A6) it was difficult to see why it was found not to

apply to the claimant. **Arnold v Britton** was also authority for the proposition that the court should be very slow to reject the natural meaning of a provision as correct simply because it appeared to be an imprudent term for one of the parties to have agreed. Had the tribunal not fallen into the error of looking at subjective intention, the words of the agreement would have been given their natural meaning and the claimant's claim upheld.

9. The second part of the second ground referred back to the reasons challenge and the absence of a finding as to whether the PD applied to the claimant, standing the reference to all BA employees and if it did apply whether it had been varied such that it had been removed and if so by what method. For these reasons it could be seen that the tribunal had moved away from the requirement to look at the terms of the contract and what they say and that too was an error. The appeal could succeed on the first ground alone which failing on a combination of both grounds.

The respondent's submissions

10. Ms Hirsch accepted that it would be an error for the tribunal to fail to follow the substance of Rule 62 but submitted that so long as constituent parts of the requirements thereof could be unearthed from the material beneath it did not matter that it was not visible on the surface of the decision – **Greenwood v NWF Retail Limited [2011] ICR 896** at paragraph 56. She accepted that the judgment could have been structured more clearly in this case. However this had been a full industrial panel which heard a wide range of evidence. It chose not to make findings on things that were not essential and it was entitled to take that course. She suggested that the absence of some findings, for example about whether another employee had told the claimant before he applied for the promoted post that he would not secure the PD were simply illustrative of a tendency on the part of this and many other tribunals not to want to make adverse credibility findings or upset the parties unnecessarily. She suggested that to do otherwise might have involved having to make a finding that the claimant had lied.

11. The respondent's overall submission to the tribunal had been that the claimant had made an opportunistic claim after he had accepted a new role which had already given him a 5% pay increase. He had never been entitled to the PD payment because he was not on the "A grade" scale at the time of the GFA. The tribunal had made a number of key findings of fact on how the GFA was reached, how it was agreed to be applied and what the motivating factor was for its creation. When he was offered and accepted his subsequent role in 2015, the claimant's salary was stated in the offer letter and accepted by the claimant who worked from 1 March 2015 on that increased salary for some months without complaint. The contract was accordingly clear and the tribunal could have dismissed the claim on that basis alone. Ms Hirsch accepted that she had offered to amend the pleadings to make clear that could be done. She accepted also that the tribunal had not on the face of it made any decision about whether to allow her amendment and dispose of that argument. Ultimately she accepted that paragraph 192 could only be interpreted as conveying that the tribunal considered the terms of the offer letter to be significant but not determinative.

12. Responding specifically to the first ground of appeal, the question to be considered was whether, in the context of the material evidence and submissions at the hearing, it was apparent why the tribunal reached the decision it did – **English v Emery Reinbold and Strick Limited [2002] 1 WLR 2409.** Counsel went through some of what she contended were the relevant findings in fact. She accepted that a finding to the effect that "Mr Wallace said" or "Mr Wallace was clear that" was not a finding as to the truth of what Mr Wallace or any other witness said unless it was then specifically accepted by the tribunal in conclusion. The purpose of the GFA was the subject of explicit findings by the tribunal and so could not be in doubt. Under reference to paragraphs 16, 18, 20, 24 and 36 Counsel submitted that these could all be used as aids to interpretation by the tribunal later in the judgment. She accepted that paragraphs 40, 48, 49, and 52 had to be regarded as what Mr Wallace said in evidence rather than what the tribunal

concluded. In contrast, paragraph 50, particularly, relating to PD being no longer applicable having ended in 2008, was an important finding and could be taken as such when read with the tribunal's acceptance of that position in the discussion and deliberation section. Counsel accepted that the recorded evidence (at paragraph 51) about a possible discussion between the claimant's colleague Ms Reid and him about whether the PD would apply was a red herring and could be ignored. On the grievance procedure, she contended that while paragraph 83, which records that Mr Wallace confirmed to Mr Shearer of the respondent that the intention of the PD had been to protect only those individuals currently then on A scale rates, could not be regarded as determinative on that issue, it was at least a finding that such information had been passed on.

13. Turning to the deliberation and discussion section, Ms Hirsch submitted that read in the context of the judgment as a whole these paragraphs were sufficient to convey to the claimant why he had not been successful. The tribunal was entitled to accept the evidence of the respondent's witnesses and gave a reason for that. Then in paragraph 193 the purpose of the GFA was relied upon. Most importantly, the tribunal found in terms that *"the PD was always intended to be a transitional measure"*, recording that by 2008 there was no need for it and that Minutes of Meetings referred to it as *"closed"*. Taken together, these were clear and direct findings that the PD was simply no longer in force by 2008 and that was sufficient to dispose of the whole claim. Although the issues had not been spelt out clearly enough early in the judgment the central issue was whether their claimant was entitled to the PD and he was not because it had been removed in 2008. It was not inappropriate for the tribunal to give a long recitation of facts and then only refer in discussion to the few that were material to its determination.

14. On the second ground, Ms Hirsch submitted that the starting point for construction of the claimant's contract had to be the offer and acceptance for his position as Logistics Coordinator, an A grade role. As already indicated the letter of offer clearly stated the salary figure for the position

and the claimant had not thought to vary that term or raise the issue of a PD when he accepted it. The tribunal's reasons included that the PD was intended as a pay protection and not as a pay supplement (paragraph 194). That was a conclusion reached on the evidence. In the absence of evidence that the PD applied to the terms agreed by the claimant in 2015 his claim had to fail.

15. Even on the basis that the terms of the GFA had to be construed the tribunal's approach had not fallen into error. In **Arnold v Britton and Others [2015] UKSC 36** at paragraph 15 the UK Supreme Court had set out the various factors in play in the interpretation of a written contract. Although the natural and ordinary meaning of the clause was important, it had to be read in context and the facts and circumstances known or assumed by the parties at the time the document was entered into were important. In this particular case the purpose of the PD was to avoid hardship to existing "A grade" employees moving to the new scale. It was not intended to apply to those such as the claimant who were not on A grade at the time the new scale was implemented as such employees had not suffered any loss and so had never been part of the group who had been given the PD. Evidence of intention is relevant in interpreting the contract and so, even if the GFA was somehow relevant, interpreting it so that the provision for PD did not apply to the claimant was consistent with the relevant authority relied upon on behalf of the claimant.

Discussion

16. Dealing first with the reasons challenge, this centres on the requirement of the tribunal to comply with rule 62 of the Employment Tribunals Rules and Procedure 2003 (as amended) ("2013 Rules"). Rule 62(5) is in the following terms:

> **"(5) In the case of a judgment the reasons shall: identify the issues which the tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgement includes a financial award the reasons shall identify, by means of a table or otherwise, how much the amount to be paid has been calculated.**

17. It is well established that a failure to comply with rule 62 (or its predecessor rule 30(6)) constitutes an error of law. In **Greenwood v NWF Retail Limited UKEAT/0409/09/JOJ**, HHJ Hand QC reviewed the various authorities on this issue in the context of **Meek** compliance and stated the following:

> *" ... A judgment will not be erroneous in law simply because the structure of the rule is not visible on the surface of the decision so long as its constituent parts can be unearthed from the material beneath. On the other hand the constituent parts will need to be more than a formal statement paying lip service to the sub-paragraphs of the rule; the judgement must demonstrate substantial compliance. ... It will not be enough to set out the terms of the rule if there cannot be found in the rest of the judgment material that demonstrates substantial compliance with the terms of the rule."*

The argument in this appeal is that the claimant contends that the tribunal failed to comply with the substance of the rule and so erred. While the respondent accepts that the structure of the judgment may not identify which parts of the rule are being followed and where, it is contended that there is sufficient, reading the judgment as a whole, to illustrate substantial compliance with it.

18. This is a case in which the tribunal had to identify and construe the terms of the claimant's contract in order to determine whether there had been any unlawful deduction in wages. Accordingly, identification of the terms of his contract was the primary issue and the judgment would have been easier to follow if that had been set out. The respondent had contended that the case could be resolved on a straightforward interpretation of the claimant's own contract of employment, which unequivocally did not include an entitlement to the Personal Differential (PD) referred to in the collective agreement (GFA) at all and referred instead to what is understood to be a subsequent collective agreement in force in 2015 (the Single Modern Agreement, "SMA"). However, as that potentially knockout blow had not been specifically foreshadowed in the pleadings and Mr Bathgate had taken objection to it being relied upon, Counsel for the respondent had moved an amendment to the effect that the terms of the 2015 offer and acceptance represented a full answer to the claim. The tribunal records these events at paragraphs 161 – 165 of the

judgment. No decision on the amendment was taken or at least none is stated in the judgment and so I proceed on the basis that it was not allowed or at least the argument within it did not find favour with the tribunal. That is consistent with the terms of paragraph 192 of the judgment which refers to the terms of the 2015 letter of offer to the claimant as being *"significant"*. This can only mean that it was significant but not determinative and so the substance of the argument within the Minute of Amendment was impliedly rejected. It is unfortunate that this matter was not addressed more directly by the tribunal such that both sides were clear as to the tribunal's position on it. Counsel for the respondent at the appeal hearing appeared to be unclear at first, but I suggested that this was the effect of paragraph 192. She did concede ultimately that the tribunal could not be taken as having accepted her argument on the 2015 offer and acceptance being a complete answer to the claim. Accordingly the tribunal's failure to make a clear decision on the Minute of Amendment has no material bearing on the outcome of the appeal as that was to the claimant's advantage and the respondent has not cross-appealed on the point. In the circumstances, I express no view on whether an argument that the offer and acceptance was a complete answer to the claim was a compelling one or not. However, what the tribunal concluded in relation to the contract being significant is one of the factors to be taken into account in deciding whether the reasons given were sufficient.

19. It seems to me that the issues that were focused in the parties' pleadings and in evidence were:

(1) Whether the terms of the GFA that provided for payment of a PD to certain employees applied to the claimant at any time;
(2) Whether the GFA (and the PD clause contained within it) was in force in 2015 and
(3) if it was, whether it had to be interpreted as applying to an employee who was working for BA as far back as April 2000 and was subsequently promoted to an A5 or A6 post or whether it was restricted to those who were already employed as A grades at the time the GFA was signed in 2001.

20. There was more than one way of looking at these issues. As already indicated, the starting point could properly have been to consider the terms of the claimant's 2015 contract to see whether it incorporated the GFA. Alternatively, and this was the course chosen by the parties and the tribunal, the whole circumstances in which the PD became payable in 2001 could be explored together with available evidence about what happened to it subsequently. Further, whether all of the issues narrated above required to be determined depended in part on the order in which they were addressed. In other words, the claimant's current contract was indisputably that entered into in 2015. If the GFA and the PD clause within in it were no longer in force and so not incorporated into that contract, then that would be an end of the matter.

21. The structure of the tribunal's judgment is one that is not uncommon, with two notable exceptions. First, there is no specific articulation of the issues for determination set out in it. This is commonly found early in tribunal judgments in compliance with rule 62(5). Secondly, the findings in fact contain a combination of actual findings established from the evidence and accepted by the tribunal and a narration or record of what certain witnesses asserted in evidence. It is these usual features that must be examined in order to analyse the claimant's first ground of appeal. It is worth noting, however, that in the section on relevant law the tribunal sets out briefly part of the provisions of **section 13** of the **Employment Rights Act 1996 ("ERA 1996")** and the associated section allowing a complaint of unlawful deduction of wages to be made to the tribunal. While there is no reference to the principles of construction of contract, it was not in dispute that if the PD was incorporated into the claimant's contract and that part of the GFA was still operable he would succeed in this section 13 claim but that if he failed to establish that he had such a contractual entitlement he would fail. Accordingly, it was not so much a construction of the terms of the GFA that was in dispute as the circumstances and time frame within which it applied.

22. Ms Hirsch submitted that the issue for determination was clear enough from reading the judgment as a whole. The claimant had, as indicated, sought to establish that he had a contractual entitlement to payment of the PD and that issue had been determined. I accept that submission to the extent that paragraph 196 does express a clear conclusion on that point. What really matters is whether the judgment is clear about why the claimant lost. That requires consideration of the way in which the findings in fact are structured. Paragraphs 15 – 28 set out the background to the GFA being entered into. It includes clear findings as to its purpose. It is unhelpful that even in that section there is, at paragraph 26, a preface of *"so far as Mr Wallace was concerned …"* in relation to a finding about one of the reasons for negotiation of the GFA. A finding about what one person thought the purpose was is not a finding as to what the purpose actually was. It was for the tribunal to either find that fact established or not. Paragraphs 29 – 34 then set out the terms of the GFA on which the claimant relied. It was not in dispute that the PD did not apply to him in 2001 when the Agreement was negotiated. Paragraph 35 is illustrative of the tribunal's tendency to narrate what someone said in evidence as if it was a finding that what they said had been accepted by the tribunal. Whether it has any value will depend on whether there is anything later in the judgment that gives a clue as to whether that evidence was accepted. Paragraphs 39 – 50 relate to the key issues of whether the PD was payable to a non-grade A existing employee who was later promoted to an A5/A6 grade and whether the PD was removed in 2008 when the new pay scales were introduced. Paragraph 47 may provide an answer to the first of those points but paragraphs 48 and 49 are again a narration of what Mr Wallace said about the second matter. That pattern, a clear finding followed or proceeded by a reference to Mr Wallace's view or understanding is repeated at paragraphs 50, 51 and 52.

23. As I understand the argument for the claimant it is that, taking these passages together, it is unclear whether the tribunal was making concrete findings in fact at all, or was simply recording the evidence given by the witnesses. Paragraphs 55 and 56 are appropriate findings in fact. They

confirm the terms of the claimant's 2015 contract and find in terms that there was no reference in it to the GFA, but that it did refer to a different collective agreement ("SMA") which is incorporated into his contract. The findings in relation to the internal grievance and appeal processes (paragraphs 59 – 102) are of little assistance. They record what occurred at those hearings and the conclusion reached. A possible exception is paragraph 83, although this again rests on the narration of Mr Wallace's understanding of who was covered by the PD. There is then a section of interest at paragraphs 103 – 114 about a reconvened appeal hearing where Mr Wallace gave evidence about a minute of a meeting in February 2008 where a note had been appended indicating that the issue of pay scales was "closed". An interpretation of the Minute appears to have been put (presumably by Counsel for the respondent) to Mr Wallace who is recorded as accepting that it indicated that the issue of PD was closed.

24. Read in isolation the findings in fact referred to above are a little confusing as to which aspects of the evidence have been accepted by the tribunal and so treated as established facts and which are simply recorded as evidence given and subsequently rejected or accepted. The claimant's own evidence is a record of matters he accepted, with one exception. In paragraph 117 he disputed having been told by a colleague that he would not be eligible for a PD if he applied for promotion. The tribunal makes no finding that he was so told. I consider it speculation to regard that, as Counsel for the respondent suggested, as the tribunal not wishing to make an adverse credibility finding if not required. It may be, conversely, that the tribunal accepted the submission of Mr Bathgate (recorded at paragraph 155) that any conversation between employees about the issue was irrelevant to the tribunal's determination.

25. In any event, against that background the tribunal's task was to determine whether the claimant had a contractual entitlement to something contained in a named collective agreement, the GFA. That required consideration of whether that agreement was incorporated into his

contract at the material time. In addressing that matter, the tribunal was entitled to give reasons that were directed only to that central disputed issue. Having considered matters, I have concluded that, reading the findings in fact together with the submissions made, the reasons given in the deliberation and determination section are just sufficient to convey what material parts of the evidence were relied on for the tribunal's conclusion. In reaching that view I have relied on the following points:

- The tribunal understood that the terms of the 2015 contract were significant (though not determinative) having already found that it made no reference to the GFA (and consequently the PD) at all.
- The tribunal relied on the claimant not having been in an A grade role until 2015, many years after the GFA had governed pay for promoted A grade positions.
- The tribunal accepted that the PD always intended to be a transitional measure and that it had served its purpose and so was a closed or terminated provision from 2008 and
- Insofar as it considered the statutory interpretation point, the tribunal noted that there was no reference at all to PD for employees such as the claimant in the material part of the GFA.

26. It was sufficient for the tribunal's conclusion that the claimant had no contractual entitlement to PD to find that provision for such pay protection ended in 2008 and of the conclusions stated by the tribunal that is the one given in the clearest terms. Accordingly, while it would have been of interest to know whether the tribunal considered that the ordinary construction of the words in the GFA about all those in full time BA employment on 1 April 2000 being entitled to PD if promoted to A5 or A6 grade would on the face of it include someone in the claimant's position, it was not ultimately necessary to consider that because of the clear finding that the provision was no longer operable from 2008. In any event, it can be inferred from the

tribunal's references to "in all the circumstances" that it viewed this as a case where evidence of intention was relevant to the decision to be taken. That leads to the second issue of the construction of the contract.

27. There was little between the parties on the second ground ultimately as it was argued at the appeal hearing. Mr Bathgate contended that the tribunal had not applied the tests set out in **Arnold v Britton and Others [2015] 2 WLR 1593** because it had failed to understand and give weight to the language of the provision to be construed which was said to be clear and unambiguous. It follows from the decision I have reached on reasons that the tribunal's conclusion was based primarily on the PD being no longer an operative provision after 2008. Accordingly, the term in the GFA providing for it was not actually a term of the claimant's contract that required to be construed. However insofar as the tribunal did consider whether it could ever have applied to someone in the claimant's position, it concluded that the evidence of Mr Wallace and Mr Shearer was to be preferred on that point.

28. Further, the expression used by the tribunal (at paragraph 190) was slightly inappropriate as it was not for Mr Wallace or Mr Shearer to interpret the GFA; it was for the tribunal to interpret it, having regard to their evidence about the intention of the parties at the time. However, it is tolerably clear that the tribunal accepted that the evidence of those involved at the time of the negotiation were best placed to offer evidence of intention and that their evidence was accepted as one of the factors assisting a conclusion on what a reasonable person with those employees' knowledge would have understood the terms to mean.

29. While **Arnold v Britton [2015] 2 WLR 1593** involved a commercial contract, some of the factors listed by the court in that case are pertinent to any task of contractual construction. As Lord Neuberger of Abbotsbury put it at paragraph 15:

"*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", to quote Lord Hoffman in* ***Chartbrook Ltd v Persimmon Homes Ltd*** *[2009] AC 1101, para 14 and it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the twenty five leases, in their documentary, factual and commercial context. 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 parties' intentions."*

30. Mr Bathgate was correct to point out that a court or tribunal tasked with identifying intention should disregard subjective evidence of any parties' intentions. It seems to me, however, that the tribunal was doing no more in this case than equating the views of the respondent's witnesses with those of a reasonable person, having made its own findings as to the purpose of the GFA at the time it was entered into and about the date of termination of the effect of its provisions.

31. For the reasons given, I do not consider that the tribunal's judgment is illustrative of any material error on either ground. There is just enough to satisfy the substantial requirements of rule 62(5). I would emphasise, however, that it would be helpful if tribunals avoided structuring a judgment such that in a section that should contain only the facts found by the tribunal to be established insofar as material to the issue for determination, one finds simply a narration of evidence given. Only if there is a separate section or some other part of the judgment that indicates in terms which of the material facts in dispute were accepted and which were rejected, will compliance with the requirement to make findings in fact on disputed issues be put beyond doubt. Had that been done in this case and had the structure laid out at rule 62 been followed in form as well as in substance, there might have been no need for a full hearing in this appeal.

Disposal

For all of the reasons given above, the appeal will be dismissed.