Claim no. 2600586.2020

EMPLOYMENT TRIBUNALS

Claimant:	**Ms A Young**
Respondent:	**Abellio East Midlands Limited**
Heard at:	By video-link
On:	13 October 2020
Before:	Employment Judge Dyal (sitting alone)
Representation:	
Claimant:	Mr Fitzpatrick, Counsel
Respondent:	Mr Shellum, Counsel

RESERVED JUDGMENT

1. The Respondent did not make unauthorised deductions from the Claimant's wages. The claim is dismissed.

REASONS

Introduction

1. The Claimant complains of unauthorised deduction from wages. In essence her complaint is that the Respondent calculated her maternity pay pursuant to its 2011 policy, not its more generous 2019 policy. The issue of principle for the tribunal to decide is whether the 2019 policy applied to the Claimant's maternity leave (or any part of it). If the 2019 policy applied then the Respondent paid the Claimant less than was properly payable and thereby made unauthorised deductions from her wages contrary to s.13 Employment Rights Act 1996.

The hearing

2. The hearing was conducted by CVP. Generally the technology worked well and we were able to troubleshoot the few problems that arose.

3. At the outset of the hearing I declared that Mr Fitzpatrick and I are members of the same barristers' chambers. I also declared that I have recently been assigned as his mentor in chambers. I explained what this meant: it is an informal role which simply involves a senior barrister giving a more junior one some pointers on career development. It has nothing to do with individual cases. We have only had one discussion to date, that was a short video call in the summer of this year. The term 'mentor' may therefore suggest a deeper relationship than is in fact the case. I also made clear that Mr Fitzpatrick and I had never spoken about this case. Indeed, I had no idea he was involved in it until I joined the CVP call. I gave the parties a short break to consider if they wished to make any representations. Mr Shellum took instructions and indicated that he had no objection to me hearing the case. Mr Fitzpatrick likewise. I considered the matter for myself and was entirely satisfied that I was able to decide the case with complete impartiality. I was also satisfied that a fair minded, well informed observer would not conclude that there was a real possibility of bias.

4. I was presented with an agreed bundle running to 106 pages to which the Claimant's contract of employment was added at the outset of the hearing. I heard evidence from the Claimant and for the Respondent from Grace Badawale, Head of HR Projects, Kate Holden, Head of Organisation Development and Kirsty Derry, HR Director. All witnesses were cross-examined

5. I heard closing submissions from counsel. Mr Fitzpatrick relied upon skeleton argument which he distributed by email in the course of the hearing. Mr Shellum was initially displeased that the document had not been shared in advance. However, we had a short break so that he could read the document and having done so he was content (as was I) that there was nothing in it that he was unable to deal with.

Findings of fact

The Claimant's employment and her maternity leave

6. The Claimant's continuous employment began on 13 October 2008. At the time, her employer was with East Midlands Trains Limited ('EMT') which was part of the Stagecoach group. She was a train manager.

7. Clause 25 of her contract of employment read as follows:

> *Incorporation of Trade Union Agreements*
>
> *With the exception of individual salary review, your contract of employment is subject to such terms and conditions as may be settled from time to time, in relation to employees of the Company in your grade or category, under the agreed collective bargaining procedures established with recognised trade unions or other organisations…*

8. The Claimant commenced a period of maternity leave on 11 March 2019. The then current maternity policy dated from 2011 (the '2011 Policy'). In terms of maternity pay, as it related to the Claimant, it provided for 10 weeks of full pay and 29 weeks statutory maternity pay (SMP). The Claimant remained on maternity leave until around September 2019 (the exact date of her return was not in evidence) before returning to work. She was paid in accordance with the 2011 policy.

Introduction of a new maternity policy

9. In July 2019, a new maternity policy was introduced (the '2019 Policy'). It improved maternity pay to 26 weeks full pay and 13 weeks SMP. It is necessary to consider the background to this policy change in considerable detail.

10. Industrial relations in the railway sector are heavily unionised. EMT was no exception. It had three levels of collective consultation and bargaining machinery:

    10.1. local level (for local disputes);
    10.2. functional level (affecting particular grade groups across multiple locations);
    10.3. Company Council: for dealing with issues that affected multiple groups across the business.

11. EMT recognised four trade unions including the RMT, of whom the Claimant is and was a member.

12. The parties did not put the various recognition and collective bargaining agreements that explain the detail of the collective bargaining structures before me so I have not seen their detail.

13. EMT had a franchise agreement with the Department of Transport. I have not seen the agreement but I accept Ms Derry's evidence that a feature of that agreement was that the DfT kept a close oversight of pay issues and that EMT needed its permission to negotiate on maternity pay. In the course of 2018, Ms Derry obtained permission to negotiate on maternity pay as she thought it may be necessary to do so in order to resolve an industrial dispute on pay. In the event it was not necessary.

14. However, there was an appetite both among management of EMT and among the unions to improve the maternity pay provisions and to bring them in line with other parts of the sector. Ms Derry therefore asked Mr Jon Coussens, HR Services Manager, to produce a paper benchmarking maternity pay across different employers. This was presented to EMT directors in November 2018 but did not progress further at that time.

15. The Company Council has a Policy Sub-Committee. It is responsible for discussing, reviewing and revising workforce policies. Its membership included Ms Derry and Ms Babawale and senior representatives of each of the four recognised unions. The union members who sat on the sub-committee also sat on the Council itself.

16. At a meeting of the Policy Sub-Committee on 14 February 2019, the unions jointly requested a review of the maternity policy with a view to the pay provisions being improved. At a Company Council meeting on 6 March 2019, the Policy Sub-Committee requested that the Company "harmonise" its maternity policy. This meant matching what Network Rail offered its employees (26 weeks full pay, 13 SMP). The request was welcomed in principle but certain approvals were required before it could be accepted.

17. Ms Derry went about seeking the approvals:

    17.1. The DfT: the approval was obtained, but, because EMT was imminently to be transferred to the Respondent, the approval was conditional upon the incoming transferee also approving.
    17.2. The incoming transferee (the Respondent): the approval was obtained in June 2018.
    17.3. EMT's Finance Director, Mr Gledhill: the approval was obtained in an email exchange on 18 June 2019 (described below).

18. In her email to Mr Gledhill, Ms Derry canvassed the difficulty of setting a suitable commencement date for the new policy. She said this:

> *I'm just thinking through effective date of policy change and want to check in with you any views from a budget perspective? Clearly the business won't have budgeted for this in this DA so one option is to make effective from 18 Aug [2019 – the date of the forthcoming transfer] but then we assign this as an Abellio improvement, which it isn't. More materially we have been reviewing since Jan and originally committed to get back to the reps by end of March.*
>
> *My proposal is to make the change effective from the start of the tax year - what do you think? This will mean a small amount of back pay and as you know, this is still less than our sick pay.*

19. Mr Gledhill responded that he was happy to cover the “incremental cost” but did not comment on the appropriate commencement of the policy.

20. In the meantime, a working group of the Policy Sub-Committee continued to meet regularly. It did so for reasons unrelated to maternity policy. The working group’s membership included senior representatives of each of the four recognised unions; all of whom sat on the Company Council. On 2 July 2019, at the end of a working group meeting, Ms Derry updated those present on how the maternity policy issue was progressing.

21. Ms Derry’s account of the discussion is, in summary, as follows (the account is disputed by the Claimant):

    21.1. Ms Derry told those present that she had obtained the approvals needed to move forwards with the changes to the maternity policy so as to match Network Rail.
    21.2. She said in terms that the new policy would be backdated to 6 April 2019;
    21.3. She explained clearly that this meant that the new policy would apply, but only apply, to periods of maternity leave commenced on or after 6 April 2019 - the first day of the tax year. In some cases this would mean paying back pay to make up the difference in pay for leave taken between 6 April 2019 and the date on which the new policy was brought into force.
    21.4. There was a discussion of these commencement provisions. It was pointed out that they would leave some women unhappy – those who remained on maternity leave at the 6 April 2019 but had commenced before it. However, it was agreed that whatever commencement provisions were there would be winners and losers and those who lost out would be “grumpy.”
    21.5. Further, it was agreed that the commencement provisions Ms Derry had outlined were logical and sensible and all present agreed to them. They were not controversial in the meeting.

22. I find as a fact that this is what happened at the meeting and in particular that there was agreement to the 2019 Policy only applying to periods of maternity leave commencing on or after 6 April 2019. I defer to my discussion and conclusions below my reasons for making this finding as my reasons are lengthy and I do not wish to break up the chronology.

23. The final step needed in order for EMT to give effect to the proposed new maternity policy was for the Company Council to approve it and the provisions in respect of its commencement. There was a Company Council meeting on 10 July 2019. Ms Derry was on annual leave, so Ms Holden attended in her place.

24. Ms Holden’s and Ms Babawale’s accounts of the meeting are essentially as follows:

    24.1. Ms Babawale gave a presentation in which she explained to the Company Council what was proposed by way of improvement to the maternity policy.

In terms of maternity pay, it would be increased to 26 weeks of full pay and 13 weeks of SMP;

24.2. In the course of that presentation she explained that the policy would be back dated to 6 April 2019.

24.3. She specifically explained that the new policy would only apply to periods of maternity leave commenced on or after that date.

24.4. The Company Council approved the 2019 Policy and the commencement provisions to it as Ms Babawale had explained them. These were uncontroversial; not least because they had been foreshadowed on 2 July 2019.

25. I find as a fact that this is what happened at the meeting and in particular that there was agreement to the 2019 Policy only applying to periods of maternity leave commencing on or after 6 April 2019. The Claimant does not accept this account, and I again defer my reasons for accepting it to the discussion below.

26. It is relevant to record that Ms Babawale's presentation was accompanied with some slides. The slides said simply this as regards commencement of the new policy: *"The above applies to all grades and it was agreed to backdate the change in the maternity policy to the start of the current tax year – 6th April 2019".*

27. The minutes of the meeting of 10 July 2019 say simply this as regards commencement: "*The company's Maternity Policy has been improved by providing 26 weeks' full pay and 13 weeks' Statutory Maternity Pay (SMP). This applies to all grades. This change will be back-dated to 6th April 2019, the start of the 2019/20 Tax Year. It was agreed that the Maternity Policy would be updated and published accordingly."*

28. A briefing document sent to representatives after the meeting of 10 July 2019, recorded the relevant issues in the same way as did the meeting minutes.

29. On 11 July 2019, Mr Coussens emailed the Respondent's payroll provider notifying it that there was a new maternity pay policy. After explaining the enhanced pay provisions he said: "*This needs to be backdated to any employee that started maternity leave on / after the 6th April 2019. For clarity, those employees who commenced maternity leave before the 6th April 2019 remain on the previous arrangements."* Mr Coussens had been at the meeting of 10 July 2019. Ms Babawale's evidence, which I accept, was that the payroll provider at that time was prone to mistakes and misunderstandings and needed things to be spelled out.

30. EMT had a weekly employee news bulletin. The bulletin of 19 July 2019 said this: *The revisions to our maternity policy have now been approved by both the Department for Transport (DfT) and Abellio and our maternity pay entitlement has been increased to 26 weeks full pay and 13 weeks Statutory Maternity Pay*

(SMP). This applies to all grades and the change to the policy will be back dated to the start of the current tax year (6th April 2019).

31. Later in July 2019, the new maternity leave policy was published (the 2019 Policy). The policy did not itself state what its commencement provisions were though both parties accept that it had commencement provisions albeit not stated therein. The dispute is over what the commencement provisions were.

32. On 18 August 2019, the Claimant's employment, and the employment of all other then current employees of EMT, transferred to the Respondent. Shortly thereafter, the 2019 Policy was rebranded into the Respondent's corporate design but with its material terms unchanged.

Claimant's complaints

33. On 27 August 2019, the Claimant emailed Ms Maria Gates, HRBP, indicating her understanding that she was entitled to the maternity pay benefits of the 2019 Policy having been paid in accordance with the 2011 Policy. She received a response from Maris Gates, HRBP, stating that she was not entitled to those benefits because she had commenced maternity leave before 1 [sic] April 2019 and so was still covered by the old policy. This was, I infer, a slip or a typographical error and what Ms Gates intended was to write 6 April 2019. I infer this from Ms Derry's evidence. She was asked in cross examination about the reference to '1 April 2019' and she explained that based on her own conversations with Ms Gates she knew that even at that time, Ms Gates was well aware that 6 April not 1 April was the threshold date.

34. On 24 September 2019, the Claimant sent a further email stating that she wished to raise a grievance. She considered that she was entitled to full pay in accordance with the 2019 Policy. In response, Ms Bryony Northwood, told the Claimant that it had been agreed at the Company Council meeting of 10 July 2019 that the changes would only be back dated to employees who commenced maternity leave after 6 April 2019. I accept the Claimant's evidence that she discussed these matters with RMT representatives contemporaneously, and that they told her that they did not agree with the Respondent's position.

35. There were 14 women who commenced maternity leave before 6 April 2019 and remained on maternity leave after that date. All were treated in the same way as the Claimant. There were no complaint's other than the Claimant's although one other woman raised a query as to whether the 2019 Policy applied to her. None of the recognised trade unions have complained about the Respondent's interpretation / application of the commencement provisions of the 2019 Policy in any of the three collective fora described above, or at all. I accept however that the RMT representatives the Claimant spoke to when raising her individual grievance told her that they supported her grievance and that the RMT have supported this litigation.

Law

36. The applicable statutory provision is section 13 Employment Rights Act 1996. Of particular relevance is subsection 3 which provides as follows:

    > *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

37. Wages are properly payable if there is a legal obligation to pay them. This may be a contractual obligation but it need not be: *New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA.*

38. In assessing what is properly payable the tribunal is entitled to construe documents including contracts.

39. Mr Shellum submitted that when construing a written contract the principles of construction summarised by Lord Neuberger in *Arnold (Respondent) v Britton* [2015] UKSC 36 at paragraph 15 should be applied. I agree. Regard should be had to:

    > *the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [agreement], (iii) the overall purpose of the clause and the [agreement], (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.*

40. Mr Fitzpatrick referred me to the famous passages of Lord Hoffman's speech in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at 912-913. He accepted that this must be read in light of *Arnold.* Both counsel were agreed on that.

41. In his skeleton argument, Mr Fitzpatrick characterised the 2019 Policy as a "gift". I think that was a strange characterisation of a company policy, particularly one agreed with the recognised trade unions. It is not a characterisation I could agree with. However, Mr Fitzpatrick made clear in his oral submissions that the Respondent accepted that if the Claimant fell within the scope of the 2019 Policy, there was a legal obligation to pay her in accordance with it. That I do agree with.

Discussions and conclusion

Reasons for accepting Respondent's account of meetings of 2 and 10 July 2019

42. This is really the central issue in the case and was the main battle ground of the hearing.

43. The Claimant did not entirely accept the accounts of the meetings of 2 and 10 July 2020. In particular, she did not accept that it was clearly explained, understood or agreed that '*backdated to 6 April 2019'* meant that the 2019 Policy would only apply to those who began maternity leave on or after that date. Her case, rather, was that the meaning of that phrase was left undefined, was ambiguous and fell to the tribunal to determine using principles of contractual interpretation.

44. Mr Shellum challenges the Respondent's account of the meetings on several bases. In my view the most cogent basis is that there is virtually no written record of any discussion or agreement about the policy applying only to maternity leave commencing on or after 6 April 2019. Most significantly:

    44.1. There are no notes of the discussion of the maternity policy at the meeting of 2 July 2019 at all;
    44.2. Ms Babawale's written presentation at the meeting of 10 July 2019, says simply this: *"The above applies to all grades and it was agreed to backdate the change in the maternity policy to the start of the current tax year – 6th April 2019"*
    44.3. The minutes of the meeting of 10 July 2019 say simply this: "*The company's Maternity Policy has been improved by providing 26 weeks' full pay and 13 weeks' Statutory Maternity Pay (SMP). This applies to all grades. This change will be back-dated to 6th April 2019, the start of the 2019/20 Tax Year. It was agreed that the Maternity Policy would be updated and published accordingly."*
    44.4. The briefing document sent to representatives after the meeting of 10 July 2019, records the relevant issue in the same way as do the meeting notes.
    44.5. The employee weekly news bulletin of 19 July 2019 said only this: *The revisions to our maternity policy have now been approved by both the Department for Transport (DfT) and Abellio and our maternity pay entitlement has been increased to 26 weeks full pay and 13 weeks Statutory Maternity Pay (SMP). This applies to all grades and the change to the policy will be backdated to the start of the current tax year 2019).*

45. The further bases on which Mr Shellum disputed the Respondent's account are these:

    45.1. The Claimant's case is being backed by the RMT and, Mr Shellum submitted, I should infer from that, that the RMT does not agree that the Respondent's account of the meeting is accurate. This should weigh on my findings of fact.

45.2. It had been necessary for Mr Cussons to spell out the position to payroll in his email. It had also been necessary, on Ms Derry's evidence, for her to give Ms Holden a briefing in advance of the meeting of 10 July 2019 (referred to at paragraph 33 of her statement, though the briefing itself was not in evidence).

45.3. The 2019 Policy itself does not state what the commencement provisions are. However, the policy does say *"From April 2019 SMP will be paid at £148.68."* This supports the Claimant's position.

46. I consider that Mr Shellum mounted an impressive and formidable challenge to the Respondent's account of the meetings of 2 and 10 July 2019. However, on balance, I accept the Respondent's account:

46.1. The Claimant was not at the meetings of 2 and 10 July 2019 whereas the Respondent's witnesses between them were and are able to give direct evidence of what was said. The Claimant was only able to give evidence that the RMT representatives she spoke to told her that they did not agree with the Respondent's position; but those representatives did not give evidence to the tribunal so could not be cross-examined. So I do not place much weight on what they told the Claimant.

46.2. I do not accept that the fact of the RMT backing this litigation helps me resolve a factual dispute of the present kind. The RMT representatives who were present at the meetings of 2 and 10 July 2019 have not been called to give evidence. Again I therefore cannot place much weight on the fact of the Union's support for the litigation. To be clear, I do not hold the fact that no RMT representative has given evidence against the Claimant. On the contrary, my point is simply that in the circumstances I do not think I can accept that the RMT's backing of the case offers any material assistance in resolving the current factual dispute.

46.3. I found the Respondents' witnesses accounts of the meetings of 2 and 10 July 2019 credible and plausible. In particular I found credible and plausible their account of the readiness with which those present accepted that the 2019 Policy should apply only to those starting maternity leave after 6 April 2019. Although that commencement provision is highly controversial in this litigation, I find it very plausible that it was not at those meetings:

46.3.1. Whatever start date provisions were chosen there would have been women who narrowly lost out on improved maternity pay benefits. I find it highly likely all those present at the meetings appreciated that;

46.3.2. Applying the 2019 policy to those who started maternity leave on or after 6 April 2019 was a benign and moderate approach to take. Of course it is true that another date could have been chosen but that would be true whatever date was chosen. 6 April 2019 was as

sensible a date as any. The commencement of the policy was fixed at a watershed: the start of the new tax year. Further, the date chosen was some months in the past rather than in the present or future so it was relatively generous to the workforce.

46.4. I think the failure to record in writing more detail about what was meant by 'back dated to 6 April 2019' must be seen through the lens of my previous point. The commencement provisions proposed to the meetings were not controversial but benign and moderate. In that context I find the failure to capture in writing that it had been agreed that the policy only applied to those who started leave on or after 6 April was much more understandable than if there had been any significant controversy about it. The failure is unfortunate and regrettable, however.

46.5. I heard and saw the Respondents' witnesses giving evidence today. They were each cross-examined with care and skill by Mr Shellum. Each one of them appeared to me to be doing her best to answer truthfully and to assist the tribunal, for instance making concessions where they were due.

46.6. I found significant, and what I perceived to be genuine, corroboration between the accounts given by the Respondent's witnesses.

46.7. I think that Mr Coussens' email to payroll corroborates rather than undermines the Respondent's position. It was sent the day after the meeting of 10 July 2019, a meeting which he attended. The fact he wrote in those terms tends to suggest that is what was agreed in the meeting. He was right to spell it out to payroll.

46.8. The development of the new maternity policy in this case is characterised by marked cooperation and amicable relations between the two sides of industry. In the circumstances, I find it unlikely that the Respondent would have unilaterally imposed an additional commencement provision (as regards start date of maternity leave) out of the blue and without discussing it with the Unions. It would also have needed to have contrived it very quickly after the meeting of 10 July 2019, given Mr Coussens' email to payroll the very next day.

46.9. I do not think that the fact Ms Derry sent Ms Holden a briefing is significant. I have not seen the briefing but I accept Ms Derry's explanation that she sent Ms Holden a briefing because Ms Holden was standing in for her at a significant meeting on 10 July 2019 whilst she was on annual leave.

46.10. I did not think that the reference in the 2019 policy to "*from April 2019, SMP will be paid at £148.68*" is significant. It does not really have anything to do with the disputed issues and does not shed any light on them. I also

accept Ms Babawale's evidence that she simply updated the amount of SMP in the maternity policy every year so that it was accurately stated.

Consequences of findings of fact

47. The 2019 Policy exists because the Company Council agreed it. In agreeing it, the Company Council made the 2019 Policy subject to commencement provisions. Those commencement provisions were the central matter of dispute before me. I have resolved that dispute. The 2019 Policy applied only to periods of maternity leave that commenced on or after 6 April 2019.

48. The Claimant started maternity leave before 6 April 2019. Unfortunately for her, this means that the 2019 Policy did not apply to her. Her wages were not, therefore, properly payable in accordance with 2019 Policy but rather in accordance with the 2011 Policy. She was therefore paid that which was properly payable and her claim must fail.

49. In my view this deals with the Claimant's case as it is pleaded in the Particulars of Claim. The basis upon which the Claimant avers that the 2019 Policy applied to her is set out at paragraph 4 of that document. In essence it is that the 2019 Policy was agreed at the Council Meeting of 10 July 2019 and the Council did not make the application of the policy conditional upon starting maternity leave on or after any date. I have rejected that case.

Further arguments

50. In closing submissions Mr Shellum developed the Claimant's case rather differently to the Particulars of Claim. I confess that, at the time, I did not appreciate this point and so did not raise it.

51. However, since I have heard full argument I think it is sensible for me to express my views on them.

52. Mr Shellum's argument was as follows:

    52.1. The pay provisions of the 2019 Policy were incorporated into the Claimant's contract of employment.
    52.2. The 2019 Policy itself did not state what its commencement provisions were but it had some – they are found elsewhere.
    52.3. The commencement provisions were found in the employee news bulletin of 19 July 2019. The words of the bulletin were incorporated into the Claimant's contract of employment: *The revisions to our maternity policy have now been approved by both the Department for Transport (DfT) and Abellio and our maternity pay entitlement has been increased to 26 weeks full pay and 13 weeks Statutory Maternity Pay (SMP). This applies to all*

grades and the change to the policy will be backdated to the start of the current tax year (6th April 2019).

52.4. The meaning of "*backdated to the start of the current tax year (6th April 2019)*" was ambiguous and fell to be construed using principles of contractual interpretation. Properly construed, the 2019 policy applied to women who were on maternity leave during the 2019 tax year even if they started that leave before 6 April 2019.

53. Having heard the argument, I was unclear what the significance would be of a finding of fact that the Company Council agreed that the 2019 Policy would only apply to maternity leave commencing on or after 6 April 2019. I asked Mr Shellum whether such a finding, if made, would be fatal to the Claimant's case. He was initially unsure. I therefore gave him a break to consider his position. His considered position was that it was not fatal to the Claimant's case because even if that was the Company Council's position it was not communicated to the workforce. The communication to the workforce was in the news bulletin. That communication was ambiguous but properly construed using principles of contractual interpretation favoured the Claimant. Properly construed the bulletin meant that a woman whose maternity leave extended beyond 6 April 2019 was entitled to the 2019 Policy even if the leave started before that date.

54. I do not accept these submissions.

55. Firstly, the 2019 Policy and its commencement provisions were agreed collectively between the employer and the four recognised trade unions through an established policy making process. This started in a policy-subcommittee before being approved by the most senior joint consultation forum in the business, the Company Council. On my findings of fact all of the unions were aware that, content that and agreed that the 2019 Policy only applied to maternity leave commencing on or after 6 April 2019. That is a formidable obstacle for the Claimant.

56. However, I could accept that, in principle, it might be possible for an employer unilaterally introduce a more generous maternity policy than it had agreed with the unions. The issue is that I see no reason to conclude that this is what happened here.

57. The communications with the workforce (unlike the communication with payroll) was not as clear as it should have been. It left ambiguous what was meant by *"the policy will be backdated to the start of the current tax year (6th April 2019)"*. However, in my view, the way to resolve that ambiguity is simply to discover what in fact was agreed by the Company Council. The policy referred to in the news bulletin and other communications is the one that the Company Council agreed. That is what the news bulletin is about. That is true as a matter of fact. It is also what, in my view, any reasonable employee would have appreciated. This was a heavily unionised workplace in which it must have been well known that policy,

particularly in relation to pay, was made collectively with the trade unions. It would have been obvious therefore that there was some kind of agreement behind the announcement.

58. I would add that, in my view, the words of the news bulletin are not intended to be contractual wording. They are just a news item. They are telling the reader that a new policy has been agreed and approved. They give a short summary of what the new policy is and a short summary outlining the commencement provisions. The words do not purport to be comprehensive: I repeat, this was a news bulletin.

59. If I was wrong about the foregoing, and the key to this case is to apply principles of contractual construction to the phrase *"the policy will be backdated to the start of the current tax year (6th April 2019)"* or any similar phrase such as "*This change will be back-dated to 6th April 2019, the start of the 2019/20 Tax Year"* I nonetheless consider that the claim must fail. If I construe those phrases using the principles of construction Mr Shellum urges, nonetheless the 2019 Policy only applies to periods of maternity leave starting on or after 6 April 2019.

60. *Natural and obvious meaning of the clause* and *commercial common sense.* I think it is helpful to take these points together.

61. In my view, although it is not easy, the more natural, obvious and commercial common sense meaning is this: the 2019 Policy applies only to maternity leave commencing on or after 6 April 2019 but applies to all such leave even the part of it that took place prior to the policy being introduced in July 2019 (the Respondent's construction).

62. In my view this construction of the clause is natural and has commercial/industrial common sense. It gives a clean and workable way of delineating between the old and the new policy. Further, it firmly anchors the division between the old and the new policies to the 6 April 2019 in accordance with the words themselves. It is rational, certain and clear.

63. On the Claimant's construction, it matters not when maternity leave began, the 2019 Policy applies if the leave continues on or after 6 April 2019. I find this problematic. Take an example:

    63.1. Imagine a woman had taken 16 weeks of maternity leave by 6 April 2019. 10 weeks had been fully paid and 6 weeks paid at SMP in accordance with the 2011 Policy. What does it mean for her pay if the 2019 Policy applies to her? Mr Shellum's answer was that she would be entitled to a further 10 weeks of full pay, meaning that she would have in total 20 weeks full pay. In other words, weeks 1-10 of her maternity would be paid at full pay in accordance with the 2011 Policy; weeks 11-16 at SMP in accordance with the 2011 Policy; weeks 17 – 26 at full pay in accordance with the 2019 Policy and weeks 27 – 39 at SMP also in accordance with the 2019 Policy.

64. I find this hard to reconcile with the wording of the 2019 Policy and with the phrases being construed. The amount of leave that the woman gets is not the amount specified in the 2019 Policy. Nor is it the amount specified in the 2011 Policy. It is an intermediate amount in between the two. So the effect of this construction of the commencement provision is that the amount of paid maternity leave that the woman is entitled to is not actually stated in any policy document. It is a calculation that must be deduced and extrapolated from the amount of maternity leave that has gone before 6 April 2019. I do not think this construction is absurd. But I do not think it is anything like an obvious or natural meaning for the phrase under construction. It is awkward and I think it has less commercial/industrial common sense, than a construction in which the amount of leave the woman is entitled to is stated in a policy document. If the maternity pay entitlement in respect of a period of maternity leave fell to be determined by reference to two policies one would expect this to have been made clear and for there to have been provisions explaining how women who's leave straddled 6 April 2019 could work out their entitlement.

65. A further alternative construction, which nobody contended for, would be for the woman in the example above, simply to be entitled to 26 weeks full pay and 13 weeks SMP because part of her maternity leave fell after 6 April 2019. I do not find that a plausible construction. It goes further than backdating the policy to 6 April 2019. In a very real sense it backdates the policy beyond 6 April 2019 to whenever the maternity leave started.

66. *Other relevant provisions of the contract:* I was invited to consider the fact that the 2019 Policy refers to the rate of SMP for April 2019. I did consider that but I did not think it assisted with this exercise of construction. It is simply a statement of the prevailing rate of SMP.

67. *Overall purpose of the clause and agreement:* I accept that the purpose of the enhancement of the maternity policy was to retain and attract female staff. However, I do not think this sheds any significant light on the construction of the commencement provisions which were designed to set boundaries to the applicability of the policy.

68. *Facts and circumstances known or assumed when the contract was entered:* If, as I consider it should, this includes knowledge of what was agreed by the Company Council and/or that the policy had been agreed between employer and the unions, then this factor only points to the Respondent's construction. If it does not include that knowledge, then I think it is a neutral factor. Under this heading Mr Shellum made the point that the Claimant was the only member of the workforce I had heard from, and she had found the phrase under construction confusing. I do not think that takes matters anywhere. I accept that the phrase being construed is not easy to construe, but the Claimant's subjective state of mind is immaterial to construction.

69. *Budgetary considerations:* I think this is a neutral factor. It would cost more money for the commencement provisions to be as per the Claimant's interpretation but, given the size of the Respondent undertaking, not so much more as to have a material impact on the construction of this term one way or the other.

70. Overall, I reject the Claimant's construction in favour of the construction I identified above.

Conclusion

71. For the Reasons given I must dismiss the claim. However, I do salute Mr Shellum's valiant efforts which I very much appreciated.

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Employment Judge Dyal

Date: 15.10.2020

SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE