Case Nos: 3302029/2020; 3302193/2020; 3302194/2020; 3302195/2020; 3302196/2020; 3302197/2020; 3302198/2020; 3302199/2020; 3302200/2020; 3302201/2020 (V)

EMPLOYMENT TRIBUNALS

Claimants: (1) Mr J Crocombe
(2) Mr E Smith
(3) Mr M Smith
(4) Mr PD Carter
(5) Mr GG Anderson
(6) Mr I Allsop
(7) Mrs SE Ansell
(8) Mr T J Lardner
(9) Mr EJ Ferris
(10) Mr PJ Dunnell

Respondent: Tenon FM Ltd

Heard at: **Watford (by CVP)** **On:** **11 February 2021**

Before: **Employment Judge Reindorf (sitting alone)**

Representation

Claimant: Mr E Smith (claimant in person, on his own behalf and on behalf of the other claimants)

Respondent: Ms F Onslow (counsel)

RESERVED JUDGMENT

The claimants' claims of unauthorised deductions from wages contrary to section 13(1) of the Employment Rights Act 1996 are not well founded and are dismissed.

REASONS

Introduction

1. In a claim form presented on 20 January 2020, the claimants brought claims of unauthorised deductions from wages contrary to section 13(1) of the Employment Rights Act 1996. The complaints were that, following a TUPE transfer from the University of Hertfordshire to the respondent, the claimants were not awarded pay rises or given Christmas Bonus Vouchers to which they would have been entitled if they had remained in the employment of the transferor. The claimants argued that there were terms in their contracts of employment which entitled them to pay rises in accordance with collective agreements reached annually between the Universities and Colleges Employers Association and the relevant unions. Their case was that these terms transferred to their contracts of employment with the respondent after the TUPE transfer.

2. The respondent's defence was that there were no terms in the claimant's original contracts of employment which entitled them to pay rises in accordance with the collective agreements, and in any case any such terms would not have transferred into the claimants' contracts with the respondent because of the operation of Reg 4A of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended). The respondent also argued that the claim in relation to the pay rise in August 2018 had been presented out of time.

3. At a Preliminary Hearing on 10 November 2020 the claims brought against the transferor as second respondent were dismissed.

4. On 16 November 2020 the claimants withdrew their claims relating to unpaid Christmas Bonus Vouchers.

The issues

5. The issues were set out in an agreed list of issues as follows:

   <u>Applicable contractual terms</u>

   1. What are the express terms governing any pay rises to which the claimants are entitled? In particular:

1.1. At the date of the TUPE Transfer, did the Polytechnics contracts incorporate any annual agreements reached between the UCEA or the PCNNC and recognised trade unions and did the Polytechnic contracts confer a contractual right to be paid by the transferor in accordance with any such agreements?

1.2. At the date of the TUPE transfer, did the UH contracts incorporate any annual agreements reached between the UCEA and recognised trade unions and did the UH contracts confer a contractual right to be paid by the transferor in accordance with any such agreements?

1.3. If there was any contractual right to be paid by the transferor in accordance with any such annual agreements as at the date of transfer, was this right transferred to the contracts of employment with the respondent in respect of annual agreements reached after the date of transfer?

1.4. In respect of Ms Ansell only, what is the effect (if any) of the Tenon contract signed by Ms Ansell on 29 May 2019 on Ms Ansell's contractual right to be paid in accordance with any annual agreements reached between the UCEA and recognised trade unions?

1.5. What is the relevance (if any) to the above of (i) the FAQs issued by the University of Hertfordshire in February 2016 and (ii) the contents of the measures letter dated 11 May 2016?

2. Are there any implied terms and / or was there any variation of the terms governing pay rises to which the claimants are entitled? If so, what are they? With respect to this, what is the relevance (if any) of the fact that the claimants were awarded pay rises in October 2016 and August 2017?

3. What is the relevance (if any) of the fact that written updated contracts of employment (in which the annual agreements were not referred to) were not provided to the claimants following the TUPE Transfer?

4. Given the above:

4.1. Were the claimants entitled to pay rises in August 2018 in line with the collective agreement reached between the UCEA and the recognised trade unions?

4.2. Were the claimants entitled to pay rises in August 2019 in line with the pay rise awarded by the University of Hertfordshire? What is the relevance (if any) of the failure by the UCEA and the recognised trade unions to agree a collective agreement governing pay rises?

Time bar

5. Are the claims in respect of alleged unlawful deductions from wages made in the year from August 2018 to August 2019 (or any of them) out of time? In particular:

5.1. Do any unlawful deductions in pay constitute a series of deductions for the purposes of s.3(3) of the Employment Rights Act 1996?

5.2. If not, are the claimants (or any of them) entitled to rely on s.3(4) of the Employment Rights Act 1996?

The Evidence and Hearing

6. The hearing took place over two days. Due to the complexity of the issues judgment was reserved.

7. I heard evidence from Mr E Smith on his own behalf and on behalf of the other claimants. For the respondent I heard evidence from Ms Joanne Henderson (formerly the respondent's HR Director) and Ms Madeline Dennehy (currently the respondent's HR Director). All of the witnesses gave their evidence in chief in written statements.

8. There was also an unsigned and undated written statement in the bundle from Mr Neil Allen (UH Unison Branch Chair), Mr Richard Winter (UH Unison Branch Vice-Chair) and Ms Pat Bridges (UH Unison Branch Secretary) [428]. This statement had been prepared at the request of the claimants for the purposes of this hearing, but none of the union officials was called to give oral evidence to the Tribunal.

9. There was an agreed trial bundle consisting of 450 pages and an agreed chronology.

10. Ms Onslow for the Respondent prepared an extremely helpful skeleton argument and bundle of authorities which were sent to the Tribunal and to Mr Smith in advance of the hearing. Mr Smith provided a short written submission. I am grateful to both Ms Onslow and Mr Smith, who were thorough, conscientious and cooperative in their presentation of their cases.

Findings of Fact

11. All the claimants were employed by the University of Hertfordshire ("the University") as Maintenance or Helpdesk staff in its Estates, Hospitality and

Contract Services Directorate until 31 May 2016. On 1 June 2016 their employment transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the TUPE transfer"). At the time of the TUPE transfer the respondent was called Office and General.

12. Mr Crocombe (the first claimant) and Ms Ansell (the seventh claimant) had originally been employed by the University when it was the Hatfield Polytechnic Higher Education Corporation ("the Polytechnic"). When the University came into existence, they remained on contracts of employment issued by the Polytechnic. These were referred to in the hearing as the "Polytechnic contracts". The Polytechnic contracts stated:

    3.1 Your terms and conditions of service are determined by the Hatfield Board of Governors, having regard to the recommendations of the Polytechnics and Colleges National Negotiating Committee (PCNNC).

13. The PCNNC was the predecessor to the Universities and Colleges Employers Association ("UCEA").

14. The other eight claimants were employed under contracts of employment issued by the University. These were referred to as the "UH contracts". These contracts provided as follows:

    6. REMUNERATION

    6.2 In determining your salary review the Board of Governors will refer to national recommendations arising from negotiations between the Universities and Colleges Employers Association (UCEA) and the recognised trade unions.

    23. VARIATION

    Any agreements reached in future as a result of national or local negotiations between the employer(s) and the recognised unions shall, after adoption by the University Board of Governors, be automatically incorporated into your contract.

15. The University's policy on information, consultation and collective bargaining [319] states at paragraph 4.1.4 that *"it is accepted that agreements reached within the JNCHES or its successor body, will be recommended for implementation by all parties in the expectation that they will act in good faith. The University of Hertfordshire will pay due regard to these recommendations when determining pay and conditions for staff locally"*.

16. The University's practice was to award pay rises annually following national collective consultation between UCEA and the unions.

17. In 2015 the University began the process of tendering its maintenance contract. Mr Smith (the second claimant) was involved in this process as a union steward, although he did not have a central role in the discussions. He acted as the main point of contact in his team with Mr Allen, who represented the affected employees in the transfer negotiations and reported back to Mr Smith on the progress of the discussions.

18. The respondent was awarded the contract at some point prior to February 2016. Consultation with affected employees took place.

19. In February 2016 the University prepared a document containing answers to Frequently Asked Questions ("the FAQs") [282] to provide to the affected employees. Tracey Russell (the University's Assistant Director of Facilities) sent this document to Ms Henderson of the respondent for review.

20. One of the questions in the FAQs was "*How long do the new company have to honour our current term and conditions?*". The answer given was that *"generally speaking, changes cannot be imposed … conditions and benefits remain the same"*, and that the affected employees would be "*eligible for the same pay rises*". Ms Henderson did not raise any problems with Ms Russell about the answer given to this question when she reviewed the document.

21. The FAQs were issued to the affected employees, including the claimants, on 12 February 2016. A consultation meeting took place on that day. It is recorded in the minutes [281] that the question of whether transferred employees would remain eligible for the same pay rises was raised at the meeting.

22. On 11 May 2016 the respondent prepared its "measures letter" [295-296]. This contained the measures that the respondent anticipated for the transferring staff. it stated "*The salary structure will change to Office and General structure, i.e. every 12 months. A salary review does not, however, guarantee that any increase to salary will be implemented as any increases to salary are entirely at Office and General's discretion*".

23. The measures letter was emailed by the respondent to the University on 12 May 2016 [299]. By email on 16 May 2016 Ms Russell asked Ms Henderson *"as previously discussed we believe the collective pay agreement negotiated by Unison on an annual basis does apply – we have recently had a similar issue with some reception staff who transferred to Securitas and it was made clear by Unison that the collective pay agreement does apply under TUPE rules. Can you provide your legal position on this?*" [298].

24. The following day Ms Henderson replied:

> *"the legal position is that in accordance with Reg 5 of TUPE, existing collective agreements do transfer. The collective agreement needs to be between the transferor (in this case UH) and a union recognised by the transferor (in this case Unison) and cover the relevant transferring employees (UH maintenance team and helpdesk). However, collective agreements are not regarded as enforceable (s179 TULCRA) as between the union and transferee (O&G). So terms agreed under a collective agreement post transfer do not apply unless the transferee agrees – this reflects the "static" interpretation of collective agreement, so that the terms effectively "freeze" at the date of transfer. So agreements on pay increases agreed post transfer would not apply"* [297-298].

25. Ms Henderson followed this up on 31 May 2016, the day before the transfer, with a further email to Ms Russell asking her whether she was happy for the explanation to be forwarded to Mr Allen [297]. She commented *"He didn't raise it at the meeting but feel we don't want the transfer to happen without the clarification as this may cause problems further down the line"*. In response, Ms Russell asked Ms Henderson to *"hold off for a bit*" while she reviewed the explanation because she didn't want to *"set more hares running*" [297]. By email the same day Ms Henderson agreed, and volunteered that she was happy to wait until after transfer as long as it was not left until the next "recognition agreement" [297]. By this Ms Henderson meant the next pay rise collectively agreed between UCEA and the unions. She did not know whether the measures letter had been shared with the transferring employees or not at this point, but she assumed that it had been.

26. The fact that Ms Russell was asking for clarification of the measures letter so that she could discuss it with Mr Allen shows that she had shown him the measures letter at the meeting she mentioned in her email of 31 May 2016. However, the claimants were not shown it, whether by Mr Allen or otherwise.

27. The transfer went ahead on 1 June 2016.

28. On 16 June 2016 Ms Russell sent an email to Ms Henderson containing Unison's position as to the entitlement of the transferred employees, which was as follows:

> *"Collective agreements and nationally agreed measures are part of individual contract terms and transfer with an individual to their new employer.*
>
> *Recent case law has reviewed such issues and recognises that the new employer can renegotiate such agreements but their proposals should not be less favourable to the employee than what they currently enjoy.*

Unison's view is that our members entitlement to national agreed pay awards had transferred with them and we expect O&G [the respondent] to honour these.

Given that the pay awards take effect from 1st August, we have time to resolve this. If O&G failed to implement, I'm advised that Unison would take action for non-payment of salary" [314].

29. There followed discussion and correspondence between Ms Henderson and Mr Allen about the terms of new draft contracts of employment for the transferred staff. These draft contracts provided:

Your salary will be reviewed annually. A salary review does not, however, guarantee that any increase to salary will be implemented as any increases to salary are entirely at Office and General's discretion [304].

30. On 2 June 2016 Mr Allen emailed Ms Henderson and Ms Russell with his response to the draft contracts. As to pay rises, he commented *"Expectation that nationally negotiated pay awards, which form part of TUPE'd T&Cs of UH staff, will be implemented"* [304].

31. On 10 August 2016 Ms Henderson emailed Ms Russell saying that she had explained to Mr Allen that the respondent did not accept the transfer of *"pre-existing collective agreements"* but that it was prepared to award transferred staff pay rises in accordance with that year's collective agreement *"whilst we argue the point"* [348]. The draft contracts of employment were never issued to the claimants.

32. The claimants were awarded pay rises with effect from 1 August 2016. The letter informing Mr Smith (the second claimant) of this pay rise is dated 21 October 2016 [233]. It states that he was awarded a 1.1% salary increase. It makes no mention of the collective agreement.

33. The following August the claimants were again awarded pay rises in line with those agreed in the collective consultation between UCEA and the unions. The wording in the letters in October 2017 which informed the claimants of the pay rises was as follows:

Following a national pay negotiation for 2017-18, we are pleased to inform you that the Universities and Colleges Employment Association (UCEA) has now reached an agreement with the unions and confirmed that there will be a pay award for 2017-2018 with effect from August 2017. Therefore, you will receive a pay award of 1.7% which will be backdated to August 2017 [234].

34. This pay rise followed a series of emails which had concluded with Ms

Henderson informing Mr Tim Hancock (the respondent's CEO) on 5 October 2017 that the transferred staff were entitled to the pay rise. In cross-examination Ms Henderson could not remember why she had come to this conclusion in 2017, having been clear in 2016 that the transferred employees were not entitled to pay rises in accordance with the collective agreements.

35. In December 2017 Ms Dennehy succeeded Ms Henderson as HR Director for the respondent.

36. In August 2018 the University implemented a pay rise in advance of the conclusion of pay negotiations between UCEA and the unions. Mr Smith (the second claimant) was informed of this in an email from Mr Allen on 23 August 2018 [368]. In October 2018 Ms Russell emailed Ms Dennehy bringing to her attention the part of the FAQs of 2016 which assured the transferred employees that they would be awarded the same pay rises after the transfer as they had been eligible for when they were employed by the University [369].

37. At a meeting on 5 December 2018 [393 – this document is misdated 6 December] Ms Dennehy told the transferred employees that the respondent would not be awarding them a pay rise for 2018. She made reference to the measures letter and said that it would have been issued to the transferred employees by the University. Having not been involved in the transfer in 2016, Ms Dennehy was not aware that the measures letter had not been shown to the transferred employees. At the meeting Mr Smith (the second claimant) told Ms Dennehy that he wanted to take the matter to the Employment Tribunal but had been advised not to do so at the moment.

38. The following day Mr Smith (the second claimant) asked Ms Dennehy by email for a copy of "what it is we supposedly signed in May 2016" [394]. By this he meant the measures letter. He did not receive a response to this email.

39. The claimants did not receive a pay rise in 2018.

40. On 7 February 2019 Mr Allen emailed Mr Smith (the second claimant) an agenda for a forthcoming meeting, which stated that it was intended to obtain a legal opinion from Thompsons Solicitors about the pay rise issue, which was *"the priority for our members"*. It appears that contact was made with Thompsons thereafter (see for example Mr Allen's email to Mr Smith of 18 July 2019 [422]). At around this time the relationship between Unison and the claimants broke down because of their handling of the complaint (witness statement of Mr Smith, paragraph 32).

41. On 10 April 2019 Ms Ansell (the seventh claimant) was granted a flexible working arrangement [142]. Her contract of employment, which she signed

on 29 May 2019, was amended to reflect this [144]. Her new contract made no mention of collective agreements or pay rises.

42. The matter of pay rises for transferred employees arose again in April 2019. A meeting took place on 3 July 2019 between Ms Dennehy, Mr Ivan Zambrano (the respondent's Partnership Director), Ms Russell and Karen Withers of the University. Ms Dennehy stated at this meeting that the respondent's position remained that it would not be awarding the transferred employees pay rises in accordance with collective agreements reached between UCEA and the unions. This was relayed in an email from Mr Phil Clarke (Director of HR at the University) to Mr John Crocombe (the first claimant) on 25 October 2019 [424].

43. On 25 November 2019 the claimants lodged a grievance with Ms Dennehy [427]. This complained of unauthorised deductions from their pay, in that they had not been awarded pay rises of 2% in August 2018 and 1.8% in August 2019. Ms Dennehy rejected the grievance by email on 2 January 2020 [425-426].

44. In 2019 no collective agreement was reached between UCEA and the unions. The University made an award of 1.8% in the absence of a collective agreement [423]. To date, a pay award has not been agreed between UCEA and the unions for 2019.

45. The claimants lodged their claim on 20 January 2020.

The law

Unauthorised deductions from wages

46. By s.13 of the Employment Rights Act 1996 ("ERA 1996") an employer must not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

47. By s.23(1) ERA 1996 a worker may present a complaint to the Employment Tribunal that his employer has made a deduction from his wages in contravention of s.13 ERA. The time limit is 3 months beginning with the date of payment of the wages from which the deduction was made (s.23(2)(a) ERA 1996) with an extension for early conciliation, unless it was not reasonably practicable to present the claim in time and it was presented within such

further period as the Tribunal considers reasonable.

48. If the complaint is about a series of deductions or payments, the three month time limit starts to run from the date of the last deduction or payment in the series (s.23(3) ERA 1996).

The effect of TUPE

49. Regulation 4(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) ("TUPE") operates to automatically transfer from the transferor to the transferee the contracts of employment of persons employed by the transferor who were assigned to the relevant part of the business. After the transfer the original contract of employment has effect as if it were made between the employee and the transferee.

50. Reg 4(4) of TUPE provides that any purported variation of a contract of employment which has been transferred under Reg 4(1) is void *"if the sole or principal reason for the variation is the transfer".* However a variation may be made to such a contract of employment if *"the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation"* (Reg 4(5)(a) TUPE).

51. By Reg 4A TUPE:

> *Where a contract of employment, which is transferred by regulation 4(1), incorporates provisions of collective agreements as may be agreed from time to time, regulation 4(2) does not transfer any rights, powers, duties and liabilities in relation to any provision of a collective agreement if the following conditions are met—*
>
> *(a) the provision of the collective agreement is agreed after the date of the transfer; and*
>
> *(b) the transferee is not a participant in the collective bargaining for that provision.*

52. Reg 4A reflects the decision of the Court of Justice of the European Union in *Alemo-Herron v Parkwood Leisure Ltd* C-426/11 [2013] IRLR 744 which concerned Article 3(1) of the EC Business Transfers Directive 77/187, which is codified by Directive 2001/23 and implemented by TUPE. The CJEU held that *"dynamic clauses"* in contracts of employment are not enforceable against a transferee. That is, the Directive does not require a transferee to comply with any collective agreement that was made after the transfer, where

the transferee has not participated in the negotiation process which led to the collective agreement.

Implied contractual terms

53. Separately to any TUPE principles, a term may be implied into a contract of employment in certain circumstances. This means that even if it is not written in the employee's contract of employment that he is entitled to a particular benefit, the employer's words and actions over time show that the employee and the employer have accepted that the benefit has crystallised into a contractual entitlement for the employee. This is known as an term which is incorporated into the contract because of an established "custom and practice" (see *Solectron Scotland Ltd v Roper* [2004] IRLR 4 EAT). The practice must be *"reasonable, notorious and certain"* (*Devonald v Rosser & Sons* [1906] 2 KB 728 at 743).

54. For a term to be implied, the policy or benefit in question must have been drawn to the attention of the employees or have been followed without exception for a sufficient period, in the context of the other circumstances, to support the inference that the employer intended to be bound by it (*Duke v Reliance Systems Ltd* [1982] ICR 449 EAT, *Quinn v Calder Industrial Materials Ltd* [1996] IRLR 126 EAT). An implied term of this sort must reflect what the parties *"have actually agreed"* (*Quinn*). The question is whether the employer's conduct (including anything said by him) was such, viewed objectively, as to convey to the reasonable employee that he intended to be bound (*Park Cakes Ltd v Shumba* [2013] EWCA Civ 974). It must be shown that the employer has applied the term because it has *"a sense of legal obligation to do so"* (*Roper*).

55. The essential question is *"whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy that benefit as of right"* (*Park Cakes* at para 35).

56. The matters to consider in determining whether a benefit or policy has become incorporated into the contract of employment by custom and practice typically include:

    56.1. On how many occasions, and over how long a period, the benefits in question have been paid.

    56.2. Whether the benefits are always the same. Any inconsistency is likely to be fatal.

56.3. The extent to which the enhanced benefits are publicised generally so as to create *"widespread knowledge and understanding"* on the part of employees. This may include publication to a union or a group of employees.

56.4. How the terms are described. If they are described as discretionary or ex gratia "*it is hard to see how the employees or their representatives could reasonably understand them to be contractual"*.

56.5. What is said in the express contract since "*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"*.

56.6. Equivocalness. The employee will not be able to show that the practice has become contractual 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*".

(*Park Cakes* at para 36. See also *McAlinden v CSC Computer Sciences Ltd* [2013] EWCA Civ 1435)

57. The burden of proof is on the person asserting the existence of the contractual term.

The parties' submissions

58. The claimants' position, ably argued by Mr Smith (the second claimant) on their behalf, was that:

58.1. The claimants had been assured before the transfer that their entitlement to pay rises in accordance with the collective agreements reached between UCEA and the unions would be preserved after the transfer. They had been told this in the FAQs and in the meeting on 12 February 2016.

58.2. The FAQs were not produced by the respondent but Ms Henderson had had an opportunity to review them before they were issued, and she did not make any changes to what the document said about pay rises.

58.3. The claimants had never seen the measures letter.

58.4. The claimants had been awarded the relevant pay rise in 2016 and again in 2017. In 2016 there was no mention of the pay rise being a *"good will gesture"*. It was not a random amount, but in line with the collective agreement. In 2017 they had been told specifically that the pay rise was in accordance with the collective agreement. The respondent's submission that it made a mistake in 2017 was not a strong enough explanation. These two pay rises formed a chain.

58.5. In 2018 the respondent had stopped awarding the pay rise and denied that the claimants were entitled to it. That was the first they knew of the respondent's position. They queried it with Ms Dennehy at the meeting on 5 December 2018 and Mr Smith told her that he would take it to an Employment Tribunal. He did not receive a response to his email to Ms Dennehy of the following day. It was therefore not right to say that the claimants had waited until November 2019 before bringing a grievance about the issue.

58.6. The pay rise was again withheld in 2019.

59. Ms Onslow set out the respondent's position in her skeleton argument, upon which she expanded in oral closing submissions. Quite properly, she assisted me in understanding how the claimants' case was best presented in the context of the relevant legal principles.

60. In summary, she argued that:

60.1. Even prior to the TUPE transfer, there was no contractual term which entitled the claimants to pay rises in accordance with the collective bargaining process. The threshold of certainty had not been reached because neither the Polytechnic contracts nor the UH contracts stated that the claimants would be entitled to pay rises in accordance with the collective agreements. The Polytechnic contracts said that the University would have "*regard to the recommendations*" arising from the negotiations. The UH contracts said that the University would *"refer to national recommendations arising from negotiations*". Clause 23 of the UH contracts did not assist the claimants because it provided that agreements reached as a result of negotiations with the unions must be adopted by the Board of Governors of the University before they would be automatically incorporated into the contracts of employment. That interpretation was supported by paragraph 4.1.4 of the University's policy on information, consultation and collective bargaining. Therefore even if the express terms of the contracts survived the transfer, at best they conferred a discretion on the employer to accept the results of the collective bargaining or not.

60.2. Even if there was such a term, it was not transferred to the claimants' existing employment contracts because of Reg 4A TUPE. Therefore the respondent was not bound by any collective agreements reached after the date of the transfer.

60.3. There was no implied term which incorporated any collective agreements in respect of pay rises. The test was not what the claimants would reasonably have expected, but was by reference to whether the respondent's conduct evidenced an intention to be bound contractually. A single pay rise in 2017 was not sufficient to evidence such an intention. The FAQs and consultation meeting were not communications from the respondent and the claimants were not aware at the time that the respondent had had some limited input into the FAQs. The measures letter, the draft contracts of employment and the way in which the August 2016 pay rise was communicated and discussed were factors pointing away from the implication of a term. The Tribunal should infer that the measures letter was shown to Mr Allen from the fact that clarifications were requested by Ms Russell for the purpose of discussing it with him. That was sufficient publication of the respondent's position, although in any event there was no need for the respondent to publicise the status quo (which was that there was no entitlement to pay rises in accordance with the collective agreements because of the operation of Reg 4A TUPE). The draft contracts of employment were shown to Mr Allen and he was told in 2016 that the respondent would *"pay this year's increase while we argue the point"*. Mr Allen clearly knew what the respondent's position was in 2016.

60.4. Even if the respondent was bound by the collective agreements, there was no collective agreement reached in respect of the year from August 2019 and therefore the claimants' claims for that period must fail. It was wrong for Mr Smith (the second claimant) to suggest during the hearing that the claimants were entitled not merely to pay rises in accordance with the collective agreements but to the same pay rises that they would have been entitled to if they remained employed by the University. For that position to be correct, there would have to be a term implied into the contracts of employment to that effect. This was raised for the first time during the hearing. There had been no communication from the respondent to indicate that this entitlement would be granted to the claimants. The FAQs and the statements made at the meeting on 12 February 2016 were not made by the respondent and were equivocal and unclear.

60.5. Ms Ansell's contract of employment was varied because of her request for flexible working. This was a permissible variation within Reg 4(1) TUPE.

60.6. The claimants' claims in respect of the August 2018 pay rise were in any event time-barred. The 2018 pay rise and the 2019 pay rise did not amount to a series of deductions because they related to different years and were purportedly due on a different basis, since in 2019 no collective agreement was reached. There was no basis for the Tribunal to extend time. The reason for the delay to bring the claim in respect of the 2018 pay rise appeared to be the claimants' union dragging its heels and advising the claimants not to bring a claim.

Conclusions

Issue 1: What are the express terms governing any pay rises to which the claimants are entitled?

61. The overall answer to this question is that after the transfer there were no express terms (that is, effective written terms) in the claimants' contracts of employment relating to pay rises. There were written terms about pay rises in the claimants' contracts of employment when they were employed by the University. However these did not survive the transfer because of the operation of Reg 4A of TUPE. This is explained in more detail below.

Issue 1.1: At the date of the TUPE transfer, did the Polytechnic contracts incorporate any annual agreements reached between the UCEA or the PCNNC and recognised trade unions and did the Polytechnic contracts confer a contractual right to be paid by the transferor in accordance with any such agreements?

62. I have concluded that the Polytechnic contracts did not at any time incorporate the collective agreements or give the first and seventh claimants a contractual right to be paid in accordance with the collective agreements.

63. The written terms about pay rises in the Polytechnic contracts only said that the University would *"have regard"* to the collective agreements (clause 3.1). This is not the same as a right for the employees to be paid in accordance with the collective agreements. As long as they had regard, in good faith, to the collective agreements, the Polytechnic (and later the University) were entitled to award a pay rise which was not in accordance with the collective agreement, or no pay rise at all.

Issue 1.2: At the date of the TUPE transfer, did the UH contracts incorporate any annual agreements reached between the UCEA and recognised trade unions and did the UH contracts confer a contractual right to be paid by the transferor in accordance with any such agreements?

64. I have reached the same conclusion in respect of the UH contracts as I have reached above in relation to the Polytechnic contracts. That is, the UH contracts did not at any time incorporate the collective agreements or give the second, third and fifth to tenth claimants a contractual right to be paid in accordance with the collective agreements.

65. The UH contracts only contained an express provision which said that the University would refer to the collective agreements (clause 6) and another express provision saying that the collective agreements would be automatically incorporated into the contracts after adoption by the University's Board of Governors. The Board of Governors had a discretion in relation to whether to adopt the recommendations in the collective agreements. This is not the same as a right for the relevant claimants to be paid in accordance with the collective agreements.

Issue 1.3: If there was any contractual right to be paid by the transferor in accordance with any such annual agreements as at the date of transfer, was this right transferred to the contracts of employment with the respondent in respect of annual agreements reached after the date of transfer?

66. Even if the Polytechnic contracts and/or the UH contracts incorporated the collective agreements, any right to be paid in accordance with the collective agreements did not transfer into the claimants' contracts of employment with the respondent.

67. Regulation 4A of TUPE is very clear that the contracts of employment of employees who have transferred do not incorporate terms which would bind the new employer to a collective agreement which has not yet been made, if the employer does not have the right to be part of the collective bargaining which will lead to the collective agreement.

68. In this case, the respondent was not part of the negotiations between UCEA and the unions. Therefore, by operation of law, they were not bound by the collective agreements which were made between UCEA (or its predecessor) and the unions after 1 June 2016.

Issue 1.4: In respect of Ms Ansell only, what is the effect (if any) of the Tenon contract signed by Ms Ansell on 29 May 2019 on Ms Ansell's contractual right to

be paid in accordance with any annual agreements reached between the UCEA and recognised trade unions?

69. Ms Ansell's contract of employment was varied because of her request for flexible working. Insofar as the variation concerned her working hours, this was not a variation which took place because of the transfer within Reg 4(1) TUPE. Rather, it was a variation which was made by agreement for a permissible reason. However that does not apply to any variations to Ms Ansell's entitlement to pay rises under her new written contract. If the respondent made changes to her entitlement to pay rises in the new contract, these would not have been made for a permissible reason under Reg 4(1) TUPE and would therefore have been void.

70. I have concluded that the respondent did not make changes to Ms Ansell's entitlement to pay rises in her new written contract of employment dated 29 May 2019. This is because, for the reasons given above, there were no terms in her original contract of employment relating to pay rises which transferred into her employment by the respondent. In any case, as I have concluded above, there were no terms in her contract of employment with the University which guaranteed that she would be paid in accordance with the collective agreements.

71. Therefore Ms Ansell's case should be approached in the same way as those of the other claimants.

Issue 1.5: What is the relevance (if any) to the above of (i) the FAQs issued by the University of Hertfordshire in February 2016 and (ii) the contents of the measures letter dated 11 May 2016?

72. The FAQs and the measures letter are not relevant to the question of whether the claimants' contracts of employment contained terms entitling them to pay rises in accordance with the collective agreements when they were employed by the University. I have found above that the terms about pay rises did not give the claimants this entitlement, because the pay rises were discretionary under the contracts.

73. These documents are also irrelevant to the question of whether, if there were effective written terms entitling the claimants to pay rises in accordance with the collective agreements, those terms transferred to their contracts of employment with the respondent. The effect of Reg 4A TUPE is automatic. It does not depend on whether or not the transferee made a commitment to honour the collective agreements.

74. The FAQs and the measures letter are relevant to the question of whether a

term might be implied into the claimants' contracts of employment with the respondent to the effect that the respondent would honour the collective agreements in future. I deal with this below.

Issue 2: Are there any implied terms and / or was there any variation of the terms governing pay rises to which the claimants are entitled? If so, what are they? With respect to this, what is the relevance (if any) of the fact that the claimants were awarded pay rises in October 2016 and August 2017?

75. I have concluded that there was no implied term in the claimants' contracts of employment which either:

    75.1. said that the respondent would honour the collective agreements; or

    75.2. said that the respondent would give the claimants the same pay rises that they would have received if they had remained employed by the University.

76. My reasons for deciding that there was no implied term saying that the respondent would honour the collective agreements are as follows:

    76.1. The claimants never had terms in their contracts of employment which had this effect. See Issues 1.1 and 1.2 above. The terms about pay rises that there were in their contracts of employment were discretionary. They could not therefore reasonably be described as giving a contractual right to pay rises in accordance with the collective agreements.

    76.2. The respondent only once made a statement to the claimants that indicated that it might honour the collective agreements. This was when it awarded them a pay rise in accordance with the collective agreements in 2017. I accept that this was a mistake by the respondent. Objectively, it did not amount to an intention to vary the contracts of employment, since it was a one-off and the letters announcing the pay rise did not describe it as a contractual right, although it is possible to understand why the claimants might have read it in that way. It must be considered in the context of the circumstances described below, which show that the respondent did not conduct itself in such a way over a period of time as to indicate that it intended to be bound by the collective agreements.

    76.3. On at least two occasions in 2016 the respondent published its position to the claimants through Mr Allen, who was their union representative who was acting as their intermediary in relation to their terms and conditions of employment. Firstly, the respondent made its

position clear in the measures letter, which Mr Allen was shown. Secondly Ms Henderson told him in August 2016 that the respondent did not accept that the collective agreements had transferred but that it would award the pay rises that year while they argued the point. This took place in the context of a discussion between Ms Henderson and Mr Allen about new written contracts of employment which did not include entitlement to the collective agreement pay rises. Thus the 2016 pay rise was clearly awarded as a matter of discretion, and was described to Mr Allen as such.

76.4. The FAQs document issued in 2016 was not published by or given to the claimants by the respondent. It was a document prepared by the University and presented to the claimants by the University in a consultation meeting which the respondent did not attend. The limited input which the respondent had to the FAQs document was not known to the claimants, and was not, in any case, sufficient to indicate that the respondent intended to be bound by the collective agreements.

76.5. From 2018 the respondent made its position clear on several occasions: to the claimants at the meeting on 5 December 2018; to Mr Allen at the meeting on 3 July 2019; and in Ms Dennehy's grievance response on 2 January 2020.

76.6. This series of events shows that the respondent did not unequivocally communicate to the claimants that it intended to be bound by the collective agreements. There was not *"widespread knowledge and understanding"* on the part of the claimants that the collective agreements would be honoured.

76.7. The two occasions on which the respondent awarded the pay rises, in 2016 and 2017, do not amount to sufficient repetition of the payment to show that the respondent intended the pay rises to have contractual effect. This is in part because the circumstances described in the subparagraphs above show that the respondent expressed the contrary intention both before and after its mistaken statement about its position in 2017.

76.8. A contractual commitment by the respondent to abide by collectively agreed pay rises would not be reasonable in circumstances where the respondent would play no part in negotiating the pay rises.

76.9. Taking into account all the circumstances, therefore, I have concluded that there were not sufficient words or actions of the respondent which

meant that a contractual term that the respondent would observe the collective agreements was *"reasonable, notorious and certain"*.

77. My reasons for deciding that there was no implied term saying that the respondent would give the claimants the same pay rises that they would have received if they had remained employed by the University are as follows:

    77.1. No statements were made by the respondent to this effect other than, arguably by implication, in the letter awarding the 2017 pay rise.

    77.2. The respondent was not unequivocally responsible for the FAQs, for the reasons given above.

    77.3. The respondent made clear in the measures letter that "*the salary structure will change to Office and General structure*". This was published to Mr Allen who was the claimants' representative.

    77.4. The respondent clarified its position on the occasions listed above.

Issue 3: What is the relevance (if any) of the fact that written updated contracts of employment (in which the annual agreements were not referred to) were not provided to the claimants following the TUPE Transfer?

78. It would have been preferable if the respondent had issued new contracts of employment which set out the position as to pay rises. However the draft contracts of employment were discussed with Mr Allen, and the respondent's position as to pay rises was also repeated in other contexts (as described above). In context, the fact that the contracts were never issued does not mean that the respondent omitted to make its position clear about pay rises or that it decided not to take that position.

Issue 4: Given the above:

Issue 4.1: Were the claimants entitled to pay rises in August 2018 in line with the collective agreement reached between the UCEA and the recognised trade unions?

79. The claimants were not contractually entitled to pay rises in 2018 in accordance with the collective agreements. Even if they were so entitled because their contracts contained a term to this effect, this was the last occasion before they lodged their claim on which they would have been entitled to this pay rise. This is because there was no collective agreement for 2019. I address in Issue 5 below the consequences of this in relation to the timing of the claim.

Issue 4.2: Were the claimants entitled to pay rises in August 2019 in line with the pay rise awarded by the University of Hertfordshire? What is the relevance (if any) of the failure by the UCEA and the recognised trade unions to agree a collective agreement governing pay rises?

80. The claimants were not contractually entitled to pay rises in 2019 in line with that awarded by the University. As I have concluded above, there was no express or implied term in their contracts of employment which entitled them to the same pay rises that they would have received if they had continued to be employed by the University.

81. The relevance of the fact that no collective agreement was reached concerning pay rises for 2019 is addressed in the paragraph above.

Issue 5: Are the claims in respect of alleged unlawful deductions from wages made in the year from August 2018 to August 2019 (or any of them) out of time? In particular:

Issue 5.1: Do any unlawful deductions in pay constitute a series of deductions for the purposes of s.3(3) of the Employment Rights Act 1996?

82. The pay rises are capable of amounting to a series of deductions, if they are described as "the same pay rises that the claimants would have been entitled to if they had remained employed by the University". This is, in effect, how the pay rises were described in the FAQs, and appears to be the claimants' understanding. I observe that it is not unreasonable for the claimants to have that understanding, given that this is what they were told by the University in the FAQs, and that it appears to have taken Mr Allen until some point in 2018 to explain to them the respondent's position as described in the measures letter and in the contract discussions in 2016.

83. Therefore, if this is the basis on which the claimants argue their case, it was presented in time. It is arguable that the claims were not presented to the Tribunal on this basis. I do not consider it necessary to consider whether a formal amendment of the claims is necessary, because the complaint fails in any event for the reasons described above.

84. The pay rises are not capable of amounting to a series of deductions if they are described as "pay rises in accordance with the collective agreements". This is because in 2019 there was no collective agreement, so if any pay rise had been awarded in that year it would have been on the basis that it was what the University would have awarded. The 2018 and 2019 pay rises would therefore have been awarded on different bases. If the claim is understood in

this way, the complaint in respect of the 2018 pay rise was presented out of time.

Issue 5.2: If not, are the claimants (or any of them) entitled to rely on s.3(4) of the Employment Rights Act 1996?

85. If the claim for the 2018 pay rise was presented out of time, I conclude that it was reasonably practicable for it to be presented in time. The only evidence as to why the claim was not presented earlier was that Mr Smith (the second claimant) told Ms Dennehy in the meeting on 5 December 2018 that he had been advised not to bring a claim yet. It appeared from the documentary evidence that Thompsons Solicitors had been engaged by July 2019 at the latest. At that time the relationship between Unison and the claimants broke down. These circumstances are not such as to support a finding that it was not reasonably practicable for the claim to have been presented earlier in respect of the 2018 pay rise.

Summary of conclusions

86. The claimants' claims have not succeeded because:

    86.1. There was no term in their contracts of employment when they were employed by the University which guaranteed that they would be paid in accordance with the collective agreements. Therefore no term of that sort could have transferred into their contracts of employment with the respondent.

    86.2. Even if there was a term of that sort in their contracts of employment with the University, it did not transfer to their employment by the respondent because of the operation of Reg 4A TUPE.

    86.3. There was no implied term in their contracts of employment with the respondent which said that they would be granted pay rises in accordance with the collective agreements.

    86.4. There was no implied term in their contracts of employment with the respondent which said that they would be awarded the same pay rises that they would have been awarded if they had remained employed by the University.

    86.5. Therefore they were not entitled to be awarded pay rises in accordance with the collective agreement in August 2018. Further,

they were not entitled to pay rises in line with the University's award in August 2019.

86.6. Even if there was an implied or transferred term in their contracts of employment that they would be paid in accordance with the collective agreements, that term could only have had effect in relation to the August 2018 pay rise. It could not apply to the 2019 pay rise because there was no collective agreement in that year. The claim in relation to 2018, standing alone, was presented out of time and it was reasonably practicable for the claim to have been presented within the time limit.

Employment Judge Reindorf

Date: 8 March 2021

JUDGMENT SENT TO THE PARTIES ON

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15/03/2021
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FOR THE TRIBUNAL OFFICE