EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102001/2020 (LEAD CASE) and others in Multiples 9310, 9313, 9349 and 4108322/2021

Final Hearing Held by CVP on 18th and 19th May 2021 at 10.00am
Employment Judge Russell Bradley

Mr Keith Davis	**Claimant** **Represented by** **Mr A Ohringer** **Barrister**
Mr Graeme Keenan	**Claimant** **Represented by** **Mr M Briggs** **Solicitor**
Rosyth Royal Dockyard Limited	**Respondent** **Represented by** **Ms K Russell** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that: -

1. The claim by John Gourlay (4108322/2021) for a statutory redundancy payment is dismissed;
2. The claims for damages for breach of contract succeed; the respondent shall pay damages to each claimant as set out in this table

Claimant	**Case number**	**Sum due**
Alistair Riddoch	4101088/2020	£3506.00
Alan James Appleby	4101089/2020	£4504.00
Joseph Scally	4101090/2020	£3070.00
Ronald Ian Blyth	4101091/2020	£4189.00
Ian Robert Johnston	4101092/2020	£3113.00
Michael Ballantine	4101093/2020	£4481.00
Mark Paterson	4101094/2020	£2975.00
Christine Turnbull	4101095/2020	£1323.00
Graham Keenan	4100990/2020	£2230.00
James Bartie	4100991/2020	£1683.00
Derek Barr	4100992/2020	£3070.00
Andrew Reid	4100993/2020	£3586.00
Charles Beveridge	4100994/2020	£2599.00
Ian Haddow	4100995/2020	£2266.00
Robert Caird	4100996/2020	£2599.00
Colin Milne	4100997/2020	£2503.00
Andrew John Roger	4100999/2020	£2506.00
John Stewart Hodge	4101000/2020	£2584.00
Stephen Hunter	4101001/2020	£2506.00
Ian Russell	4101002/2020	£2339.00
James Scade	4101003/2020	£2015.00
Derek Brown	4101004/2020	£2599.00
David Cowan	4101005/2020	£2418.00
Anthony Connelly	4101006/2020	£1299.00

John Baxter	4101007/2020	£2599.00
John Nelson	4101008/2020	£2305.00
Douglas Swatton	4101009/2020	£2126.00
James Gibb	4101010/2020	£2284.00
Christopher Farley	4101011/2020	£2474.00
Gordon Hynd	4101012/2020	£1922.00
Joseph Brown	4101013/2020	£2310.00
Alexander Logan	4101014/2020	£2059.00
Kenneth Small	4101015/2020	£2416.00
Clifford Dudley	4101016/2020	£2478.00
William Simpson	4101017/2020	£2599.00
Peter Kirk	4101018/2020	£2215.00
Cameron Neil	4101019/2020	£4278.00
David Davidson	4101020/2020	£1837.00
Kenneth Bryce	4101021/2020	£2837.00
George Brownlie	4101440/2020	£2621.70
Keith Davis	4102001/2020	£2357.88
Andrew Duff	4102002/2020	Nil
Charles Henderson	4102003/2020	£2621.70
Peter Martin	4102004/2020	£2621.70
Stewart Wilson	4102006/2020	£2526.30
James Wilson	4102007/2020	£1980.84
A Nicholson	4103610/2020	£2599.00
John Gourlay	4108322/2021	£2621.70

Introduction

1. This was a final hearing to determine claims of breach of contract. Specifically the claims were in respect of an alleged failure to pay amounts said to be due as contractual redundancy payments. The term relied on by the claimants is within a collective agreement dated July 1997.

2. With the exception of one claimant, their names and case numbers are as per an agreed list. They were presented in 2020 ("*the 2020 claims*"). I say more about the list at paragraph 8 below. The exception was the claim by John Gourlay which was presented on 15th March 2021. Nothing turns on the date of his application.

3. The 2020 claims were the subject of some case management. Orders from preliminary hearings were in the bundle (**pages 34 to 56**). The 2020 claims were conjoined. By order dated 16th April 2021 the tribunal ordered that the 2020 claims be heard together with Mr Gourlay's claim.

4. While the bundle paperwork disclosed a number of respondent entities, it was agreed that the correct respondent is Rosyth Royal Dockyard Limited.

5. The claims made by Unionline Scotland (Keith Davis and others) and John Gourlay were presented by Mr Adam Ohringer, Barrister. The remaining claims (G Keenan and others) were presented by Mr Michael Briggs, Solicitor. The respondent was represented by Ms Katie Russell, Solicitor.

6. In advance of the start of the hearing parties had lodged an indexed bundle of 366 pages and written witness statements of those who gave evidence.

7. Prior to closing submissions, all representatives lodged authorities to which reference was to be made. The total volume of that material was considerable.

8. **Page 59** of the bundle was indexed as "*Costs calculations*". With the exception of Mr Gourlay's claim, it listed all claimants. Opposite each name was an agreed sum. There was agreement on the amount due to each claimant in the event that the claims succeeded. **Page 59A** contained the corresponding agreement for Mr Gourlay. I am grateful to parties' representatives for reaching agreement on those sums.

The issues

9. **Pages 57 to 58** of the bundle contained a list of issues. It was obvious from the comments on **page 58** that agreement had not been reached on a number of aspects of Issues 3 and 4.

10. In discussion prior to hearing evidence, it was agreed that:-

    1. I could delete *"(if any)*" in issue 2

    2. The primary issue (2) was to be considered in the context of issues 3 and 4

    3. Issue 6 should be deleted

Strike out/unless order: Andrew Duff

11. Ms Russell referred to her letter dated 22nd April 2021 inserted into the bundle as **pages 101A and 101B**. Put shortly, the letter sought strike out (alternatively an unless order) following an earlier order requiring Andrew Duff (4102002/2020) to provide details of his claimed losses which had not been complied with. His failure to comply was obvious from **page 59** which shows no agreed sum.

12. The application was opposed. I heard Ms Russell in support of her application and Mr Ohringer's opposition. I suggested that in the event that I found for the claimants but did not have the information to order payment to Mr Duff, then a judgment for payment to him would not be made. That being so, Mr Ohringer said that he would endeavour to source the requisite information via his instructing agents and Ms Russell was content to withdraw her application.

John Gourlay: claim for statutory redundancy payment

13. In an email of 17th May, Ms Russell noted that Mr Gourlay's claim included one for a statutory redundancy payment albeit (she said) it had been withdrawn. On that basis and by agreement I have dismissed it.

The evidence

14. It was agreed that the evidence from the respondent's witnesses would be heard first.
15. For the respondent I heard evidence from its employees Alan Nicoll, mobilisation director, and Jill Robertson, HR Manager. For the claimants, I heard evidence from Keith Davis (claimant) and Raymond Duguid, UNITE convenor. All spoke to their written witness statements and were cross-examined. The bundle contained (at **pages 102 to 366**) an amount of documentation pertaining to the dispute. Most of it was spoken to in witness evidence.
16. With agreement from the claimants following a request from the respondent I allowed Ms Robertson to be present while Mr Nicoll gave his evidence.

Findings in Fact

17. A significant amount of evidence was not controversial. Similarly, an amount of evidence was useful as background but not essential to determine the disputed issues. I found the following facts either admitted or proved.

Prior to July 1997

18. Prior to about 1987, the dockyard at Rosyth was owned and operated by the Ministry of Defence (MOD). From 1987, the ownership of the yard was retained by MOD. From that time its management and operation were taken over by the respondent. The respondent is a company which is managed by Babcock. On or about 31st January 1997 Babcock via the respondent took ownership of the yard as well as retaining its management and operation (see **page 243**). By that time, the workforce at the yard had transferred to the employment of the respondent.
19. The respondent's workforce consists of two groups. One, "*staff*", carry out functions such as planning, HR management and finance. For "*staff*" the respondent recognises the trade union Prospect. There are about 1070 staff employees. The other, "*industrial*", carry out work on the manufacture and repair of naval ships. For "*industrial*" staff the respondent recognises two unions, UNITE and GMB. Those two unions make up the Dockyard Industrial Joint Committee (DIJC). Mr Duguid is the current chairman of DIJC. There are about 570 industrial employees.
20. In 1987, the typical working week at the yard was 39 hours over five days being Monday to Friday.
21. A pay and conditions agreement for industrial employees for the period 17th June 1991 to 17th June 1992 contained the aim of introducing a 37 hour working week for employees (on a self-financing basis) through the revision of shiftwork premia payments and improved working arrangements (**page 206**). For staff employees a joint management/union statement for the period 1st August 1991 to 31st July 1992 recorded the introduction of a 37 hour

working week on the basis of a "*revision of shiftworking premium payment and improved working arrangements in the operation of functional supervision*." (**Page 216**)

22. On 27th August 1996 one of the claimants (Christine Turnbull) signed an offer of employment as a reprographics operator (**pages 240 to 242**). It provided that she would normally work a five day week of 37 hours. By that time, those hours were typical of the contractual hours for employees of the respondent.

The 1997 Collective Agreement

23. In July 1997 the respondent and a number of trade unions (including the predecessors to UNITE and GMB) entered into a collective agreement. It consists of four pages (**243 to 246**). It is headed "***Agreement on Redundancy Compensation Terms***". Its preamble provided some historical context. It contained a commitment on the part of the respondent to avoiding compulsory redundancies. It recorded that in exchange for a buy-out of 40% of individual redundancy entitlements, the then existing scheme was to be phased out in a period to 31st March 2006. From that date a Replacement Scheme was to operate. Transitional provisions were to operate until that date. The Replacement Scheme redundancy terms were to be "*Statutory Entitlement*", uprated as appropriate by legislation but enhanced by two elements. First, a lump sum of £1500. Second, "*a service related payment of one days domestic/basic pay for each six month's service starting at 11 days after six months up to a maximum of 90 days after 40 years*." The Agreement further provided that the enhanced elements of the terms would not be subject to review prior to 1 April 2006. It also provided that the Replacement Scheme would apply to all employees who had no entitlement under the transition arrangements. In July 1997 the majority of the respondent's employees worked a 37 hour week, those hours worked over five days, Monday to Friday.

Introduction of a four day week

24. From April 2002 the respondent introduced a four day working week as the typical working pattern on site. Working hours remained at 37 per week. (**Alan Nicoll's witness statement at paragraph 36**). The respondent retained a number of other working patterns different from a four day week. They included 37 hours over 5 days and weekend working (12 hour shifts on Friday, Saturday and Sunday).

Prospect's question on a day's pay; 2005

25. On 21st March 2005 Prospect wrote to Ken Munro the respondent's then Head of HR. In that letter the union sought written verification that one day's pay constituted 9.25 hours.

Redundancies since 1 April 2006

26. In the years 2006, 2007, 2013 and 2015 to 2018 the respondent carried out a number of restructuring exercises. They resulted in various rounds of consultation. They also resulted in redundancies. A number of those redundancies were voluntary. Others were not. On all of those occasions, the respondent calculated a day's pay as annual salary divided by 52 then divided by 5. Based on a working week of 37 hours this resulted in a day's pay being calculated at 7.4 hours pay.

2016 Redundancy Policy

27. On 15 July 2016 Mr Duguid received an email from Lynne Crawford, an HR Support Manager (**pages 321 to 322**). It is headed "*HR Policies*". It is addressed to four others. The email thanked the recipients for their participation in two previous meetings on policy reviews. It also attached

"*agreed policies on grievance, redundancy and capability.*" The redundancy policy referred to is at **pages 323 to 328**. Its first heading (Scope) provides that it "*does not form part of an employee's terms and conditions of employment and may be varied by the Company from time to time as required*." Part 8, headed "***Redundancy Payments***" has a sub-heading "*Redundancy Payments for those employed prior to 1st May 1999*." It provides that those employees will have their redundancy entitlement calculated on the basis of the Replacement Scheme. While in most material respects it repeats the wording from the Collective Agreement, it refers to 1 days basic pay which is then qualified by a ** undernote saying, "*1 day's pay is calculated by weekly pay divided by 5*." On 21 July 2016 (**page 321**) Ms Crawford sent an email to the same five recipients including Mr Duguid. That email said that she would arrange for three policies including the redundancy policy to be added to Agility the next day. Agility is the respondent's document management system. Mr Duguid had discussed the redundancy policy with the respondent at the time. Neither he nor the GMB agreed the terms of the policy. The GMB was as a matter of principle opposed to redundancies. As a result, Mr Duguid did not engage with the respondent or contribute to the review of the redundancy policy.

Holiday pay calculation

28. An employee who works a four day week working pattern books 9.25 hours to take one day's leave.

The failure to agree process

29. On 1st April 2019 the DIJC gave notice to Mr Nicoll of its wish to raise a Fail to Agree on the issue of the calculation of a working day (**page 337**). The notice specified that it wished to raise it at Stage 4 of the relevant process. No agreement was reached in that process.

30. On 25th April 2019 Mr Duguid emailed Alan Nicoll. In it, he sought to engage Stage 5 of the process (**pages 338-339**). Following meetings on 9th and 13th May 2019 Mr Nicoll wrote on 15th May to the unions to record the respondent's position. The letter set out that the respondent had consistently calculated redundancy payments for the previous 13 years using 7.4 hours representing a day's pay. It also set out that the respondent would not be making any changes to that calculation.
31. Stage 6 was then engaged. In that process, the parties were unable to agree on the meaning of a day's pay. On 29th April 2020 the national officer of the GMB advised the respondent that it would support its members in seeking a resolution before this tribunal **(page 364**).
32. All of the claimants were dismissed by reason of redundancy.

Comment on the evidence

33. While the witness statements of Alan Nicoll and Jill Robertson were lengthy and useful in providing background and context, their evidence was of limited value on the issues. Mr Nicoll was not involved in the negotiation which resulted in the collective agreement (**paragraph 34 of his statement**). Ms Robertson's work with the respondent began in 2016 some time after its terms were agreed.
34. Mr Duguid was cross-examined on his involvement in the 2016 redundancy policy. He maintained the position in his witness statement (see **paragraph 12**) to the effect that the GMB had not contributed to its review in any meaningful way. He was not pressed on the question as to whether the policy had been negotiated and ultimately agreed by his union with the respondent.

Submissions

35. All parties produced written submissions. I do not repeat them. All referred to and produced various authorities. They supplemented their written submissions orally. They were agreed that the principal issue was the

meaning of a "*day's pay*" in the collective agreement. I summarise the various arguments here.

36. After outlining the facts and issues Ms Russell set out what she said was the overall approach to the construction of contracts and the four main principles in determining the meaning of a particular word or phrase.

37. On the primary issue of construction of the agreement in dispute, she emphasised that the typical working week when the collective agreement was concluded was five days. She argued that if the claimant's construction were correct, then there had been consistent underpayment since 2002. Further, an agreement on pay and conditions for the period 1st April 2001 to 31st March 2003 stated that with exception to its terms there was no other alteration to employees' terms and conditions. Separately, the claimant's interpretation leads to unfair and unreasonable results.

38. Alternatively, the respondent argued that the method of calculating a day's pay at one fifth of a week's pay (or 7.4 hours' pay) was implied into the contract. Reference was made to both the "*officious bystander*" test and to custom and usage. In the context of the latter that it was said that the 2016 Redundancy Policy recorded what was by then an already well-established practice.

39. Separately, Ms Russell anticipated an argument against her that the original agreement (being that a day's pay meant 7.4 hours) was varied and came to mean 9.25 hours. Her answer was that at no time was there any valid variation to that effect.

40. For his claimants, and beyond his written submission Mr Ohringer highlighted four points. First, he emphasised the relevant legal principles as he had sourced them from ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896 (House of Lords) and the

Supreme Court decision in ***Arnold v Britton*** [2015] AC 1619. Second, he sought to apply the relevant law to the facts in this case. The background knowledge available to the parties at the time of making the contract (1997) included working patterns, pay patterns and what was understood as a day's pay in other contexts. In his submission, everything after 1997 was irrelevant. This included (i) the 2016 Redundancy Policy, (ii) the fact that payments were calculated and made in a certain way and (iii) the fact that an anomalous result may occur. On this last point, he noted that the overwhelming majority of industrial staff work a 4 day week. In addition, he emphasised what was said in ***Arnold v Britton*** at paragraph 20. The relevant extract sets out that "*a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight*." Third, Mr Ohringer argued for what he maintained was the correct construction of the meaning of a day's pay in this case. He posited that it may have been one week divided by the number of days in a week (7). Clearly, no party had advanced that position. His alternative was that it was, instead, one week divided by the number of working days in the week, that number being dynamic depending on the point in time that the question was asked. The contract has not changed in its terms. However, the number of working days has changed. Applying that formula produced a different result now than in 1997. Fourth, on the question of variation the respondent was on extremely weak ground. In his submission, the respondent was arguing for the variation of an express term within the collective agreement. That could be valid only with the agreement of all parties which was absent here. The 2016 policy was of no assistance because it expressly set out that it had no contractual effect. There was no evidence of such a variation being proposed or accepted between the parties. Indeed such evidence as there was was to the effect that there was an objection and resistance to the idea of a day's pay being calculated by dividing weekly pay by 5. He emphasised what was said in his written submission at paragraphs 23 and 24. He concluded by asserting that the respondent's argument amounted only to saying (i) it had not complied

with the agreement since 2006, (ii) it had "*got away with it*" since then and (iii) should be able to continue to do so. That argument had no legal validity.

41. Mr Briggs adopted his written skeleton. In short summary his position was that one day's pay means the amount a worker typically earns in one day. In his view, the meaning of the words "*one day's pay*" was clear. It was unambiguous. It was capable of only one meaning. He accepted that while he took no real issue on the relevant caselaw on the interpretation of contracts, he relied on the recent Supreme Court decision in the case of *Burnett or Grant v International Insurance Company of Hanover* [2021] UKSC 21. He submitted that concepts of fairness or consistency were not relevant when interpreting the term in question. The "*choice*" for the tribunal was between attributing either a static or a dynamic meaning to it. In his submission they could not have a fixed meaning in an environment which involved changes to work and shift patterns. They were "*apt to change*" according to the circumstances and they were never synonymous with a fixed number. Further, it had been open to try to agree a static version had not happened. Finally, in his submission there was a clear and consistent express term which could not be dislodged by an implied term.

The law

42. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that "*Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;(b) the claim is not one to which article 5 applies; and(c) the claim arises or is outstanding on the termination of the employee's employment.*" There is no dispute that the claims are relevantly and timeously made under Article 3.

43. As was obvious from the submissions and authorities referred to by all parties, the relevant caselaw concerned the question of the meaning of the collective agreement.

Discussion and decision

44. The most recent and most authoritative judicial comments on the question of contractual interpretation are those of Lord Hodge in the Supreme Court in ***Wood v Capita Insurance Services Ltd*** [2017] A.C. 1173 at paragraphs 8 to 15. In turn, in the Supreme Court in the Scottish case of ***Burnett or Grant v International Insurance Co of Hanover Ltd*** [2021] I.C.R. 973 Lord Hamblen noted (at paragraph 29) that "*The parties were agreed that the policy, like any other contract, is to be interpreted in accordance with the principles discussed and set out by Lord Hodge JSC in* ***Wood*** *…*" at paragraphs 10 to 13. Reference to the policy is to the particular contract in that case.
45. In paragraphs 10 to 13 in ***Wood***, Lord Hodge said,

> "*10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In* ***Prenn v Simmonds*** *[1971] 1 WLR 1381, 1383H–1385D and in* ***Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)*** *[1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in* ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** *[1998] 1 WLR 896, 912–913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing,*

*"**A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision**" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the **Rainy Sky** case [2011] 1 WLR 2900, para 21f. In the **Arnold** case [2015] AC 1619 all of the judgments confirmed the approach in the **Rainy Sky** case: Lord Neuberger of Abbotsbury PSC, paras 13–14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the **Rainy Sky** case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the **Rainy Sky** case, para 26, citing Mance LJ in **Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd** (No 2) [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the **Arnold** case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the **Arnold** case, para 77 citing **In re Sigma Finance Corpn** [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing*

drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in ***Sigma Finance Corpn*** *[2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions*."

46. At paragraph 14, Lord Hodge said, "*On the approach to contractual interpretation, the* ***Rainy Sky*** *and* ***Arnold*** *cases were saying the same thing*."

47. In ***Arnold***, when considering the question of the interpretation of contractual provisions Lord Neuberger noted that a number of cases had come before the House of Lords and the Supreme Court in the previous 45 years. He mentioned ***Prenn*** and ***Rainy Sky*** which cases begin and end 40 of those years. He continued (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 Hoffmann in* ***Chartbrook Ltd v Persimmon Homes Ltd*** *[2009] UKHL 38, [2009] 1 AC 1101 , para 14. And it does so by focussing on the meaning of the relevant words in this case clause 3(2) of each of the 25 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 party's intentions.*" It was important, he said, to emphasise seven factors. I set them out here.

    1. "*First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in* ***Chartbrook*** *, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very*

unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in ***Wickman Machine Tools Sales Ltd v L Schuler AG*** *[1974] AC 235 , 251 and Lord Diplock in* ***Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)*** *[1985] AC 191 , 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.*

Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his

imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is ***Aberdeen City Council v Stewart Milne Group Ltd*** *[2011] UKSC 56, 2012 SCLR 114, where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22).*

Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in ***McHale v Earl Cadogan*** *[2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case*."

48. The parties in this case have focussed on a particular part of the collective agreement, namely the part headed "***The Replacement Scheme***." Indeed, the focus has been on one discrete element of it; "*one days domestic/basic*

pay". Under various headings, the collective agreement sets out the reasons for it and how it was to work over a period from its execution in July 1997 through what it calls a transitional period to a period beginning on 1st April 2006 and beyond. The issues in this case are, obviously, concerned with a period in time in which only the Replacement Scheme is relevant. In full, it says

> ***The Replacement Scheme***
>
> *The replacement scheme redundancy terms will be Statutory Entitlement, uprated as appropriate by legislation, enhanced by the following:*
>
> *1. A lump sum of £1500*
>
> *2. A service related payment of one days domestic/basic pay for each six months service starting at 11 days after 6 months up to a maximum of 90 days after 40 years' service.*
>
> *The enhanced elements of the terms will not be subject to review prior to 1 April 2006.*
>
> *The replacement scheme will apply to all permanent employees who have no entitlement under the transition arrangements.*

49. In the context of the first and fifth factors identified in ***Arnold***, I am required to take account only of facts and circumstances known or reasonably available to the parties in 1997, and in that context, what is the most obvious meaning of the disputed phrase "*one day's pay*". On the respondent's case its meaning and method of calculation are fixed in time by reference to what prevailed in 1997. In other words, it meant then and thereafter a fifth of weekly pay because of the prevailing working pattern at that time. The alternative for which the claimants contend is that it is dynamic. Its meaning reflects what is a day's pay at whatever time in the future (which by definition is sometime after April 2006) the Scheme requires to operate. I prefer this alternative

meaning. In my view the more obvious meaning of "*one day's pay*" in 1997 when it cast forward about 9 years in the future and thereafter is what a day's pay is at that future time.

50. The respondent argued against such a meaning by reference to the potential unfairness that would result for some employees. At paragraph 4.5 of her written submission Ms Russell said, "*The Claimants arguments lead to results which are not only unfair but also unreasonable*." I have considered this in the context of the third and fourth factors from ***Arnold***. In her example, it might be said that the result would be bad or even disastrous. But that of itself is not a reason, in my view, to depart from what the expression means.

51. Looking at the sixth factor in ***Arnold***, it seems to me that it cannot be said that changes to the working week were plainly not contemplated in 1997. Indeed, in 1992, a pay and conditions agreement was negotiated which resulted in a change (reduction) in the working week from 39 to 37 hours. It seems to me that by 1997 the parties could not be said to be plainly not contemplating any other changes.

52. The respondent argued for four main principles of contractual interpretation being (i) loyalty to the natural meaning of the word used (ii) context (iii) Business sense and commercial purpose and (iv) reasonableness. Paragraph 49 above is my view on (i) and (ii). Further, in my opinion the interpretation for which the claimants argued does not produce a result removed from commercial reality or one which is highly unlikely, let alone utterly fantastic ((iii) and (iv)). The respondent also anticipated a *contra preferentem* argument which did not materialise. The point was not relevant.

53. The respondent also argued for an implied term. I reject that contention for two reasons. First, on my analysis the words in dispute, "*a day's pay*" are dynamic. They do not have a fixed meaning. That being so, they could not then by implication have become fixed. An implied term fixing the meaning as a fifth of weekly pay would be inconsistent with its dynamism. Second, the respondent relies on the 2016 redundancy payment policy as indicative of an implied term on the basis that it had applied a reasonable, notorious and uniform method which was by then an "*already well-established practice*" (see

the respondent's submission at paragraph 5.3 v) d). But the policy records, in terms, that it does not form part of the terms and conditions of employment. Further, standing my finding on the letter of 21st March 2005 from Prospect to the respondent my view is that the term relied on by the respondent is not uniform and notorious. That letter suggests that there is no uniformity and there is no agreement on the calculation of a day's pay.

54. Ms Russell posed and sought to answer the question; was the collective agreement ever varied? Standing the conclusion that I have reached it was not. The words "*a day's pay*" mean something different now based on the respondent's current work patterns from what it meant in 1997 based on the patterns which prevailed then.

55. I placed no reliance on the cases of ***Cooper v Isle of Wight*** [2008] IRLR 124 or ***Leisure Leagues UK Ltd v Macconnachie*** [2002] IRLR 600 which were cited by Mr Ohringer as cases on a "*day's pay*" in contracts of employment. I am of the view that it was unnecessary to do so given the conclusion I have reached.

56. I answer the extant issues as follows;

    2. Each claimant has not received their full entitlement to contractual redundancy payment
    3. A day's pay is calculated by reference to a quarter of a week's pay
    4. The respondent has not established and applied a reasonable, notorious and certain method of calculation that method being a fifth of weekly pay
    5. The respondent has breached the contractual entitlements of the claimants.

57. I therefore find that the respondent is in breach of its contract with the claimants. Accordingly, I find that each of the claimants is entitled to an award as set out in my judgment with the exception of Andrew Duff who has, notwithstanding the passage of time since the hearing, not produced material which would allow the calculation of sums due to him. Those awards are the agreed sums which are taken from **pages 59 and 59A** of the bundle.

Employment Judge: Russell Bradley
Date of Judgment: 02 August 2021
Entered in register: 12 August 2021
and copied to parties