Appeal Nos. EA-2019-001237-AT (previously UKEAT/0093/20/AT)
EA-2020-000391-AT (previously UKEAT/0210/20/AT)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 6 and 7 July 2021
Judgment handed down on 24 August 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

AMDOCS SYSTEMS GROUP LIMITED — APPELLANT

MR J LANGTON — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JONATHAN COHEN (One of Her Majesty's Counsel) Instructed by: CMS Cameron McKenna Nabarro Olswang LLP Cannon Place 78 Cannon Street London EC4N 6AF
For the Respondent	MR DOUGLAS LEACH (of Counsel) Instructed by: Baker Law LLP Gostrey House Union Road Farnham GU9 7PT

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

PRACTICE AND PROCEDURE: COSTS

The claimant's employment with the respondent's predecessor began in 2003. He received a letter of offer, a summary of benefits and a contract. The letter of offer and the summary of benefits set out the terms of a long-term sickness scheme, and the level of income protection payments (IPP) payable under it. These included reference to an "escalator" of 5% per annum which would apply after the first 52 weeks. At the time the respondent's predecessor had insurance cover, in respect of its obligation to pay IPP, including the escalator.

In 2009 the claimant began a period of long-term sickness absence and then began to receive IPP. This was continuing at the time of the litigation in the Employment Tribunal and EAT. Following his transfer into the respondent's employment, he realised that the payments of IPP had not been including the escalator. The respondent informed him that the escalator had ceased in 2008, from which time its underlying insurance cover did not include it. The Employment Tribunal held that the claimant was contractually entitled to the escalator, and therefore upheld a claim for unlawful deduction from wages. The respondent appealed, arguing that the correct construction of the documentation was that its obligation was limited to the amount in respect of which it or its predecessor from time to time had insurance cover.

Held: the summary of benefits originally provided to the claimant contained terms that were clear and certain, and, objectively, intended to be incorporated. They conferred a contractual entitlement to the escalator. **Keeley v Fosroc International Limited** [2006] IRLR 961 applied. The references in the summary to the existence of insurance cover, did not have the effect that

the respondent's obligation was limited by reference to the extent of that cover from time to time. **Jowitt v Pioneer Technology (UK) Limited** [2003] ICR 1120 and **Awan v ICTS UK Limited** [2019] IRLR 212 considered. There was no implied limitation of the respondent's obligation by reference to the extent of its insurance cover on the basis of an appeal to commercial common sense. The respondent was bound by the commitment it had inherited. **Arnold v Britton** [2015] AC 1619 applied. The liability appeal was dismissed.

The Tribunal had also subsequently awarded the claimant the whole of his costs of pursuing the claim up to the point of the liability decision, on the basis that the respondent had relied as a central plank of its defence, upon a provision in its 2005 Manual which, on the evidence of its own witness given at trial, had ceased to apply in 2007. Its defence based on that Manual was found to have had no reasonable prospect of success, and it was found to have acted unreasonably in running it. The respondent also appealed that decision.

Held: The Tribunal had been entitled to find that the defence based on the 2005 Manual had no reasonable prospect of success and was unreasonably pursued. However, the Tribunal failed, in its costs decision, to take into consideration that there was a further element of the respondent's defence, that it had not found had no reasonable prospect of success, and which, though it in fact properly failed, was not so weak as to have had no such prospect. While the Tribunal was entitled to award the claimant a significant proportion of his costs, taking proper account of this aspect of the defence, an award of 100% was not justified. **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] ICR 420 considered and applied.

HIS HONOUR JUDGE AUERBACH

Introduction

1. I shall refer to the parties as they were in the Employment Tribunal ("the Tribunal") as claimant and respondent. These are the respondent's appeals.

2. The claimant joined the respondent's predecessor company, Cramer Systems Limited ("Cramer") in 2003. The respondent acquired Cramer in 2006 and a process of integration followed. The claimant transferred into the respondent's employment in 2015. In what follows, references to the respondent are, as appropriate, either to it or to Cramer.

3. In June 2009 the claimant began a period of long-term sickness absence, which was still continuing at the time of the appeal hearing before me. From November 2009 he began to receive payments from the respondent referred to as income protection payments ("IPP"). These amounted to 75% of salary less state benefits. The claimant considered that, after the first 52 weeks, he was entitled to have this amount increased by 5% every year. That is referred to as the "escalator". However, in 2016 the claimant was informed by the respondent that the escalator had not been, and was not being, applied. He was told that he was not entitled to it, as it had ceased to be part of the IPP scheme in 2008.

4. In 2018 the claimant presented a claim form including a complaint of unlawful deduction from wages relating to the failure to apply the escalator. Other complaints were later withdrawn. The matter came to a full merits hearing before Employment Judge Harris in 2019. The underlying issue was whether the claimant was contractually entitled to have the escalator applied in the calculation of IPP. The Tribunal decided that he was, and so the complaint succeeded. That is the liability decision. There was then a remedy hearing. It was common ground that the

award would, by virtue of section 23(4A) **Employment Rights Act 1996**, be limited to the period of two years ending with the date of presentation of the claim on 9 March 2018. After resolving certain issues about the precise method of calculation, the Tribunal gave judgment for the claimant in the sum of £29,098.46.

5. The claimant then applied for costs. That was dealt with on paper. The Tribunal decided that the respondent should pay the claimant's costs of the litigation up to the point of the liability decision. The claimant was to serve a further schedule identifying the amount of costs claimed on that basis, and thereafter the Tribunal would decide whether a detailed assessment would be required. That was the costs decision.

6. The respondent appealed against the liability decision and the costs decision and I heard those appeals together. As in the Tribunal, the claimant was represented by Mr Leach of counsel, the respondent by Mr Cohen QC.

7. I will start with the appeal against the liability decision.

The Facts

8. The Tribunal heard oral evidence from the claimant, and, for the respondent, from an HR Manager, Andrea Swinn. The salient findings of background fact were as follows. In 2003 the claimant was interviewed for the post of Test Engineer. Following that, he received a letter of 25 July 2003 together with other documents.

9. The Tribunal found as follows.

> **"7. The relevant passages from the offer letter dated the 25th July 2003 are as follows:**
>
> **Following your recent interview, I am delighted to offer you the position of Test Engineer with Cramer Systems Limited.**
> **Your employment will commence on [start date to be confirmed] …**
> **Your remuneration package will be as follows:**
> **An annual salary of £25,000;**

A pension contribution of 6% of your annual salary if you wish to join the contributory scheme;
Private healthcare for you and your immediate family;
Life insurance to 4 times basic annual salary;
An income protection plan;
A proposal to grant you 400 options in the Cramer Systems Group Limited Enterprise Management Incentives Scheme will be made to the Remuneration Committee of the Board at the first quarterly meeting following your start date. The number of options granted, type of option (whether EMI or Unapproved) and price are all subject to confirmation by the Remuneration Committee.
…
Income Protection and Sickness Payments
Cramer will pay staff on sick leave their full salary (less any statutory sick pay) for the first 13 weeks that they are ill. Thereafter, an income protection plan has been established that will pay employees 75% of their annual salary, less basic rate state longterm incapacity benefit, up to their 60th birthday.
Please see the attached "Statement of Benefits" for further information about the above benefits.

8. Attached to the offer letter was a document entitled "Statement of Benefits". The trial bundle contained two versions of this document. It was not clear which version had been attached to the offer letter sent to the Claimant on the 25th July 2003, but both versions contained identical wording concerning an income protection scheme established by Cramer Systems Limited for the benefit of their employees. The wording was as follows:

INCOME PROTECTION SCHEME & GROUP LIFE ASSURANCE SCHEME

In order to protect you and your family from the potential loss of income resulting from long term sickness or disability, the company have established an Income Protection Scheme with Sun Life Financial of Canada.
In the event of your premature death, the company have established a Group Life Assurance Scheme with Royal Sun Alliance.
When am I included?
You are included in both Schemes if you are a permanent employee from the day you commence employment with Cramer Systems. You will cease to be included in the Schemes at age 60, or on ceasing to satisfy the eligibility conditions.
What benefits are provided?
Under the Group Income Protection Scheme, the payment of benefit commences after the first 13 weeks of incapacity. You will be asked to provide medical certification for the insurance company in respect of any incapacity lasting longer than this period.
After benefits have been paid continuously for 52 weeks the benefit will increase by 5% every year, until you return to work. In this way, your benefits will have a degree of protection from inflation.
Under the Group Life Assurance Scheme, a payment would be made to your Estate, or a nominated individual, following your death. How much is the benefit?
For the Group Income Protection Scheme, the maximum initial benefit is 75% of your salary less a deduction in respect of the State benefit for a single person.
For the Group Life Assurance Scheme, the benefit is four times your annual basic salary.
Do I have to pay towards the benefit?
No. Cramer pays the whole cost, which does not count as part of your income for tax purposes.
What happens if I leave the company?
Should you leave employment with Cramer Systems your cover in both Schemes automatically ceases on the date that you leave.
NOTES The operation of both Schemes is governed by the terms of the Group policies, and nothing in this summary will override the terms of that document.

9. In addition to the offer letter and the statement of benefits, the Claimant was provided with a written "contract of service", dated the 25th July 2003, which contained the following provisions:

6. The Employee is entitled to the following benefits to the extent and in the circumstances set out in the Manual and outlined in the employee's letter of offer:
i. Salary Protection Plan
ii. Pension Fund Participation
iii. Life Assurance
iv. Equity Participation
v. Private healthcare

7. Provisions relating to absence through illness shall be those set out in the Manual. …

11. Where the rights and liabilities of the parties are set out in the Manual they shall be varied whenever and in the manner set out in any amendments made to the Manual by the Company. Such amendments will be communicated to each employee individually.

10. The Claimant accepted the offer of employment and began work for Cramer Systems Limited on the 1st September 2003."

10. I interpose two points about the documentation. Firstly, the document which the Tribunal referred to as a "Statement of Benefits", was in fact headed "Summary of Benefits" (and, in fact, so described in the offer letter). Secondly, it is convenient to set out here clause 22 of the contract of service, to which the Tribunal also made reference in its decision. It provided as follows:

"Save as may have been specifically agreed and provided herein or in any other agreement between the parties the Company and the Employee hereby adopt and incorporate into this Agreement the general terms and provisions (including any provision of amendment or variation) of the Manual herein referred to."

11. A benefits document circulated in 2004 contained provisions relating to IPP which were materially the same as those in the 2003 Summary. The claimant received periodic pay increases and, in 2006, was promoted to Test Analyst. In September 2007 Ms Swinn gave a presentation about the implications for benefit provision of the recent acquisition by the respondent. This, and a subsequent letter, were to the effect that IPP provision would not be affected.

12. A document pack sent to the claimant in around October 2007 had a section concerning "Income Protection Scheme & Group Life Assurance Scheme". This included the following.

"In order to protect you and your family from the potential loss of income resulting from long term sickness or disability, the company have established an Income Protection Scheme with Unum. In the event of your premature death, the company have established a Group Life Assurance Scheme with Canada Life."

13. The succeeding paragraphs were materially the same as those in the same passage in the 2003 document, including the sentence headed "NOTES".

14. On 17 October 2007 the claimant signed a form confirming that he wished to participate in both schemes.

15. On 1 October 2008 the respondent informed the claimant of an amendment to his contract by way of a change of his job title, to "QE Manager", and associated changes to his job family and site. He was told that all other terms of his contract remained unchanged.

16. During 2009 the claimant was diagnosed with a long-term illness. His sick leave began on 30 June 2009. In July, he completed claim forms to claim permanent health insurance. On 5 November 2009 the respondent wrote to the claimant a letter which read, in part:

> **"Further to your conversation with your HR Consultant, I write to confirm that in accordance with your Terms and Conditions of Employment dated 25th July 2003 a decision has been made to withdraw company sick pay from you effective 1st November 2009. This will not effect your entitlement to Statutory Sick Pay (SSP) which can only be paid upon provision of doctor's certificates for the period in question. You have made a claim under the income protection insurance as per our scheme rules. Under this scheme, the maximum benefit is: 75% of your insured earnings less the state long term incapacity benefit. This claim is subject to approval of the insurer, which is UNUM. Until your claim with Unum has been approved, or if it is not successful, you will receive any SSP to which you are entitled (and have provided sick notes for)."**

17. The claimant's claim was approved and he began being paid IPP on 1 November 2009. As a matter of fact, the escalator was not applied at any point.

18. In May 2015 the claimant was notified that his contract would be transferring to the respondent. Towards the end of that year he received a letter about new pension arrangements. That caused him to investigate the precise amount of IPP that he had been receiving, and to realise that the escalator had not been applied. In October 2016 the claimant's solicitors wrote requesting an explanation. The ensuing correspondence included an email from the respondent

to the claimant's solicitors of 1 November 2016, cited later in the Tribunal decision. This email stated that "the policy removed the escalation in October 2008". As this was before he went on to the scheme in November 2009 he "doesn't have escalation in his benefits payout."

19. The claimant unsuccessfully pursued an internal grievance and grievance appeal about the matter. The appeal decision, of February 2018, included the proposition that the respondent was entitled to change the supporting insurance policy behind the scheme in 2008 "to remove the 5% escalation as stated in the staff manual".

The Tribunal's Decision

20. After setting out the background facts, the Tribunal summarised the issues. It noted that the respondent relied upon clauses 6, 7 and 11 of the 2003 contract of employment, an Employee Handbook dated April 2005, and the UNUM policy document effective from 1 October 2008, providing that "no escalation rate has been selected."

21. The 2005 Employment Handbook contained the following provisions.

> **"1.1 Contract of Employment**
> **Your Offer Letter and Terms and Conditions of Employment form the basis of your contract with Cramer Systems Group Limited, Cramer Systems Europe Limited or Cramer Systems Limited ("the Company"). You will be informed of any changes in your Terms and Conditions of Employment in writing.**
> **…**
>
> **5.3 Income Protection Insurance**
> **Subject to satisfying any eligibility criteria imposed by the Company's insurers, the Employee shall be entitled to participate at the Company's expense in an income protection scheme, providing up to 75% of salary less an amount equal to basic rate state invalidity benefit, underwritten by such reputable insurers as the Company shall decide from time to time. The Company may from time to time change the benefit provider and vary or amend the extent of the cover or the basis on which it is provided. This benefit will cease on termination of employment."**

22. The Tribunal cited an extract from the UNUM Group Income Protection Policy which was effective from 1 October 2008. It stated: "No escalation rate has been selected for any

benefits." The respondent accepted that the previous policy in force until 30 September 2008 provided for a 5% annual escalator after benefits had been paid for 52 weeks.

23. The Tribunal then made further findings of fact, included the following passage:

> **"53. The Tribunal was unable to make any findings of fact in respect of the document referred to as the "Manual" in the Claimant's contract of employment dated the 25th July 2003. The written contract of employment pre-dated the 2005 Employee Handbook and so the Manual referred to in the contract of employment must have been a different document. Whether the Manual contained similar provisions to the 2005 Employee Handbook is unknown. In particular, it is unknown whether the Manual contained the "time to time" clause set out in paragraph 5.3 of the 2005 Employee Handbook.**
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> **54. In respect of the 2005 Employee Handbook, the Tribunal found that that must have replaced the earlier Manual, it being illogical to suppose that the earlier Manual continued to co-exist with the 2005 Employee Handbook. There was, however, no evidence to indicate that the Claimant was informed about the existence of the new Employee Handbook in 2005 or that it had replaced the earlier Manual.**
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> **55. The Tribunal accepted the Claimant's evidence that he had read the offer letter dated the 25th July 2003, the summary of benefits that had been attached to the offer letter and the contract of service dated the 25th July 2003. The Tribunal accepted the Claimant's evidence that he had viewed those documents as containing all the relevant information concerning the terms and conditions of his employment with Cramer Systems Limited. The Tribunal accepted the Claimant's evidence that he had not read the Manual referred to in his contract of employment or the 2005 Employee Handbook."**

24. The Tribunal gave itself a direction as to the law, and summarised the rival submissions. It noted that the respondent's case was that the claimant was not entitled to the escalator at all, or alternatively, that, if he had been entitled to it initially, that entitlement ceased with effect on 1 November 2016 when he was notified that it had been removed in October 2008.

25. I will set out the material part of the Tribunal's dispositive reasoning in full.

> **"84. The Tribunal found that the offer letter, the summary of benefits and the contract of service conferred a contractual entitlement upon the Claimant to the escalation rate that he contends he is entitled to.**
>
> **85. In the judgment of the Tribunal, it was the clear contractual intention of the parties to bestow upon the Claimant, as a permanent employee, the benefit of the income protection scheme described in the offer letter and the summary of benefits, which included the 5% escalation rate provided for in the summary of benefits.**
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> **86. It is correct that the summary of benefits made express reference to an insurer, in the context of the income protection scheme provided to permanent employees, but that fell far short, in the judgment of the Tribunal, of being sufficient to show that the Claimant's contractual entitlement was to the Respondent obtaining cover under an insurance policy for an income protection scheme and passing over to him any benefits payable under it.**

87. It is also correct that the summary of benefits stated that "the operation of both Schemes is governed by the terms of the Group policies, and nothing in this summary will override the terms of that document", but that "document", assuming it was an insurance policy with Sun Life Financial of Canada, was never provided to the Claimant and was never, of itself, of any contractual force as between the Claimant and the Respondent. In any event, it is not disputed that until the 1st October 2008, the escalation rate of 5% would have applied to a permanent employee making a claim under the Respondent's income protection scheme. It follows that it is reasonable to suppose that the "Group policies" referred to in the summary of benefits provided an escalation rate as specified in the summary of benefits and were not in conflict with the summary of benefits.

88. The Tribunal could not accept the Respondent's submission that the summary of benefits had no contractual force. In the judgment of the Tribunal, the summary of benefits was clear and certain as to the benefits payable under the Respondent's income protection scheme. The fact that it was called a "summary" did not, in the judgment of the Tribunal, prevent the document from having contractual status.

89. In the judgment of the Tribunal, there was nothing in the offer letter, the summary of benefits or the contract of service to alert the Claimant that his entitlement to benefits under the Respondent's income protection scheme may change from time to time. Had that been the intention of the Respondent at that time, then wording could have been used to make that clear in the offer letter or the summary of benefits or the contract of service. No such wording was used.

90. The question is raised as to what did the Manual have to say about the Respondent's income protection scheme. The answer to that is that no-one seems to know. The Tribunal was not prepared to assume that the Manual referred to in the contract of service contained a time-to-time clause as set out in paragraph 5.3 of the later 2005 Employee Handbook. The Tribunal was also not prepared to find an implied time-to-time clause (of the kind set out in paragraph 5.3 of the later Employee Handbook) in the Claimant's contract of employment in the absence of evidence as to the contents of the Manual. In the judgment of the Tribunal, such an implied term was not necessary under either the officious bystander or the business efficacy tests.

91. In any event, however, given the Tribunal's finding as to the contractual force of the provisions in the summary of benefits regarding the income protection scheme, the effect of clause 22 of the contract of service was such as to remove the contractual effect of anything that the Manual said, if it said anything, about the amount of income protection to which the Claimant was entitled under the Respondent's income protection scheme. In other words, in the judgment of the Tribunal the Manual was subject to the agreement between the parties, as set out in the summary of benefits, that the Claimant was entitled to an increase of 5% every year upon the payments made to him under the income protection scheme, up until the age of 60, after those payments had been made continuously for 52 weeks.

92. The Respondent contended that it was entitled to rely upon paragraph 5.3 of the 2005 Employee Handbook in support of its contention that the Claimant's contract of employment contained a time-to-time clause, restricting the Claimant's entitlements under the Respondent's income protection scheme to those that were indemnified by the Respondent's insurers from time-to-time, because of the way in which the Claimant had pleaded his case in paragraph 9 of the Voluntary Further and Better Particulars dated the 25th July 2018. The Tribunal, however, was not impressed with that argument. Paragraph 9 of the Voluntary Further and Better Particulars pleaded, incorrectly, that the version of the Manual in force at the date of commencement of payments to the Claimant under the Respondent's income protection scheme was the 2005 Employee Handbook. Though the Claimant may not have been aware of the error at the time when paragraph 9 was pleaded, the Respondent would certainly have known, or ought to have known based on the evidence from Ms Swinn, that the 2005 Employee Handbook ceased to be effective from the 1st October 2007, some 2 years before the Claimant made his claim for income protection. As to what Manual or Employee Handbook was in force as of November 2009, the picture, regrettably, was not particularly clear from the evidence. The hearing bundle contained an

Employee Handbook dated January 2012 but there was no Manual or Employee Handbook shown to the Tribunal for the period from the 1st October 2007 to the 31st December 2011. In any event, the error made by the Claimant in paragraph 9 of the Voluntary Further and Better Particulars did not, in the judgment of the Tribunal, enable the Respondent to argue that it had effectively been conceded by the Claimant that the Manual referred to in the contract of service was in identical terms to the later 2005 Employee Handbook.

93. On the basis of the evidence before it, the Tribunal was unable to find that the Claimant's contract of employment, as set out in the offer letter, the summary of benefits and the contract of service contained a time-to-time clause as later appeared in the 2005 Employee Handbook. The Respondent, therefore, did not succeed in its primary argument that the Respondent was only ever contractually entitled to receive to the salary for which the Respondent was indemnified under the income protection scheme. The finding of the Tribunal was that the Claimant was contractually entitled to receive a 5% increase every year on the benefits paid to him under the Respondent's income protection scheme after such benefits had been paid continuously for 52 weeks.

94. Turning to the Respondent's second and third submissions, both of which turned on the significance of the Claimant being informed on the 1st November 2016 that the escalation rate had been withdrawn with effect from the 1st October 2008, the Tribunal was not persuaded that the effect of the information given to the Claimant on the 1st November 2016 was to reset the terms of the income protection scheme to which he was entitled to 75% of his salary with no escalation rate, either back to the time that he made his claim for income protection or from the 1st November 2016. In support of that argument, the Respondent relied upon clause 11 of the contract of service but that clause related to the communication of amendments to the Manual referred to in the contract of service. In the judgment of the Tribunal, the communication dated the 1st November 2016 was not the type of communication referred to in clause 11 of the contract of service. The 2005 Employee Handbook that no doubt replaced the Manual referred to in the contract of service had the potential to be the type of amendment referred to in clause 11 of the contract of service but there was no evidence whatsoever to indicate that the contents of the 2005 Employee Handbook were ever communicated to the Claimant individually or otherwise. Simple placement of the 2005 Employee Handbook on the intranet system, without informing the Claimant of the placement, would not suffice as communication to the Claimant that his rights and liabilities under the Manual had been changed. The Tribunal was reinforced in that view on the basis of the Respondent's correspondence with the Claimant dated the 12th September 2005, the 23rd May 2006, the 15th September 2006 and the 13th July 2007. In none of those letters was there any mention by the Respondent to the effect that the Manual in force at the date of the commencement of the Claimant's employment had been replaced by the 2005 Employee Handbook. It was also significant, in the view of the Tribunal, that during Ms Swinn's presentation in 2007, the Claimant was told that his entitlement to income protection would be equal under the Amdocs regime to what it had been under the Cramer regime. There was simply nothing at all to alert the Claimant that he was not, and had never been, contractually entitled to a 5% escalation rate but was only entitled, and had only ever been entitled, to a level of income protection that might fluctuate from time to time if the Respondent chose, without giving notice, to change insurers or change the insurance policy."

The Grounds of Appeal

26. The original grounds of appeal were, in summary, to the following effect.

27. Ground 1 asserted that the Tribunal erred in finding: (a) that the "Summary of Benefits" attached to the 2003 offer letter had contractual effect; (b) that clause 22 of the contract of service

had the effect of disapplying the provisions of the Employee Handbook (referred to in the grounds as "the Manual") in favour of the Summary of Benefits; and (c) that the respondent did not successfully vary such entitlement by the email of 1 November 2016.

28. Ground 2 asserted, in the alternative, that, if the Tribunal did *not* err in finding that the Summary of Benefits was contractual, then it erred by failing to find that the words: "The operation of both Schemes is governed by the terms of the Group policies, and nothing in this summary will override the terms of that document" had the effect of limiting the respondent's obligation to make payments, to the level of the claimant's entitlement under the relevant insurance policy to which the respondent subscribed at any particular time.

29. At the start of oral argument Mr Cohen withdrew ground 1(c) in view of Mr Leach having conceded in his skeleton that, if I found that the Tribunal was wrong to conclude that the Summary was the source of entitlement to the escalator, the liability appeal would then succeed.

Arguments

30. The written and oral argument was extensive. I have considered it all. What seemed to me to have been the most significant arguments were, in summary, as follows.

Respondent

31. As to ground 1(a), the Tribunal had erred in concluding, at [85], that "the clear contractual intention of the parties" was to bestow upon the claimant the benefit of the scheme described in the offer letter and the Summary of Benefits, which included the escalator. Its approach to the task of construction was erroneous. As is well-established, and was confirmed in **Wood v Capita Insurance Services Limited** [2017] AC 1173, what the parties had agreed had to be determined by a consideration of the objective meaning of their written agreement.

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32. Once the claimant had signed the contract of service, that was the only contractual document (though it might incorporate other material by reference). Mr Cohen accepted, in line with the discussion in **Wood** at [10], that it had to be construed in context, and in this case the offer letter and the Summary formed part of the context. But the Tribunal's reliance, at [88], on the proposition that the Summary was "clear and certain", leading to the conclusion that it had contractual status, was also erroneous. It may have been clear, but it was still a "summary", which meant that it was not a comprehensive statement. The offer letter described it as being "for further information". It informs the reader that the respondent has bought an insurance policy and then summarises the terms of that policy. It does not purport to confer individual rights. It did not use language such as "we will pay you". It did not use, in the expression of Auld LJ in **Keeley v Fosroc International Limited** [2006] IRLR 961, at [35] and [38] the "language of entitlement." Clause 6 of the contract of service stated that IPP benefits were set out in the Manual and "outlined" in the letter of offer. The Tribunal failed to consider the significance of this language. Had it done so, it would have been bound to conclude that the Summary was plainly not contractual and did not inform the interpretation of the contract.

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33. Mr Cohen submitted that if ground 1(a) succeeded, the appeal must succeed. But ground 1(b) was closely linked to it. He submitted that the Tribunal erred, at [91], in concluding that the effect of clause 22 was that the Summary displaced whatever the Manual may have said about IPP. This paragraph of the Tribunal's decision contained no reasoning, but the finding was inherently flawed for the following reasons.

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34. First, neither the offer letter nor the Summary contained any words excluding any terms relating to IPP contained in the Manual. Clause 6 of the contract of service expressly provided, to the contrary, that the claimant was entitled to participate in the IPP scheme "to the extent and

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A in the circumstances set out in the Manual." The Tribunal's analysis meant that the contract had given with one hand, in clause 6, and then taken back with the other, in clause 22. Such an interpretation was unsound, and contrary to the principle in **Wood** that contractual terms are to be construed in the context of the contract as a whole.

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35. Secondly, the importation of any terms relating to IPP found in the Manual was achieved by clause 6, not clause 22. The purpose of clause 22 was merely to incorporate any residual general terms and provisions contained in the Manual, as additional contractual terms, save as otherwise expressly agreed.

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36. Thirdly, the Tribunal's interpretation defied commercial logic. The respondent plainly intended to be only an intermediary, obtaining and passing on the benefits of insurance cover to its employees. On the Tribunal's analysis it had intended to provide a fixed level of benefit described in the summary of benefits, regardless of the level of insurance cover it had obtained. That was a commercially improbable scenario. Mr Cohen's primary case was that the contract was *not* ambiguous on this point. But, if it was, then the Tribunal had failed to consider the importance of commercial explicability when interpreting a contract, as explained by Lord Hodge JSC in **Wood** at [11] and [12].

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37. Mr Cohen submitted that if either ground 1(a) or (b) succeeded, then the claimant *only* had a contractual entitlement to the escalator if such a right were conferred by the relevant Manual. As to that, he confirmed that the respondent did not seek to challenge on appeal the Tribunal's finding that the provisions of the 2005 Employee Handbook (which Mr Cohen referred to as the 2005 Manual) did not take effect as a variation to the claimant's contract.

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38. While (on the respondent's case) the 2003 Summary of Benefits was not a contractual document, Mr Cohen also accepted that it was *evidence* from which the Tribunal could properly have concluded that the Manual that was current in 2003 provided a right to benefit from the IPP terms then in place with the insurer, including the escalator. It was also accepted that the respondent could not show that the Manual in place in 2003 included words referring to the terms of the policy applying "from time to time", so it could not be said that later changes in those terms would, by that mechanism, automatically "flow through".

39. However, submitted Mr Cohen, the claimant for his part could not rely on any Manual provision as applicable and coming positively to his aid. The Tribunal had found that the 2005 Manual ceased to be effective in 2007; but it had made no finding about any other Manual provision that replaced it, and that may have been current when the claimant went off sick, and/or began to be in receipt of IPP in 2009. The claimant had not shown that there was any applicable Manual provision giving him a right to the escalator. This was not in dispute in this appeal.

40. In oral submissions Mr Cohen did not formally abandon ground 1(b) as a freestanding ground; but he came close to accepting that it did not add anything to 1(a). In any event, his position was that success for the respondent on either was enough for the appeal to succeed.

41. Turning to ground 2, Mr Cohen submitted that, even if (contrary to his case) the Tribunal correctly concluded that the Summary of Benefits had contractual effect, the effect of the words: "The operation of both Schemes is governed by the terms of the Group policies and nothing in this summary will override the terms of that document" was to limit the claimant's entitlement, to whatever provision was made by the terms of the insurance policy in force during any given period. The Tribunal's reasoning, at [86] and [87], appeared to turn on its finding that, if the "document" referred to was the policy with the Sun Life Financial of Canada, that "was never

provided to the Claimant and was never, of itself, of any contractual force between the Claimant and the Respondent." That reasoning was erroneous, because a contractual provision to the effect that the extent of the respondent's commitment corresponded to the provision set out in the insurance policy, would be effective by incorporating those terms by reference. It was a basic principle of contract law that the provisions of a document could be incorporated by reference, without it needing to be shown to the party in question.

42. Lord Denning MR's famous reference, in **Thornton v Shoe Lane Parking** [1971] 2 QB 163, to the need for red ink and a red hand pointing to the provision relied upon, had no relevance to a case, as here, in which an individual was provided with a contract, which they had an opportunity to consider, and then signed. Nor did the other authorities relied upon by the claimant assist him. In **Villella v MFI Furniture Centres Limited** [1999] IRLR 468 the employer could not rely on a term contained in the insurance policy, to limit the availability of PHI cover, because, as a matter of construction, it was not incorporated into the contract. Another authority relied upon by Mr Leach, **Briscoe v Lubrizol Limited** [2002] IRLR 607, simply restated what was said in **Villella**, and took matters no further.

43. Further, the Tribunal had not found that these words were "static" in effect, applying only to incorporate the terms of the policy that applied in 2003. Any such finding would itself, submitted Mr Cohen, have been wrong. The language did not compel that construction, and it would be contrary to the commercial purpose to construe it that way, as the plain commercial purpose was to make clear that the employee's right to payment was no greater than the provision in respect of which the employer was indemnified by its insurance cover; and that cover would, in the nature of things, vary from time to time. Indeed, not to infer a "from time to time" provision

would actually prejudice the employee, as it would mean that when the insurance policy changed, the benefit ceased altogether.

Claimant

44. As to the law, Mr Leach relied upon a number of authorities that he had also relied upon before the Tribunal, in particular **Jowitt v Pioneer Technology (UK) Limited** [2003] ICR 1120 and **Awan v ICTS UK Limited** [2019] IRLR 212. In **Jowitt** the contractual commitment made by the employer, in respect of long-term disability pay, was held not to be contingent on the terms of the underlying insurance policy being satisfied. Mr Leach highlighted the Court of Appeal's observations that the employee knew nothing of the existence of the policy, much less its terms; and that there was no foundation for incorporating those terms directly or by reference into the contract of employment. In **Awan** there was a TUPE transfer. The transferor had the benefit of an insurance policy which underwrote disability pay; but the transferee did not. However, the EAT held that the contract provided a right to the pay regardless of this.

45. The facts of the present case were closely analogous to the facts of both those cases. The Summary of Benefits stated that Cramer had established a scheme, and stated the essential terms, including the escalator, with precision, and that "Cramer pays the whole cost." The reference to the "Group policies" did not expressly refer to an *insurance* policy or policies, still less that with Sun Life. Nor was the claimant provided with a copy of the Sun Life policy.

46. As for the contract of service, clause 6 referred to both the Manual and the offer letter; but the offer letter referred to the "Group policies" and not to the Manual. For the purposes of clause 22, the IPP terms were "agreed elsewhere", that is, in the offer letter and the summary of benefits.

47. The respondent had relied before the Tribunal upon the 2005 Employee Handbook as "the Manual". But that document itself, in its introduction, indicated that it was the offer letter and terms and conditions of employment that "form the basis of your contract of employment." Even had the 2005 Manual been current at the relevant time, the purported power "from time to time" to vary the cover contained in clause 5.3 would therefore have been ineffective. This Handbook also incorrectly or incompletely summarised the benefits as they stood in 2005, omitting reference to the escalator. A later version of the Handbook in the Tribunal's bundle, from 2012, made no reference to IPP at all.

48. Mr Leach highlighted a number of other features of the particular documentation and facts in the present case. In the present case, as in **Awan**, the Tribunal had properly held that the reference to the *existence* of an insurer fell short of showing that the contractual commitment of the employer was limited by reference to the terms of the policy. The claimant was not given the policy. The benefits were paid by the respondent through PAYE. There was no *express* provision in any document limiting the respondent's commitment by reference to the terms of the insurance policy. In any event, the policy in 2003 *included* the escalator, and there was no "from time to time" variation provision incorporated into the contract in this case.

49. In relation to ground 1(a) Mr Leach submitted that the Tribunal properly concluded at [88] that the Summary of Benefits provided a "clear and certain statement" of the claimant's entitlement, applying, in effect, the **Keeley v Fosroc** test. The use of the word "summary" did not denude the provisions of contractual force. This document was in fact more detailed than the offer letter or the contract of service, or even the 2005 Handbook on which the respondent had erroneously relied before the Tribunal. The fact that the offer letter directed the reader to the Summary of Benefits for more information, *supported* its incorporation into the offer letter.

Clause 6 of the contract of service correctly referred to this benefit as being "outlined" in the letter of offer, because the Summary of Benefits provided further detail.

50. In oral submissions Mr Leach cited a passage in the speech of McCombe LJ in **Sparks v Department and Transport** [2016] ICR 695 at [31], where the issue was whether certain provisions were apt for incorporation. He asked rhetorically, whether, had those same provisions been found in a formal contractual document, it could seriously have been argued that, as a matter of construction, they were not so apt? So, here, had the provisions of the "Summary" been found in the contract of service, it could not seriously have been argued that they were not certain enough to have binding effect. Similarly, in **Awan** the fact the provision relied upon was in a "booklet" which the contract of employment described as providing "information" on a benefits plan did not prevent it from having contractual effect. In **Villella**, as discussed at [25] to [34], the employee was able to rely on the provisions of a "memorandum"; and a conflict in that case between how that document, and the offer letter, described its status was to be resolved by application of the *contra proferentem* rule.

51. Nor, as the Tribunal found, was any copy of the "Manual" that may have been in force in 2003 seen by the claimant at the time. Nor was any such document disclosed in the litigation. The Tribunal had no evidence as to its content and specifically stated (at [53] and [90]) that it was *unable* to make any finding of fact about its contents. Nor, as was reflected at [51] and [92], did the Tribunal have any evidence as to the terms of any Manual in force in November 2009, when the claimant began to receive IPP.

52. As to ground 1(b), what the Tribunal said at [91] about clause 22 of the contract of service was strictly *obiter*: the Tribunal had decided that the 2005 Manual did not apply, and that it had no evidence about what the Manual as at 2003 said. But, in any event, it was right to find that

A the specific agreement of the parties regarding IPP terms, as found in the offer letter and the Summary of Benefits, took precedence over any terms in the Manual at that time. The respondent's case overlooked the fact that clause 6 of the contract of service referred not just to the Manual, but also to the offer letter, which itself incorporated the Summary of Benefits. But, even if clause 6 might have incorporated *some* other or additional provision from the Manual, the Tribunal was right to conclude that it could not say what it was.

C 53. As to the submission about commercial logic, the answer was to be found in the discussion in **Arnold v Britton** [2015] AC 1619 at [17] to [20]. The primary source of objective construction was the meaning of the language that the parties had chosen to use in the words of the contract. A party could not retroactively appeal to commercial common sense to rescue them from what had turned out to be a bad bargain for them.

54. In relation to ground 2, concerning the reference to "Group policies", no policies, whether of insurance, or otherwise, were provided to, or seen by, the claimant, at any time. A line of authorities, in particular **Villella**, **Briscoe**, **Jowitt** and **Awan**, is to the effect that, in this context, the significance of a term within an insurance policy has to be drawn very clearly to the employee's attention, if it is to be treated as incorporated into the contract of employment. The claimant did not see the underlying insurance policy in 2003, nor had he at any time since. Even the 2008 policy was only seen by him for the first time in the course of the litigation. Applying the foregoing line of authorities, no policy terms were incorporated into his contract. That conclusion alone disposed of this ground.

55. In any event, at best for the respondent, the reference to "that document", appearing as it did in a Summary issued in 2003, was to the policy in force in 2003, which the respondent conceded, and the Tribunal found, included the escalator. The Tribunal did not err in not reading

this sentence as implicitly referring to the terms of whatever insurance policy was in place "from time to time". There was no ambiguity. Those words could have been included, but they weren't; and there was no warrant to read in words that were not there.

Discussion and Conclusions

56. In this case all the essential facts have been found by the Tribunal, and this appeal does not seek to disturb them. It was common ground in argument before me that the outcome of the appeal turns on the correct construction of the relevant written documents, which is a question of law. See **Thorner v Major** [2009] 1 WLR 776 at [82].

57. I start with some points drawn from the authorities on the pertinent principles of construction in a case such as this.

58. The general principles of contractual interpretation have been reviewed and confirmed in the trilogy of Supreme Court decisions ending with **Wood**. As explained there, at [10], the court's task is to ascertain the objective meaning of the language which the parties have chosen. As explained at [13], textualism and contextualism are both potentially available tools when carrying out that task. The extent to which each will assist "will vary according to the circumstances of the particular agreement or agreements." As explained in the passage from **Arnold** relied upon by Mr Leach, commercial common sense cannot be invoked with hindsight to escape or mitigate the objective natural meaning of the language of the contract.

59. In the employment context, a frequent complicating factor, is that contractual terms are not invariably to be found in a document that is, in terms, described as the contract. Often there is no such document. Rather, such terms are often to be found in a document that has some other label or title, or none at all, or, in a given case, in more than one such document. As the discussion

A in authorities such as **Keeley** and **Awan** explains, if the actual language of a section or provision of a document, objectively construed, is the language of entitlement, particularly where it relates to an important matter such as remuneration, that feature is liable to be more significant than the title of the document in which it appears, or whether other documents have described it as, for example, being for information.

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60. I turn to the sub-line of authorities concerned with permanent health, sickness or disability pay schemes or arrangements.

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61. In **Villella** the issue was whether the employee, who was in receipt of benefits under the employer's long-term disability scheme, ceased to be entitled to them when his employment ended. The employer relied upon a provision in the insurance policy to that effect. The documents that the claimant had been given were a letter and a "memorandum". The memorandum began by stating that "[t]he company has introduced a long-term disability scheme which is ensured with NEL Permanent Health Insurance Ltd. Brief details of the scheme are given in this leaflet, which is intended to serve as a guide only." That document set out the level of benefit that would be provided in various specified circumstances.

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62. In holding that the employer could not rely on the clause in the insurance policy, the Court referred, at [28] to [33], to a number of factors, including (a) the policy was not shown to the employee or drawn to his attention. Although this was "not a ticket case", the principle in **Thornton** applied; (b) the only documents given to him were the letter and the memorandum. The letter described the memorandum as providing full details. The conflict between that and the memorandum's self-description as "brief details" was to be resolved in favour of the employee; (c) the memorandum described the benefit in clear terms, inconsistent with it being subject to approval by the insurer or terminable as claimed; (d) a provision concerning the effects

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of leaving service carried the inference that, whilst disabled, an employee would not lose benefits; and (e) "The memorandum, whilst referring to the existence of insurance, does not refer to the terms thereof or suggest their relevance."

63. In **Briscoe** the wording of a handbook described the condition for eligibility to disability benefit as being *narrower* than the insurance policy in fact provided. Potter LJ, at [14] to [17], observed that **Villella** showed that the court "looks unfavourably upon an employer who seeks to restrict his contractual obligations" in reliance on "a policy which he has not brought to the attention of his employee"; but in a case such as the present the employer could not "rely on his own error to deprive the employee of a benefit which he has in fact intended to bestow."

64. In **Jowitt** the relevant clause of the handbook began: "The company runs a scheme that is designed to provide an income during lengthy periods of absence due to prolonged sickness or injury." It set out the entitlement and eligibility conditions attaching to it. A less favourable eligibility condition in the insurance policy was not incorporated. At [12] Sedley LJ (for the Court) observed that the handbook clause "represents in simple terms that the company itself makes provision ('runs a scheme') for pay during long-term disability or illness, and spells out what the provision is." It was prudent for the employer to insure its potential liability, but Mr Jowitt knew nothing of the policy "much less its terms". Sedley LJ cited Lord Denning MR in **Thornton**. He also observed, at [13], that **Briscoe** "which reached a different result on the facts, seems to me wholly consonant in its principles and its reasoning."

65. In **Awan** the contractual point was a sub-issue within the context of a disability discrimination claim. The contract of an employee of American Airlines contained a clause which stated that "[t]he company has established a Pension and Death and Disability benefits plan" for eligible employees and set out the benefits provided. It stated that "information" on

this plan was to be found in a particular booklet. The booklet itself stated that the benefits "are provided by an Insurance Policy." The policy was not attached, nor were its terms set out, notified or provided to employees. In point of time after he fell ill, the claimant's employment TUPE-transferred to the respondent, which was not able to avail itself of American Airlines' insurance policy; and its own insurers did not accept liability in respect of the claimant.

66. The EAT rejected the argument that the employee's entitlement was limited to such benefits as the employer was able to obtain from its insurers. Simler P said:

> **"35. I do not accept this argument which flies in the face of the contractual documentation in this case. I start with the Claimant's contract itself, which is clear. Clause 6 represents that the employer has established (among other schemes) a disability benefits plan for all eligible employees. The word plan simply signifies an arrangement or scheme. Clause 6(c) sets out precisely the benefits that "will" be provided under the plan as "an annual payment of two thirds of salary". In other words, the benefit provided under the plan is expressed in clear and unambiguous terms as payment of salary. That this benefit is grouped with other benefits is simply a function of the fact that they are benefits provided under schemes set up by the employer to make provision for disability, retirement or death. There is no reference to third party providers or funders of these benefits and no reference to any insurance policy in this clause.**
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> **36. Mr Kohanzad did not contend that the insurance policy itself was incorporated into the Claimant's contract (and I can see no arguable basis for such a contention on the material provided to me – there is simply no evidence that the insurance policy was ever provided to employees, although its existence was referred to in the Booklet). The employment contract could have stated that eligibility for disability benefits was subject to the provisions of a relevant insurance policy or the rules of a particular insurance provider. It could have said that the obligation to make payments to the employee would only arise if and when payments were paid out by the insurer. However none of this was said.**
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> **37. Nor is there any substance in the contention that clause 6 would have been expressed as part of clause 5 if it conferred benefits payable as salary by the employer. The two entitlements are different and differently expressed. There is no compelling reason why they should have been dealt with together.**
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> **38. Nor in my judgment does the Booklet offer any support for Mr Kohanzad's argument. Section G of the Booklet, set out in full above, is consistent with clause 6 of the Claimant's contract, in providing, in the event of absence from and inability to work for a continuous period of 26 weeks or more, for the receipt of "disability income" of two thirds of base annual salary, less relevant benefits. Moreover the benefit described as "disability income" is expressly treated as "normal pay". To that end, it explains that PAYE deductions will be made. Since PAYE deductions are made by the employer, it is inherent in this section of the Booklet that the income paid as disability benefit, and treated as normal pay, is paid by the employer. It seems to me that the contract and Booklet could not have been clearer in providing for the right to payment by the employer of a benefit broadly calculated as two-thirds annual, and treated as pay.**
>
> **39. The other references in the Booklet relied on by Mr Kohanzad do not alter this conclusion. It was plainly sensible for the employer to obtain insurance cover for any liability under the disability scheme. However, the statements that the benefits are**

> **provided by an insurance policy, and that the cost of the insurance is borne by the employer do not begin to convert the express contractual right set out in clause 6(c) and section G of the Booklet into a right to the provision of insurance cover only, or to the payment of benefits contingent on the availability of insurance cover. That is simply not stated or communicated to employees anywhere in the contract or Booklet. The statements merely convey limited information to the reader that there is an insurance policy, and that it is paid for by the employer. The obligation on the employer to pay benefits under the disability plan is regardless of whether the insurer pays under the policy or not."**

67. Standing back, I make the following observations about these authorities. First it is clear that **Briscoe** turned on its own facts. It did not articulate any guiding principle different from those emerging from the other authorities. Secondly, in all three of the other cases, the employee was provided with documentation which told them, in terms, that the benefit existed, and set out, unambiguously, essential provisions as to the level of benefit and the circumstances in which it would be provided, which objectively conveyed a contractual commitment.

68. Thirdly, a consistent theme is that, if there is any ambiguity or uncertainty as to whether the employer's obligation to provide benefits is to be limited by reference to the specific terms of the employer's insurance cover, any such ambiguity will be resolved against the employer and in favour of the employee. That is not, I observe, a departure from orthodox contractual principles, but an application of the ancient common law rule, that any ambiguity as to whether a provision applies is to be construed against the party who seeks to rely upon it.

69. Next, a reference to the fact that the employer has arranged insurance in respect of the benefit, was not, in these cases, alone sufficient to make good the contention that the employer's commitment was limited by reference to the terms of that policy. To be effective, the limitation of the employer's exposure must be unambiguously and expressly communicated to the employee, so that there can be no doubt about it. That might be done by spelling out unambiguously, in a document provided to the employee, or drawn to their attention, what the

particular limitations are, by stating in terms that the employer's obligation will be limited to the amount of payments made by the insurer, or something unambiguous of that sort.

70. I turn then to apply the law to the facts of this case as found by the Tribunal. I start with the status of the three documents which were provided to the claimant in 2003.

71. The contract of service, which was also self-described as "An Agreement" between the two parties, was signed and dated by the claimant and for and on behalf of Cramer. Its contents were plainly contractually binding. However, in relation to IPP the effect of clause 6 was, in my judgment, to incorporate as contractually binding terms, the provisions of the letter of offer and the Summary of Benefits. That came about in the following way.

72. The reference to "Salary Protection Plan" was plainly to what the offer letter called "An income protection plan". The preamble to clause 6 referred the reader to the letter of offer and to the Manual for further particulars. It did not refer only to the Manual. The letter of offer was only an outline, but it was a potential source of terms, as far as it went, and the objective sense was that its contents would be in keeping with whatever was set out in the Manual.

73. In this case, the letter of offer set out headline terms with clarity. When the benefit would kick in: after 13 weeks when full sick pay expired; how much it would be: 75% of salary less incapacity benefit; how long it could last: up to age 60. It then referred to the attached Summary of Benefits. The description of that as being "for further information" did not signify that its terms were not contractual. Nor did the use of "Summary" in the title of the document itself. What mattered was not the title but the contents: the ground that they covered and the language in which they were expressed.

74. The language of the Summary of Benefits was, itself, in my judgment, the language of entitlement. It repeated, unambiguously, the headline terms that had appeared in the offer letter. It also set out, precisely, the terms of the escalator: when it would kick in, the annual increase amount, and how long it would continue to apply. It also addressed with clarity other important matters, such as whether the employee has to make any contribution payment (no) and tax treatment. Its question and answer format was also expressive of it being addressed directly to the employee, and providing information that they would be able to rely upon.

75. What of the fact that the preamble to clause 6 of the contract of service also referred to "the circumstances set out in the Manual"? As to that, the contract did not define "the Manual"; and the Tribunal found that the claimant was not given it. But what he *was* given, with the offer letter, was the Summary of Benefits. The former could objectively be fairly described as outlining the benefit, and the latter as setting out the extent and circumstances of the entitlement. The objective reader would infer that, if the Summary of Benefits was not in fact an extract from the Manual, then the Manual itself could not be expected to say anything materially different.

76. Pausing there, I conclude that the Tribunal correctly found that the content of the Summary of Benefits had contractual effect. Ground 1(a) of the appeal fails.

77. I turn to ground 1(b). The correct analysis is this. Clause 22 of the contract potentially had the effect of incorporating by reference into the contract, provisions of the Manual in relation to matters about which neither this contract, nor any other agreement between the parties, made provision. IPP was a matter in relation to which the contract did make provision: it did so in clause 6. That being so, clause 22 had no application in relation to that topic.

78. The Tribunal plainly had a copy of the contract of service before it. But it did not set out the words of clause 22 in its decision, and its analysis of its effect at [91] is not quite right. It is not that clause 22 removed the effect of whatever the Manual said. Rather, clause 22 only had effect to incorporate a provision of the Manual, in respect of a matter in respect of which the contract made no provision. But that would not have precluded the contract *elsewhere* making some provision incorporating a provision of the Manual. Clause 6 did itself refer to the Manual. But the Tribunal had no direct evidence of what the Manual as at 2003 might have contained, and could make no finding about it.

79. However, to repeat, clause 6 did not refer only to the Manual; and, for the reasons I have set out, its effect was that the contents of the offer letter and the Summary of Benefits on the subject of IPP *were* contractual. In that sense, the Tribunal's overall *conclusion* at [91], that the contractual nature of the Summary of Benefits was not affected by clause 22, was correct. Further, as I have indicated, the only objective inference that the reader of the contract of service, the offer letter and the Summary of Benefits could draw about the Manual would be that it would not say anything materially different about IPP from what the Summary said.

80. Accordingly, although the Tribunal's analysis in [91] is not quite right, it was neither a necessary part of its reasoning, nor did it affect the soundness of the conclusion that it came to as the contractual status of the Summary of Benefits. In so far as the point of ground 1(b) is that the Tribunal wrongly considered that clause 22 reinforced its analysis, I agree. But if the point of ground 1(b) is also that the Tribunal should have concluded that clause 22 supported the *respondent's* case that the Summary was *not* contractual, I disagree. Either way, this ground does not assist the respondent, because it does not show that the Tribunal was wrong to conclude that the Summary was contractual.

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81. I turn to ground 2, which concerns the effect of the sentence appearing under "NOTES" in the Summary of Benefits (cited by the Tribunal at [8] of its reasons, as set out by me at [9] above). Though it does not say so in terms, it was accepted by the claimant before the Tribunal, that the reference to "Group policies" was to the Cramer Group's insurance policies relating to the two benefits under consideration. In any event, I think that is the better reading, and, further that the shift from plural to singular at the end, when referring to "that document" is simply an infelicitous drafting shorthand, for "the policy in question."

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82. However, that is not enough to bring ground 2 into port, for the following reasons. Firstly, in line with the approach in the **Villella** – **Awan** line of authorities, if reliance was to be placed on a term in an insurance policy as qualifying, or cutting back on, what the documents have elsewhere expressly stated were the substantive benefits entitlements (as opposed to, say, matters to do with the procedures that might need to be followed, and conditions that might apply, in order to make a particular valid claim, and verify that the entitlement has been triggered) further steps would need to have been taken to bring those particular terms to the claimant's attention, above and beyond the inclusion of this sentence in this document.

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83. As to that, the Tribunal found that the claimant had not been given, nor given ready access to, the insurance policy terms, or any other document setting out the specifics of what those terms were. I do not agree that this is a case of pure incorporation by reference, or that the fact that the claimant had time to consider the documents he was sent before he signed, puts clear blue water between this scenario and the **Thornton**-type scenario. Given the realities of the employment context, it seems to me, respectfully, that this line of authorities rightly returned to **Thornton** more than once as a touchstone; and I follow in that approach.

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84. Secondly, even if this sentence was sufficient to incorporate all the terms contained in an insurance policy, then the starting point is that this would, objectively, be construed as referring to the policy in force at the time when the contract was made, which, in fact, incorporated the escalator. For it to be the case that, were that policy in the future to be replaced by another policy with less favourable terms, then those less favourable terms would henceforth apply, some explicit language to that effect would need to have been included. That, to my mind, is a straightforward application of the *contra proferentem* rule. Further, there is no necessary implied term limiting the employer's exposure, by reference to the extent of coverage of the policy in force from time to time. For the reasons explained in **Arnold v Britton**, the invocation of "commercial common sense" has no traction. Having made the commitment, the respondent was bound to honour it, whether or not it continued to be fully backed with insurance cover in later years.

85. For all of these reasons ground 2 therefore fails.

86. The appeal against the Tribunal's liability decision accordingly fails.

The Costs Appeal

The Tribunal's Decision

87. Rule 76(1) **Employment Tribunals Rules of Procedure 2013** provides, materially:

> **"76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—**
>
> **(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
>
> **(b) any claim or response had no reasonable prospect of success;"**

88. In the course of the liability decision the Tribunal described the respondent's primary case as being that the claimant was only ever entitled to the salary in respect of which it was indemnified by its insurer. It considered that that case rested "to a large extent" on paragraph 5.3 of the 2005 Handbook. In that decision the Tribunal identified the respondent's secondary and tertiary cases as being based on a variation of entitlement having been achieved on 1 November 2016, either so as to "reset" the claimant's entitlement to that which applied under the 2008 policy, or at least to stop the escalator applying from 1 November 2016 onwards.

89. In the costs decision the Tribunal then stated, at [11], that the purported contractual force of paragraph 5.3 of the 2005 Handbook was "a central component to [the respondent's] primary, secondary and tertiary cases." The respondent's case had been that the 1 November 2016 email effected, through the mechanism of clause 11, an amendment (whether or not retroactive) to that paragraph. At [12] the Tribunal continued that the costs threshold was crossed under both Rule 76(1)(a) and (b). It said:

> **"The Tribunal is satisfied that it was unreasonable for the Respondent to have advanced, as its fundamental basis for defending the liability stage of the claim (as so found by the Tribunal), the assertion that the 2005 Handbook had contractual force and that its conduct in so doing was unreasonable. Further, when judged on the facts as known, or ought to have been known, by the Respondent at the outset of the proceedings, the Tribunal is satisfied that a defence to the claim that was largely based on the contractual force of the 2005 Handbook had no reasonable prospect of success."**

90. Having found that the costs threshold had been crossed, by both routes, at [13] the Tribunal considered whether to exercise its discretion to award costs. It was satisfied that there was a proper basis to do so, the "essential point" being that it should have been apparent to the respondent from the outset, that its contention relying upon the 2005 Handbook "was devoid of merit and had no reasonable prospect of success."

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91. The Tribunal went on to say, at [14], that the amount of costs should be limited to those associated with the liability decision, that is, the costs of the litigation up to that point. The respondent had not acted unreasonably in its contentions at the remedy stage, nor had those contentions had no reasonable prospect of success.

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Grounds of Appeal and Arguments

92. The grounds of appeal contend that the Tribunal erred in law (1) by finding that there was unreasonable conduct, as the respondent had advanced a defence which did have reasonable prospects of success; (2) in finding that there had been unreasonable conduct without finding that it was unreasonable to argue (a) that the right to IPP arose under the contract of employment, and, pursuant to it, had been varied on 1 November 2016; and (b) that the Summary of Benefits provisions were limited by reference to the terms of the underlying insurance policy; and (3) because it was in any event wrong to award the *whole* of the costs associated with the liability decision, when the Tribunal had limited its adverse findings to only one point taken by the respondent, not including those referred to at (2).

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93. In submissions Mr Cohen said there were two fundamental points. First, the findings that there were no reasonable prospects and unreasonable conduct, were perverse. Secondly, and alternatively, even if the Tribunal was entitled to so find in respect of the defence based on the 2005 Handbook, the Tribunal was wrong to say that this underpinned the *whole* defence; so an award of the *whole* of the costs of the liability stage of the claim was, in principle, wrong.

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94. In relation to the first point, there had been a factual dispute as to whether the claimant had seen, or could reasonably have been expected to have seen, the 2005 Handbook, which had been published on the respondent's intranet. The respondent reasonably pursued its case on that issue, which was only resolved once the Tribunal had heard the claimant cross-examined. As the

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A Tribunal concluded that he had not seen *any* version of the Handbook, and he did not rely on whatever the 2007 version might have said (about which there was no evidence) it was also wrong to attach the significance that it did to Ms Swinn's evidence accepting that the 2005 version had been withdrawn in 2007. More generally, it was unfair to criticise Ms Swinn, or the respondent, for some confusion, given that these were historic matters relating to a business that the respondent had acquired from the original employer in 2006.

C 95. In relation to the second point, the second and third strands of the respondent's defence had rested on the general proposition that, by virtue of clause 11, the 1 November 2016 letter effected a variation of whatever the relevant Manual had previously provided in relation to IPP. Those arguments were not tied to the proposition that the relevant Manual was in fact the 2005 Manual, or the "from time to time" provision in clause 5.3 of that Manual.

96. Further, the Tribunal's approach overlooked the fact that the *claimant's* case was not based on any Manual, but on the proposition that the Summary of Benefits was a contractual document which gave him the absolute right to the escalator. The respondent had, in any event, reasonably contested *that* case, including its contention that, even if the Summary of Benefits *could* be relied upon as a contractual document, it should itself be construed as having incorporated the provisions of the underlying insurance policy from time to time. These were further elements of the defence which could not be said to have been unarguable.

97. Mr Leach submitted that the costs appeal did not surmount the high hurdle of a perversity challenge. Further, the Tribunal's finding that there was unreasonable conduct was justified, independently of the finding that the "no reasonable prospect" gateway was crossed. There can be unreasonable conduct even where the party's case itself has reasonable prospects.

98. As to ground 1, the Tribunal had been right to view the respondent's secondary and tertiary cases as linked to its primary case based on clause 5.3 of the 2005 Handbook. Its specific case had been that, if there was a requirement to notify the claimant of a change effected by clause 5.3, then it was effected by the 1 November 2016 email doing so pursuant to clause 11. This was how the respondent's case had been put in its closing skeleton argument. The respondent's argument as to why the *claimant's* analysis was wrong, also turned on clause 5.3 of the 2005 Handbook, it being the respondent's case that the claimant was wrong to assert that clause 22 of the contract of service trumped that provision of the 2005 Handbook.

99. Mr Leach also submitted that the respondent's remaining contentions: that the Summary of Benefits was not contractual, that if it was, its provisions were subject to the terms of the policy in force from time to time, and that the 1 November 2016 email effected a general amendment to the provisions of *any Manual*, or the contract generally, were all hopeless. The Tribunal was therefore entitled to make a whole costs award on the basis that the central plank of the respondent's case had had no reasonable prospect of success. Even if that conclusion was perverse, the conclusion that the respondent had engaged in unreasonable conduct would still stand, and still provide a proper alternative basis for the costs order that was made.

100. As to ground 2 it was not, in any case, necessary for the Tribunal to find that the respondent's arguments based on clause 11 of the contract of service, and on the effect of the Summary of Benefits, had no reasonable prospect of success, in order to conclude that there had been unreasonable conduct of the proceedings. In any event, the Tribunal did, properly, find that the former argument had no reasonable prospects of success. It was also implicit in its decision that it considered that the latter argument did not have reasonable prospects of success, in the absence of the respondent being able to rely on the 2005 Handbook.

101. As to ground 3, the Tribunal properly concluded that reliance on the 2005 Handbook permeated the whole defence. But in any event, as explained in **Barnsley Metropolitan Borough Council v Yerrakalva** [2012] ICR 420 at [41], there did not have to be a precise causal link between the unreasonable conduct and the costs claimed. The Tribunal's approach, awarding the whole of the liability costs, but excluding the remedy costs, was within its broad permissible discretion.

Discussion and Conclusions

102. There is a strong element of interaction and overlap among the grounds of the costs appeal, and the underlying arguments. I have found it most convenient to approach my decision, by addressing what seem to me to be the distinct stages of the underlying arguments, in what I find to be the most logical sequence.

103. I start with the observation that this is a case where the underlying basis for the unreasonable-conduct assertion was that the respondent had run a defence or defences which had no reasonable prospect of success. There was no independent allegation of unreasonable conduct of the litigation in some other respect. Whether through the rule 76(1)(a) or the rule 76(1)(b) route, the Tribunal therefore had, one way or another, to consider the following questions. First, did the defence, or part of it, have no reasonable prospect of success, from the outset? If so, secondly, did the respondent know, or ought it to have known, that? Thirdly, if so, was a costs order appropriate, and, if so, in what terms? (See my discussion of this aspect in **Radia v Jefferies International Limited**, UKEAT/0007/18 at [62]ff.).

104. With that preliminary, I take the substantive issues raised by the costs appeal in the following order. First, did the Tribunal err in concluding that the respondent's defence, in so far as it was based on the 2005 Handbook, had no reasonable prospect of success? Given that it

emerged that the 2005 Handbook ceased to have effect in 2007, I do not think that it did. That fact meant that it could not arguably be relevant to the claim of an employee whose contract was formed in 2003, and who began sickness absence and was in receipt of IPP from 2009.

105. Secondly, did the Tribunal err in concluding that the respondent ought reasonably to have known that from the outset? The fact that the oral evidence of a witness has unfolded in a manner adverse to the case of the party who called them, does not necessarily mean in every such case that the party itself ought reasonably to have appreciated or anticipated the problem from the outset. However, in this case, the evidence which undermined the respondent's reliance on the 2005 Handbook, being that it ceased to be in force in 2007, came from Ms Swinn, who was the respondent's only witness, and who had herself, as the Tribunal described in the liability decision, given a slide presentation in 2007 to incoming Cramer employees on the subject of benefits, including this benefit. Against that background, I do not think I can say that it was perverse for the Tribunal to take the view that the respondent ought reasonably to have realised that there was a problem with this part of its defence from the outset.

106. Was it, then, wrong of the Tribunal to take the view that this justified an award of the whole of the claimant's costs of the litigation up to the conclusion of the liability stage? I turn, first, to the pertinent guidance in the authorities.

107. In **McPherson v BNP Paribas (London Branch)** [2004] ICR 1398, at [40] (referring to the costs rules in the Rules of Procedure 2001) Mummery LJ said this:

> **"In my judgement, rule 14 (1) does not impose any such causal requirement in the exercise of the discretion. The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion, but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by Mr McPherson caused particular costs to be incurred."**

108. In **Yerrakalva** (referring now to the 2004 Rules) Mummery LJ said this:

> **"40. The actual words of Rule 40 are clear enough to be applied without the need to add layers of interpretation, which may themselves be open to differing interpretations. Unfortunately, the leading judgment in *McPherson* delivered by me has created some confusion in the ET, EAT and in this court. I say "unfortunately" because it was never my intention to re-write the rule, or to add a gloss to it, either by disregarding questions of causation or by requiring the ET to dissect a case in detail and compartmentalise the relevant conduct under separate headings, such as "nature" "gravity" and "effect." Perhaps I should have said less and simply kept to the actual words of the rule.**
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> **41. The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had. The main thrust of the passages cited above from my judgment in *Mc Pherson* was to reject as erroneous the submission to the court that, in deciding whether to make a costs order, the ET had to determine whether or not there was a precise causal link between the unreasonable conduct in question and the specific costs being claimed. In rejecting that submission I had no intention of giving birth to erroneous notions, such as that causation was irrelevant or that the circumstances had to be separated into sections and each section to be analysed separately so as to lose sight of the totality of the relevant circumstances."**

109. So: the Tribunal does not have to determine a "precise causal link" between the conduct triggering a costs award, and the costs award, but nor is causation irrelevant; and what matters is to look at the whole picture. This approach gives Tribunals a wide margin of appreciation, but not an unlimited one. It is worth recalling that in **Yerrakalva** itself, the Tribunal considered that the claimant should pay 100% of the respondent's costs, the EAT quashed that order entirely, and then, applying its own guidance, the Court of Appeal substituted an award of 50% of the respondent's costs.

110. Was it within the tolerances of the **Yerrakalva** guidance for the present Tribunal, based on its conclusions in relation to the 2005 Manual aspect of the respondent's defence, to make an award of the whole of the respondent's costs of the liability stage?

111. Here, Mr Cohen's point that it was reasonable to explore at trial whether the claimant had actually seen the 2005 Manual, does not assist. If (as the Tribunal properly found) there was no

reasonable basis for the respondent to seek to rely on the 2005 Manual *at all*, then there was no reasonable need to explore that particular question.

112. Next, the respondent argues that the Tribunal wrongly regarded its arguments about the 1 November 2016 email having effected a variation of the contract, as wholly parasitic on its case based on the 2005 Manual. As to that, I see some force in Mr Cohen's point that the clause 11 power could be invoked in relation to a provision contained in *any* Manual. However, clause 11 could still *only* have a bearing in relation to a communication about an amendment to a right in fact conferred by a Manual. The email did not purport to refer to any change to a Manual. This strand of the respondent's defence was rightly rejected by the Tribunal; and it appears to me to have been so weak, that the presence of this strand alone would not alone lead me to conclude that a 100% award of costs overstepped the mark.

113. Mr Cohen's point that the claimant did not for his part positively rely on any Manual provision as supporting his claim, in and of itself, takes matters no further.

114. However, his next substantive point is that, even leaving aside its defence based on the 2005 Manual, the respondent still had a reasonably arguable defence to the claim which the claimant *did* advance, which was based upon the proposition that the Summary of Benefits gave him an incorporated right to the escalator. The respondent's response to that, was that the Summary was not incorporated, and that, even if it was, the final sentence of the Summary itself incorporated the provisions of the underlying insurance policy from time to time. Both those contentions failed, as has the liability appeal in those respects. But that does not by itself mean that these defences were not reasonably arguable. In his skeleton Mr Leach describes both these arguments as "hopeless". But I do not agree. Particularly in light of the existing line of

A authorities, both faced real difficulties, but I do not think it would have been right to say that their prospects were so poor that they, in combination, had *no* reasonable prospect of success.

115. This then brings me to the final fence. Having regard to my conclusions thus far, did the B Tribunal's decision to award 100% of the liability costs go beyond what I have called the tolerances of the **Yerrakalva** guidance?

116. To get a better sense of how the different arguments were deployed, I was taken not only C to the Tribunal's decisions, but also to the amended pleadings as they stood at trial, and the parties' skeleton arguments for the liability hearing. Having considered all the material, I think that the Tribunal was entitled to take the view, standing back and looking at the whole picture, D that the argument based on clause 5.3 of the 2005 Manual was the main or central plank of the respondent's defence, with the argument based on clause 11 and the 1 November 2016 letter as a fall-back partial defence. These were, as it were, the basis of the positive case advanced by the respondent in defence of the claim. But they were not the only planks. It was also a part of its E defence at trial, that the Summary was not incorporated, or that, if it was, it in turn incorporated the terms of the employer's insurance cover from time to time, albeit, it appears to me, with more emphasis having been placed by Mr Cohen on the latter point.

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117. However, in the substance of the costs decision (as opposed to the citation within it from the liability decision) the Tribunal did not discuss these aspects of the defence. Nor did it hold them, as such, to have been unarguable, and, as I have set out, I do not think it would have been G right to do so. Further, had they succeeded, they could have provided a complete answer to the claim. The Tribunal erred by not taking this aspect into account at all; and in all those circumstances, in my judgment, the Tribunal's conclusions about the 2005 Manual defence H justified the claimant being awarded a significant proportion of his costs, but not 100%.

Outcome

118. The liability appeal is dismissed. The costs appeal is allowed in as much as the Tribunal was entitled to award a significant proportion of costs incurred up to the conclusion of the liability stage, but not 100%.

119. Counsel have had sight of this decision in draft, and put in submissions as to the further disposal of the costs appeal. They agree that the fresh decision as to what proportion of costs to award must be taken by the Tribunal, as do I. There is not a single right answer, and, even if I could be in a position to take the decision, the parties have not consented to me doing so.

120. Mr Leach argues for remission to the same judge, Mr Cohen to a different judge. I can see some benefits to remission to EJ Harris, given that he presided at the trial. Mr Leach also has indicated that the underlying amount of the (whole) costs was determined at a later hearing by EJ Harris, albeit that the £20,000 summary assessment cap was then applied, so he will likely have some recollection of having grappled with the costs incurred already.

121. However, I do not think it would be impossible, or unduly cumbersome, for another judge to adjudicate this point. EJ Harris' underlying assessment of the whole costs figure (of which there must be a record) does not need to be revisited. All that has to be decided afresh is what proportion of the summarily assessed costs is to be awarded, subject to the application of the cap. While EJ Harris did err in awarding 100%, the fresh exercise will not require a to-the-penny or to-the-minute analysis of the element of costs incurred that was attributable to the 2005 Manual defence, even if such a thing were possible. Rather, the **Yerrakalva** guidance calls for a balanced appraisal of the big picture. Another judge can be given access to the pleadings, the Tribunal's decisions, the witness statements, bundle, skeletons, and will of course have the benefit of my decision. Whoever the judge is, there will have to be a decision by the Tribunal as to whether

A the matter is determined on paper or at a further hearing; but either way, both sides will of course get the chance to make their submissions before a decision is taken.

B 122. I have no doubt at all that EJ Harris would approach the task professionally and faithfully to my ruling. But I think it would be a big ask to expect him to put out of his head entirely his own previous take on this aspect of the matter; and it is important that, whatever percentage is awarded next time around, both parties have complete confidence in the process.

C 123. Though I have found it finely balanced, I have concluded that it would be better to remit the task to a different judge.

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