EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101326/2020

Case Heard by Cloud Video Platform on 8, 9, 10, 11 March 2021

Employment Judge J Young

John Hall	**Lead Claimant: Represented by Mr S Healy, Counsel**
Telecom Service Centres Limited t/a Webhelp UK	**Respondent Represented by: Mr R Byrom, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimants are entitled to be paid by the respondent enhanced redundancy payments as calculated under reference to the redundancy policy issued by Thomas Cook UK Travel Ltd of April 2005 and table attached.

REASONS

Introduction

1. In this case claims were lodged by 15 claimants claiming that when made redundant by the respondent they should have received enhanced redundancy payments rather than payments based on the statutory formula. The respondent denied any entitlement to enhanced redundancy payments.

2. At Preliminary Hearings it was agreed that John Hall would be the Lead Claimant and the claimants could be divided into two broad groups namely:

   (a) 3 claimants for whom neither the claimants nor the respondent could not find any documentation setting out their terms and conditions of employment.

   (b) 12 claimants for whom documentation could be found. This group could be sub-divided into :-

      I. 7 Claimants whose documents explicitly refer to the incorporation of the “HR Manual” (which contains provisions relating to enhancement redundancy pay) into their contract.

      II. 5 Claimants whose documents referred to an “Appendix” which contains terms and conditions the claimants say are incorporated into their contract.

3. The Parties agreed to provide a “sample claimant” for each of those groups but Mr Hall would remain the lead claimant. The sample claimants for each group were agreed as John Hall, Amanda Hughes and Alaina Lemetti. Reference in this Judgment to “the claimants” is to encompass the lead and related cases.

Issue for the Tribunal

4. At this Hearing it was agreed that issues of quantum would be reserved and this judgment would deal with liability only namely whether there was a contractual entitlement to enhanced redundancy pay in respect of any of the groups or sub groups and if so which one(s).

The Hearing

Documentation

5. The parties had helpfully provided a Joint Inventory of Productions and that together with further Productions lodged by the respondent prior to the Hearing and received without objection were paginated 1– 536. (J1-536)

Evidence

At the hearing I heard evidence from:-

(i) the lead claimant John Hall who was employed by Thomas Cook Travel UK Ltd ("Thomas Cook") at their Contact Centre in Larbert from 1998 until 2018 when his contract of employment was transferred to the respondent. He was a workplace representative as a member of the Transport and Salaried Staff's Association (TSSA) from 2001. He adopted as true and accurate his witness statement dated 23 February 2021 subject to insertion of the word "no" in paragraph 39 between the words "had "and "legally". He answered questions in cross-examination.

(ii) Tanya Coleman employed by Thomas Cook on 28 February 2000 as a Sales Consultant at their Larbert Contact Centre and whose contract of employment was also transferred to the respondent in 2018. She adopted as true and accurate her witness statement dated 24 February 2021. She answered supplementary questions and questions in cross -examination.

(iii) Alaina Lametti employed as a Sales Advisor with Thomas Cook on 30 October 2000 based at their Larbert Contact Centre and whose contract of employment was also transferred to the respondent in 2018. She answered questions in cross-examination.

(iv) Anthony Wheeler, a full-time Officer of TSSA and, in that capacity, had contact and negotiations with Thomas Cook and the respondent. He adopted as true and accurate his witness statement dated 24 February 2021 and answered supplementary question and questions in cross-examination.

(v) Gary Kelly, employed as an Organiser for TSSA since March 2013. He adopted as true and accurate his witness statement dated 25 February 2021. He answered questions in cross-examination.

(vi) Rhonda Lloyd who had been employed with the respondent from around May 2018. She had commenced employment as Head of People, New Business and Transition and at date of hearing was Director of People Solutions and Recruitment. She adopted as true and accurate her witness statement dated 26 February 2021 and answered supplementary questions and questions in cross-examination.

(vii) James McKenna, who had been employed with the Respondent since around March 2015. At date of hearing was Director of People Services, UK, South Africa and India but previously in the period December 2018 to November 2019 occupied the position of Head of People Services, South Africa and India He adopted as true and accurate his witness statement dated 26 February 2021 and answered questions in cross-examination.

Credibility

In respect of certain witnesses (Tanya Coleman, Alaina Lametti, Anthony Wheeler, Gary Kelly) reference was made in their witness statements to them having read statements of other witnesses and agreeing with the contents. That of course leads to the issue of whether their evidence was

tailored by reading the evidence to be given by other witnesses. As was pointed out by Mr Byrom that offended the Guidance on the use of signed witness statements in Scottish litigation with particular reference to the statement that "legal advisors or other people involved in taking evidence from a witness to prepare a statement should finalise the statement without showing the witness the other statements which are being obtained for their client" (Guidance of March 2012). That said I did not consider that any of the witnesses in this case had altered their evidence to suit what they had read in other statements. While there were inconsistencies in certain parts of the evidence the time period covered in the case was considerable and I considered that the witnesses were doing their best to recollect events and give a truthful account. I did not consider that there were any credibility issues which may have been affected by Guidance not being followed.

From the relevant evidence led, documents produced and admissions made I was able to make findings in fact on the issue.

Findings in Fact

6. The Respondents carry out the business of providing outsourced services for businesses at various locations in the UK and abroad. That includes the provision of contact services for business.

7. The claimants who made claims in this case were originally employed by Thomas Cook at various dates prior to 2013. In 2018 the Respondent entered into a contract with Thomas Cook to deliver outsourced services which had previously been undertaken in-house. That resulted in the transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") of approximately 250 employees to the respondent including the claimants. That transfer took effect from 1 October 2018. Those employees transferred were assigned to work on matters relating to Thomas Cook.

8. The business of Thomas Cook collapsed and the company entered into liquidation on 23 September 2019. At the time the respondent entered into

collective and individual redundancy consultation with those employees working on the Thomas Cook business which included the claimants. The claimants were dismissed from their employment by reason of redundancy on or around 25 October 2019.

Contracts of Employment/Statements of Terms and Conditions

Sample contract documents

9. There were various contracts used in respect of employment with Thomas Cook. The earliest sample contract dated 30 January 1998 (J86/89) referred to the role of "Sales Consultant" with Thomas Cook at their direct call centre at Larbert". That contract contained reference to the "Human Resources manual" for example in relation to finding detail of holiday entitlement; and in reference to shift premiums it was indicated that "any specific inclusions in this offer override any related general provisions in the Human Resources Manual".

10. The acceptance statement in respect of this offer (J89) advised that the offer was accepted "on the terms and conditions stated above (including the appendix to offer of employment)."

11. An "Appendix to Offer of Employment Letter" was produced (J95-96) and I accepted that this document was the appendix referred to in the acceptance statement within the sample employment contract (J89). The Appendix gave "more details relating to conditions of employment" and at various parts made reference to the "Human Resources Manual". That reference appeared in relation to shift working; holidays; discipline & grievance. The appendix also indicated (J96) that:-

> "Thomas Cook has entered into an Agreement with the Transport Salaried Staff's Association a trade union for the travel trade. The Agreement applies to Role Levels 1-5. Employees may become members if they wish. A copy of the Agreement is in the Human Resources Manual".

12. A sample "Amendment to Contract of Employment" of 29 November 1999 (J97/99) advised employees of amendments consequent on extension to opening hours on issues of varied shift patterns and associated opening hours; overtime, shift premiums; Sunday working and Bank holidays. It indicated that while the amendment came into effect from 3 January 2000 all other details remain unchanged . Reference was made to the "appendix to this letter" where "more details of your conditions of your employment" could be found. A signed "Acceptance Statement" confirmed that the amendments were accepted "(including the appendix to offer of employment)". Again I accepted that referred to the appendix at J95-96.

13. A further sample document dated 29 October 2002 entitled "Revised Terms and Conditions of Employment" (J100-102) advised that there was a need to share "the result of a recent review of Thomas Cook's terms and conditions of employment". The changes were effective from 3 November 2002 (unless stated otherwise) and referred to the move to an April review date for pay; consolidation of London allowance; paternity; adoption; long service; career break; and notice periods and concludes that apart from those changes:-

"All other terms and conditions remain unchanged unless referred to above. Details of all the Terms and Conditions can be found in the HR Manual".

14. A further letter relating to "Amendment to Terms and Conditions of Employment "dated 25 October 2010 (J118) altered details of a particular Sales Consultant role but again indicated that "All other terms and conditions remain unchanged"

John Hall contract documents

15. A document entitled "Contract of Employment between Thomas Cook and John Hall (J289/296) and dated 19 September 2006 was stated by Mr Hall in his witness statement as "my contract of employment…" However, when that was put to him in cross examination he indicated it was not the contract he had seen and it was not signed by him. He stated that when the TUPE consultation had taken place in 2018 he had been provided with this contract

but he had never accepted it and these were not the conditions for his employment. He believed that his contract was similar to the sample provided dated 30 January 1998 (J86/89).

16. The Contract (J289/296), which in his witness statement Mr Hall claimed was his contract, stated that his employment began on 18 May 1998 and employment was continuous from that date. The contract terms included the statement that :-

> "Thomas Cook has entered into an Agreement with the Transport Salary Staff Association and Trade Union for the travel trade. The Agreement applies to role levels 1 to 5. Employees may become members if they wish. A copy of the Agreement is in the Human Resources Manual".

17. Guidance on Public Holiday entitlement was to be found in "the Human Resources Manual". The disciplinary and grievance procedures were stated as being available in the "Human Resources Manual ". A similar term existed in respect of notice periods which were as "detailed in the Human Resources Manual".

The contract concluded with the statement :-

> "I have read the terms and conditions of employment contained in this contract and I agree that these terms and conditions shall supersede and replace all earlier terms and conditions of my employment with the company whether express or implied"

That clause was not in line with the clause regarding "Discretionary Sick Pay" (J292) which stated "please refer to your original contract of employment for your sick pay entitlement".

Susanne Morton; A Hughes; Jeanette Kerr (nee Arkinstall) contract documents.

18. Susanne Morton commenced employment 22 February 1999 and her contract terms (J412-415) were in terms of the sample contract at J86-89. Her contract contained reference to the "appendix to offer of employment" as including terms and conditions. Further contracts in line with the sample at J86/89 were

produced for A Hughes who commenced employment on 9 March 1998 (J465-468) and Jeanette Kerr (nee Arkinstall) who commenced employment on February 1999 (J477-484).

Tanya Coleman contract documents.

19. The contract documentation for Tanya Coleman included an Application for Employment (J307-310), an Offer of Employment accepted 28 January 2000 (J311-313); an amendment to Contract of Employment dated 7 March 2000 (J314-316) and a further amendment to terms and conditions of employment dated 25 October 2010 (J319).

20. The Offer Letter (J311-313) outlined various conditions and stated:- “in the appendix to this letter you will see more details of your conditions of employment with Thomas Cook. Please read them carefully in conjunction with this letter. You will also find two copies of the operating standards in use in this building. These form part of your conditions of employment whilst you are employed at this particular location”. It also made reference to guidelines on Public Holidays being found in “”the Human Resources manual”

21. The “Acceptance Statement (J313) indicated that acceptance was made on the terms and conditions in the offer letter “(including the appendix to offer of employment”). I found that was a reference to the appendix document referred to previously (J95-96).

22. The amendment to that contract issued to Tanya Coleman on 7 March 2000 (j314-316) included reference to the “appendix to this letter “containing “more details of your conditions of employment with Thomas Cook” and would form “part of your conditions of employment”. The principal change in that amendment appeared to relate to individualised working hours effective from 13 March 2000.

23. Miss Coleman could recall signing a further amendment or update to her contract prior to her taking maternity leave. That document was not produced. She indicated that it changed “a few things” with a particular reference to shift patterns and hours.

24. A further amendment to terms and conditions of employment for Ms Coleman (J319) was in similar terms to the sample produced also dated 25 October 2010 (J118) with a difference in salary.

Helen Feney contract documents

25. There was also produced contract documentation for Helen Feney. She received an offer letter of employment dated 15 September 1997 (J334-337) which was in the same terms as the sample produced (J86/89). Her contract documentation included an "office operating standards document" which related to procedures on fire, uniform and general appearance,"eating and drinking" and breaks. She also received an update to terms in her "Transfer to Permanent Employment" letter dated 11 May 1998. That related to details on salary; hours of work and shift premiums; overtime; Sunday working; pension scheme. Again, this document referred to the "appendix to this letter" containing "more details of your conditions of employment with Thomas Cook" (J345-346).

Jennifer Dales contract documents

26. The "Contract of Employment" between Thomas Cook and Jennifer Dales (nee Murray) was accepted 19 February 2009 stating that employment began on 12 November 2008 (J361/369). This contract was in the same terms as that (disputed) contract produced for John Hall (J289/296) without reference to any preceding "original contract of employment" on discretionary sick pay. Instead reference was made to the "HR Manual" for guidance on procedures and entitlement on that discretionary payment.

Contract documents for Lisa Gillespie; Pauline Jack; Lorraine Sutherland; Grace Shaw; Lynsey Anderson;

27. Contracts on similar standard terms as issued to Jennifer Dales were produced for Lisa Gillespie (nee Dale) who commenced employment 10 May 2010 (J377-J32); Pauline Jack who commenced employment 13 July 2009 (J395-401); Lorraine Sutherland who commenced employment on 2 January 2013 (J423-433); Grace Shaw who commenced 26 June 2007 (J442-447);

Lynsey Anderson who commenced employment on 25 October 2004 (J451-458).

Agreement between Thomas Cook and TSSA

28. As indicated TSSA were recognised by Thomas Cook and they negotiated terms and conditions of employment mainly around pay. The Agreement between Thomas Cook and TSSA was entered into on 19 June 1970 (J56/84). In terms of the "Machinery of Negotiation and Consultation" (J56) a salaried staff council would be set up (amongst other representative bodies) and that would comprise six representatives nominated by the union and six by Thomas Cook. The functions of that Council included the "interpretation of agreed promotion and redundancy arrangements". Negotiations on matters such as pay, hours and other conditions of service were to be dealt with in direct negotiation between the Staff Manager of Thomas Cook and the Headquarters of the union. That negotiation could also include "any matters upon which the salaried staff council have failed to agree".

Redundancy policies

The 2005 Policy

29. The Thomas Cook Redundancy Policy bearing footnote "HR09-02 Issue 11 – April 2005" (J105-109) identified that when redundancy "is foreseen" then there would be consultation with the "affected Employee area /Employee representatives or the Transport Salaried Staff Association". In the event that there was redundancy then payments for those who "remain in employment until the agreed effective date of redundancy" would be based on "years of continuous service and age of the employee at the date of severance" (J107). The table (J109) gave the number of week's pay which would be "granted according to age and service". A week's pay would be as defined by the Employment Rights Act 1996 except the upper limit would not apply and would be in respect of earnings for the "hours normally worked" and include "Base Salary, Linked Allowance, (e.g. Shift premium, Port roster) and

Mortgage Subsidy". However, overtime and bonus payments would not be included.

30. The policy concluded by stating (in capitals): -

> "NOTE: AGREEMENT IS REACHED BETWEEN THOMAS COOK AND THE TSSA ON THE ABOVE DETAILED REVISED CONDITIONS OF THE COMPANY'S REDUNDANCY ARRANGEMENTS".

31. That policy ("the 2005 policy") was included in the Thomas Cook HR Manual. In terms of the contents section issue January 2006 (J110/113) it formed part of the section entitled "Leaving Employment" under "Redundancy" which carried the same reference of "HR 09-02 Issue 11 April 2005" (J113).

32. The redundancy policy of Thomas Cook of August 1999 (J90/94) ("the 1999 policy) had preceded the 2005 policy and was in the same terms as the 2005 policy. A week's pay was defined in the same way. The table was on the same terms, except it included the words:-

"After 20 years' service, 3 weeks' pay for every year of service over and above the initial 20 years subject to a maximum of 70 weeks".

Those words do not appear in the table for the 2005 policy where the maximum number of week's pay is 50.

The 2008 policy

33. A "Redundancy and Redeployment Policy" was issued within the HR Manual under the footnote "HR 09-02 Issue 12 September 2008" (J114-117). That policy ("the 2008 policy") stated under the heading "Redundancy Payments" that:-

> "In the event of Redundancy, Thomas Cook offers enhanced payments above the statutory entitlement *(excluding those on temporary contracts or business areas where specified).* All payments are inclusive of the statutory redundancy pay entitlement and will be advised to the individual as part of the notification".

34. Payments were to be based on an individual's "base pay and shift allowances" but there would not be included within a week's pay "car allowance; on-call allowance; special or personal allowances".

35. The 2008 policy contained no reference to any agreement with TSSA and there was no table attached. There was no evidence that this policy had been negotiated with TSSA.

36. The evidence of Mr Hall was that in the years following 2005 various consultations on and redundancies were effected and he got little by way of query from members as regards payments because the position was clearly set out within the HR Manual with particular reference to the table (J109). Anyone wishing to know what they were likely to get when they left could simply look at that table to check that the offer matched. After 2008 when there was no table attached to the policy his recollection was that he asked why this was the case but got no satisfactory response. He continued to use the table attached to the 2005 policy in answer to any queries on entitlement. Any redundancy payments were made on the enhanced basis set out in the 2005 policy.

The 2013 Policy

37. In 2013, Thomas Cook required to present a "rigorous UK turnaround plan" due to continued underperformance. They presented to TSSA in March 2013 an "Employment Cost Review 2012/13 and Structure Proposals to Support UK Transformation" (J119-153). There were various proposals presented by way of restructure and cost savings. The areas "in scope" for review of costs were benefits related to "sickness; redundancy; overtime and additional

annual leave; pension (new joiners only); maternity and adoption and employee travel concessions (salary sacrifice)" (J134).

38. In relation to redundancy it was proposed that a new policy would take effect from 1 April 2013 for "all new joiners". Additionally, this new policy would affect existing employees effective from 1 October 2013 "in respect of any change programmes being announced on or after this date" (J136).

39. The revised scheme was to be modelled on "statutory scheme principles" so far as calculating the number of weeks pay to be payable in the event of redundancy but with "Company enhancement of:

- Weekly pay uplift of 1.25 x to be used in the redundancy pay calculation.
- No statutory cap, to be applied to the weekly pay subject to a weekly pay uplift of 1.25 x" (J136).

40. It was stated in terms of the proposals for cost review that there were legacy policies which required to be addressed because they were unsustainable in the current climate. It was stated that these policies and schemes were a "combination of contractual and non-contractual items and therefore the proposal is to consult on these with a view to agreeing any changes. Consultation is proposed for a period of 90 days, unless agreement is reached earlier on appropriate items" (J133). There was no distinction within the proposals document as to which "policies and schemes" were regarded as contractual or non-contractual.

41. Mr Hall recalled meetings in relation to these proposals. The meetings were significant and negotiation took place on various benefits including redundancy. The outcome of the consultation on redundancy payments as advised by Mr Hall was that the new proposed terms would only apply to "new starts" and existing staff kept their former entitlement.

42. The only outcome document available on the cost review was the Bulletin issued by TSSA on 11 June 2013 which advised of the proposal to make

changes to benefits and that "over the last 13 weeks period your Reps and Thomas Cook have been in regular meetings negotiating these changes and now after a lot of give and take on both sides, we the Reps, feel we can now accept the offer on the table". In relation to redundancy the Thomas Cook proposal was outlined and against that it was stated:-

> "No change for new starts from original offer.
> For existing staff removal of changes proposed and remaining on their existing Redundancy Policies". (J167-169)

43. The Bulletin stated that "if anyone has any concerns or issues over what the reps have accepted on your behalf or wish further information" then Q&A sessions were to be arranged. It was advised by Mr Hall that the cut off date for "new starts" was agreed as 1 July 2013.

The 2017 Policy

44. At some point the HR Manual of Thomas Cook with its policies were put online in an intranet area designated "Heartbeat". It was not clear what date the various policies forming the HR Manual were first put online but the contract for Lorraine Sutherland of December 2012 does refer to "HR online" regarding sick pay (J426). In any event on 1 August 2017 a redundancy policy appeared on HeartBeat with the version number "003" dated 1 August 2017 ("the 2017 policy") (J495/505). This policy indicated in the "Policy Summary" (J495) the approach for dealing with all employees identified as at risk of redundancy and stated:-

> "This policy is non-contractual and does not form part of employees' terms and conditions of employment, and may be amended at anytime"

45. The provisions regarding redundancy payment at Clause 6.1 (J500) states that:-

"In some circumstances Thomas Cook gives eligible employees enhanced redundancy payments above the statutory entitlement…."

Payments would be based on "an employee's base pay and allowances that make up the usual weekly pay for work done (e.g. shift) however, the following is not to be included:-

- Car allowance
- On-Call allowance
- Special or Personal allowance"

In respect of those who started on or after 1 July 2013 :-

"Redundancy pay is based upon the ordinary statutory weeks but multiplied by 1.25 uplift".

The clause concludes by stating:-

"Employees with continuous Thomas Cook service that started before 1 July 2013, redundancy pay is calculated using the discretionary redundancy payment model which is a non-contractual arrangement".

The 2018 policy

46. A revisal was made to the 2017 policy on 26 March 2018 by version "004" and was an update following new tax rules on termination payments (the 2018 policy) That updated policy (J70/181) was on the same terms as the 2017 policy subject to change in relation to the tax treatment of redundancy payments.

47. The 2018 policy continued the statement in its Policy Summary that the policy was "non-contractual" and again that those who commenced employment before 1 July 2013 would have payments calculated using the "discretionary redundancy payment model which is a non-contractual arrangement".

Redundancy Payments made

48. The evidence from Mr Hall was that following the "Employment Cost Review and Structure Proposals" in 2013, approximately 230 people were made redundant in total and redundancy payments were made on the terms set out in the table annexed to the 2005 policy. Thereafter there were ongoing store closures and by 2018, 900 stores had dropped to 650. As the main TSSA Representative at Thomas Cook he was involved in various consultations in that respect albeit there were few challenges to the reasons for closures. The many redundant employees were paid enhanced terms in line with the agreement reached in 2013 which for those employees who started prior to 1 July 2013 were based on the 2005 policy.

49. The evidence from Tanya Coleman was that after the 2013 review there were approximately 300 people affected by redundancy and she had no indication of any failure to make payment on enhanced redundancy terms to those affected. She spoke of her friend "Suzie being at risk of redundancy" who was offered a redundancy settlement in accordance with the 2005 table.

50. The evidence of Aleina Lametti was that she was offered a redundancy package after the restructure in 2013. That was in line with the 2005 redundancy policy table. She did not take the offer but instead agreed to vary her terms of employment in relation to opting out of Sunday working. One of the reasons she stayed with the company was the enhanced redundancy benefits on offer and the protection and financial security offered. She regarded this as a very important term.

51. The evidence of Gary Kelly was that subsequent to 2013, many redundancies were effected by Thomas Cook arising from the closure of retail outlets Those employed prior to 2013 were paid enhanced terms in line with the table attached to the 2005 policy.

52. I accepted this evidence on redundancy payments made by Thomas Cook beyond 2013.

53. Neither John Hall or Tony Wheeler recollected any proposal by Thomas Cook or consultation between Thomas Cook and TSSA or other representatives as

regards the 2017 or 2018 policies which would mean the redundancy policies could be agreed as “non-contractual and discretionary”.

TUPE consultation of 2018

54. The contract for services between Thomas Cook and the respondent agreed August/September 2018 came about as a consequence of Thomas Cook initially circulating a “request for purchase” which went to a number of outsourcing businesses for bids To come to a decision it was necessary for the Respondent to obtain employee liability information. The Respondent then received the 2017 and 2018 policies in March 2018 from Thomas Cook prior to commencing TUPE consultation. The information upon which they relied came from Thomas Cook. They had not had sight of any earlier policy information. While the 2005 policy was referred to in discussion the respondent was never supplied with a copy. While it had been requested from TSSA it had not been received.

55. Rhonda Lloyd was the lead HR Representative for the respondent acting alongside Thomas Cook in the consultation meetings which took place with affected employees on 21 August, 28 August 4 September, 11 September and 18 September 2018.

56. The minutes and presentation slides in relation to the consultation were published on to the Company intranet (HeartBeat) where employees could access the information. The only exception was information emailed to those on long term sick or maternity leave or to trade union officials.

57. So far as the respondent was concerned the due diligence exercise revealed that some employment policies were contractual and others were non-contractual. In their “measures letter” to employees they listed the measures proposed on transfer for those matters which were contractual being the pension scheme, life assurance and holidays, childcare vouchers and the like. No measures were proposed in relation to redundancy payments as the respondent did not consider they required to intimate measures given their

belief from the terms of the 2017 and 2018 policies that the enhanced terms were discretionary and non-contractual.

58. Minutes of the consultation meeting of 11 September 2018 (J506-515) show this meeting was attended by John Hall and Anthony Wheeler of TSSA along with several employee representatives being part of the employee representative council of Thomas Cook designated "Voice". The meeting was also attended by representatives of the respondent including Rhonda Lloyd and representatives of Thomas Cook including Zoe Evans of their HR Department. The issue of the redundancy policy was raised.(J507).At that time the respondent advised that "under TUPE only contractual terms and conditions transfer so there is no legal obligation to apply Thomas Cook redundancy policy. However, if there were to be a redundancy situation in the future we would consider options based on the business position at the time". There then follows an exchange;-

"JH – can we have TC view on this? Where does it state this is non-contractual? ZE – I can confirm this is non-contractual TW -JH wants evidence on this. ZE confirmed she will get data and send to JH"

59. Minutes of the subsequent consultation meeting of 18 September 2018 (J182-188) under "Actions from meeting on 11 Sept" state:-

- "ZE to provide TSSA with details to confirm redundancy policy with TC as non-contractual – Sent 17 September.
- JH – would like to challenge this, my contract refers to the HR manual which is different.
- ZE – the old policy was placed with new policy.
- JH – you have not consulted with the union.
- ZE- there was a letter sent in 2013 stating discussion took place with the union. This confirmed it is non-contractual.
- JH- now you have two policies in place and it is incorrect.
- ZE- it is not incorrect, the changes were consulted with the union.
- JH – my contract refers to the HR Manual.

- ZE – the old policy moved into the policy library. JH – can you confirm what is different?. ZE – the HR manual is a book where the policies were stored. We now have a digital storage on Heartbeat in the policy library.
- JH – it does not say it is not contractual.
- ZE – it does state this, I will take your point offline.
- JH- can you send me the policy documents that has been consulted with the union?
- ZE – I will send you the letter from 28 June 2013 that confirms when the process was changed.
- AE – can you read this out?
- ZE – it is two pages.
- JH – send me a copy and a document that all reps have signed.
- TW- I'm sure JH will be asking me to contact the Solicitor".

60. The letter of 28 June 2013 referred to by Zoe Evans which she maintained confirmed "when the process was changed" was not read out at the meeting of 18 September 2018 or ever seen by Rhonda Lloyd and so she was unaware of its contents. Ms Lloyd did follow-up the consultation meeting on 18 September 2018 with an email to Zoe Evans to try and obtain a copy of the letter but did not receive a copy.

61. Neither John Hall nor Anthony Wheeler took part in any consultation with Thomas Cook over the issue of the 2017 or 2018 redundancy policy "being non-contractual". Mr Hall stated that no letter was sent to him by Zoe Evans. He advised that "sent me a snippet of something – she said two pages long and only sent me one sentence – snippet – not know where she got that from". He was asked if he could provide the email which was sent to him on that matter and stated that he did not have access to the Thomas Cook system. He was asked if he had not kept a copy and said that he "would have if Thomas Cook had not gone bust".

Collective Redundancy Consultation December 2018/ January 2019

62. In December 2018, the Respondent entered into collective consultation with TSSA and employee representatives on redundancy. At that stage the Respondent proposed to move some of the Thomas Cook campaign work from the UK to South Africa. The intent was that through consultation criteria could be established for the restructure exercise to be discussed with the representatives. The respondent still held some UK operations involving the Thomas Cook campaign which would remain beyond the off-shoring proposals. The objective was to protect as many jobs as possible and it was estimated that there were alternative employment opportunities for the vast majority of impacted employees. However, the proposal was to offer voluntary redundancy where alternative employment opportunity was not taken up. James McKenna in his role at the time took the lead in the consultation process for the respondent. The consultation forum was made up of the TSSA representatives (Anthony Wheeler and John Hall) and "Voice representatives".

63. Dispute arose in relation to the status of the redundancy policy within the collective redundancy consultation in December /January 2019. While the initial intention appeared to be that that there would be no compulsory redundancies as matters progressed through the meetings from 6 December 2018 it became clear that there would be redundancies effected either on voluntary or compulsory basis.

64. The contractual nature of the redundancy terms was maintained by the representatives at the meeting of 18 December 2018 with Barry Risk (one of the guest Voice representatives) maintaining that in July 2013 "there was a Collective agreement with TSSA to enhance redundancy terms" and that Thomas Cook had gone through " collective consultation for 13 weeks" and if there was no longer any contractual right to enhanced terms then "have TC have gone back to TU to confirm unilaterally rescinded" .It was maintained "over 1000 people" had received enhanced payments At that time the respondent stated their belief that the redundancy entitlements were non-contractual and that this had been clear from Thomas Cook. The discussion identified the position of the representatives that the redundancy terms had

been “in place for decades” and agreed between TSSA and Thomas Cook and questioned whether Thomas Cook provided “evidence” to TSSA and employees to say that this was removed” and that these were “implied terms, express terms”. The respondent advised their advice was different but that they would check the position with their legal advisors. (J212).

65. After doing so, the respondent indicated they are not changing their position, that the enhanced terms were discretionary and that statutory redundancy payments would be made. That was apparent from the discussion at the meeting of 4 January 2019 The representatives continued to disagree. However the respondent at that time indicated that to try and resolve the “impasse” they would put forward some proposals for consideration.(J220).

66. At the meeting on 9 January 2019, the respondent advised a desire to come to an agreement on redundancy terms and were offering “broadly similar terms to what TC had in the past but these enhanced payments have to be linked to certain criteria” (J229). It was suggested by Mr Wheeler that there had been an ongoing contractual debate but rather than “debate what is contractual and what isn’t ……Could we enter a paragraph into the communication to allow us to progress this concept. Something along the lines of “ these terms are a once only arrangement and are not aligned to contractual arrangements going forward” . The respondent indicated that they could discuss that and jointly agreed the wording and that “ contractual v non-contractual we could discuss for a long period of time but it would not resolve this issue” to which Mr Wheeler responded that “this allows us to move on and both hold our principled positions” and “we can revisit if we need to.” Andrew Doig as Chief Operating Officer of the Respondents then advised “yes have a difference of opinion. We are proposing this payment for this specific exercise. There is no precedence set”.

67. There was then an agreement reached in the course of the consultation meeting of 16 January 2019 that redundancy payments would reflect the 2018 policy but only on the basis that there were certain conditions attached being that if (a) people didn’t perform or (b) if they were put on a performance

improvement plan or (c) given a warning for their performance or (d) given a warning for absence or other conduct, then only Statutory Redundancy Payments would apply (J221). That agreement was reached with Mr Wheeler indicating that there would be agreement on a letter provided and the Mr McKenna stating "we are now formally agreeing the redundancy terms" (J240). It was made clear however that these agreed terms were for that restructuring exercise only and in the event of any future redundancy proposals the discussion could continue on terms at that point. While the representatives wished the respondent to guarantee these revised terms for future exercises that was not accepted by the respondent. The respondent wished to be careful at that point that they were not accepting that there was any contractual right to these terms. As Mr McKenna indicated "put on the table broadly similar terms with a view to moving forward but there had to be some conditions attached to those terms, which they accepted - and also the terms themselves are not exactly the same".

Second Collective Redundancy Consultation September 2019

68. Following Thomas Cook receivership in September 2019 a redundancy situation arose for those who were engaged on the Thomas Cook contract. The Respondent entered into collective consultation on 25 September 2019. Mr Barnett, as Managing Director of the respondent took the chair on those consultation meetings, with Mr McKenna in his position of Head of People Services taking a prominent role for the Respondent. The representatives for the employees came from employee representatives and TSSA.

69. The minutes of the meeting of 25 September 2019 (J255/262) disclose that the respondent's position was that redundancy terms were non-contractual and that payments would be made on the basis of the statutory formula (J258). At this time Mr Kelly represented TSSA and asked if the Thomas Cook redundancy terms were non-contractual (J258). Mr McKenna advised that they were non-contractual and that had always been the Respondents position. It was stated by Mr McKenna that "TC also confirmed this position in their 2013 policy and that legal advice has been taken". Mr Kelly stated that

the "union would be seeking legal advice and asked for clarification that there would be no enhanced redundancy during this round" (J258).

70. At the second meeting of 2 October 2019 (J263-270) the issue of enhanced redundancy payments was again raised and there was clear dispute between Mr Kelly representing TSSA and Mr McKenna for the respondent on the issue of whether these terms were contractual/non-contractual. Mr McKenna stated that the respondent's position was not going to change on that issue.

71. At the meeting of 9 October 2019 (J271-277) it was explained by Mr McKenna that legal advice had been taken on the issue and that they felt their position was " more robust" based on that advice. He gave detail of the view taken. During this discussion it was stated by Mr Hall that the "email by Zoe Evans sent was a snippet and not a full document and that he had queried this at the time". Mr Mc Kenna responded that it had "previously been minuted that this is a non-contractual policy. JM added that this policy was referenced during its consultation last year and was accepted by all parties". Mr Kelly intimated at that time that the TSSA position had not changed and they were seeking legal advice on the issue.

72. At the subsequent meeting of 21 October 2019 (J279/282) it was stated by Mr Kelly that the union believed there was a case to be made as regards contractual payments and they would be taking the matter through the relevant process.

73. After individual consultation took place the claimants were dismissed with redundancy payments based on the statutory formula (J283-288).

Intimation of 25 September 2019.

The insolvency of Thomas Cook brought about an intimation from Manuel Cortes of TSSA to all "TSSA Thomas Cook Members" (J516-536). The document states on 23 September 2019 the Official Receiver was appointed

as Liquidator and at the same time Special Managers were appointed to support the Official Receiver being partners in KPMG.

74. That intimation covered various matters of concern to employees including information on redundancy and insolvency. It included a Q &A which included the role of the Redundancy Payments Service and what could be recovered from that source. It was stated that redundancy pay according to the statutory formula could be recovered. Information was also given regarding recovery of payment in lieu of notice, arrears of wages and holiday pay.

75. No mention was made in that intimation of Q & A that redundancy payments from Thomas Cook were on an enhanced basis. In answer to the question:-

"How do I claim the rest of the money that is owed to me that is not/will not be paid by the RPS?" it was stated:-

"Once you have lodged a claim on the RPS portal you do not need to take any further action in respect of claims for arrears of wages, accrued holiday pay, pilon or redundancy pay.

Any remaining balance due to you above that paid by the RPS will rank as a claim in the liquidation. The RPS will send details of your claim and sums paid to the liquidator/special managers directly.

Please note that the Liquidator/Special Manager are unable to confirm at this stage what monies may be available to distribute to creditors from the respective liquidation. Please see the following links for reports to creditors and updates in this regard… "

76. Mr Wheeler's position on this matter was that Mr Cortes was not aware of all the varying contracts when he put the intimation together and he was not contacted prior to the issue of this document. Mr Cortes wished to get a document out to members quickly subsequent to insolvency as he knew that individuals were anxious about their position on various matters.

Submissions

77. I was grateful for the full submissions which were made in this case. Mr Healy lodged outline submissions for the claimants and spoke to those submissions. Mr Byrom lodged a full written submission. No discourtesy is intended in making a summary.

For the claimants

Mr Healy referred to the three groups of claimants which he identified as :-

(1) "The John Hall Group" who had documents explicitly referring to the HR Manual (or HR Online). Those contracts were for John Hall (289), Lisa Gillespie (nee Dale) (376), Pauline Jack (394), Lynsey Anderson (451), Jennifer Dales (361) Gray Shaw (440) and Lorraine Sutherland (421).

(2) "The Tanya Coleman Group" who had contracts referring to the appendix (95) and which made reference to an entitlement to "refer to any sections of the HR Manual held in each department". Those contracts were for Tanya Coleman (311), Helen Feeney (334), Amanda Hughes (465), Janette Kerr (477) and Suzanne Thogersen (412).

(3) The "Alaina Lemetti Group" which included Miss Lemetti as well as Winifred Burke and Janice Hogg who had no contract documentation available. The start dates for the last group of Alaina Lemetti, Winifred Burke and Janice Hogg were respectively 30 October 2000; 27 October 1997 and 1 February 1999.

78. On the evidence of Mr Hall, he could be treated as falling within groups (1) and (2).

79. It was submitted that all three groups were contractually entitled to redundancy calculated in accordance with the table (J109) attached to the 2005 policy (replacing the earlier policy of August 1999). This case was advanced on the basis of express incorporation or alternatively custom and practice.

80. The 2005 policy was agreed between Thomas Cook and the TSSA in terms of the statement on the policy document. The redundancy calculation was expressed in mandatory terms and evidence suggested that the practice was to make redundancy payments in accordance with that table for many years (including after 2013 when there was an attempt by Thomas Cook to negotiate changes to some contractual rights). It was submitted that the Tribunal can be satisfied on the basis of the wording of the policy and its application in practice that there was no discretion in connection with the policy namely that a redundant employee was entitled to the calculated amount "as of right".

81. As regards incorporation into individual contracts the Respondent appeared to concede that at paragraph 14 of the Grounds of Resistance (J38) namely that the policy was contractual (and so capable of enforcement by individual employees) but then became "non-contractual following consultation with the TSSA" in 2013.

82. That apparent concession that the policy at least until 2013 had a contractual force was submitted to be correct. On that basis it was submitted that the focus for the hearing should be on whether there was an agreed variation whereby the policy ceased to be contractual, whether in 2013 or some later date and prior to the redundancy exercise affecting the claimants in 2019.

83. It was submitted that for groups 1 and 2 the policy was expressly incorporated into individual contracts. It was included in the HR Manual which was referred to (to some extent) in the contract of all the claimants in these two groups. Although the entirety of HR Manual may not have been incorporated the terms and respect of redundancy are particularly apt for incorporation *Keeley -v- Fosroc International Limited (2006) IRLR 961* and *Allen and Others -v- BTR Systems Limited [2013] IRLR 699, EAT (paragraph 59).* The redundancy term was a detailed and important provision for staff.

84. As regards the third group, it was submitted that albeit they had no written contracts now available there was custom and practice of paying redundancy

in accordance with the policy to all staff employed on "legacy contracts" and a term ought to be applied on the basis. The evidence suggested that the practice of making payments in accordance with the redundancy policy was "reasonable, certain and notorious" The policy was well-known amongst staff (distinct from *Pellowe v Pendragon plc EAT 804/98* where the chart for calculating redundancy was only available to management). Payments in this case seem to have been automatic and staff had a reasonable expectation that they would receive such if their roles became redundant.

85. Under reference to *Albian Automotive -v- Walker [2002] EWCA 946 paragraphs 8, 15 and 18,* it was submitted the terms were drawn to the employees' attention and well-known. They were followed for substantial period of time and on a number of occasions. It was scheme adopted by agreement with workplace representatives and its terms adopted within a written agreement namely the 2005 policy. Employees had a reasonable expectation that policy would apply to them.

86. In so far as the respondent would assert that the claimants had pled that the whole HR Manual was incorporated within their contracts and that had not been demonstrated that was an over technical approach. The claimants only needed to rely on the redundancy policy and it was submitted they had discharged the burden in that respect.

87. To effect a change to the 2005 policy would require an agreed variation but for "existing staff" such as the claimants there was no evidence of such agreement. The burden of proof would fall on the respondent to show such agreed variation and that had not been discharged.

88. The 2017 and 2018 policy wording proved nothing as that appeared to be a unilateral variation. Staff continued to work after the change made but it was not clear just how the change was brought to their attention. In any event they could not be deemed to have accepted as the term did not impinge until made redundant. *(Harlow v Artemis International Corporation Ltd [2008] IRLR 629)*

For the Respondent

89. The respondent relied on the written submissions submitted.

90. Those submissions pointed to inconsistencies in the claimants evidence and acknowledgment of reference to policies within the HR Manual being non-contractual. It was submitted that the claimants had relied on outdated redundancy policies which had changed over the period of time. Witnesses had noted that the 2005 policy did not say it was contractual. While there had been reference to the HR Manual within contracts there was nothing to state that it had contractual force.

91. It was noted that the witnesses Tanya Coleman, Tony Wheeler and Gary Kelly had sight of each other's statements prior to finalising their own and all admitted an opportunity to alter their statements as a consequence albeit denying that they had. That sight of other witnesses' evidence raised questions as to cross contamination. In contrast the Respondent's witnesses had given their evidence clearly and consistently with their statements.

92. It was submitted that the pleadings in the case were to the effect that the terms and conditions of employment with Thomas Cook and thus the Respondent incorporated the provisions of "Cooks HR Manual as at 2005". There was no evidence that the whole HR manual of 2005 was incorporated. The pled case was not that contractual force was only limited to the redundancy policy or payments.

93. It was also important to note that the burden of proof was on the claimants to show that they had a contractual entitlement and that was breached. The claimants had not been able to show that there was a contractual entitlement.

94. The HR Manual as at 2005 was never produced. The only extract was at pages J105/109 being "Issue 11" of the 2005 redundancy policy. There was no express wording in the HR Manual to say that it was contractual.

95. It was also accepted that policies and the Manual were updated over time and had been moved online. Certain aspects of the 2005 policy were outdated and not followed for example the appeals process (J106). That pointed to accepted change. The pled case was that the 2005 policy still applied but that

could not be the case as the claimants' witnesses had accepted that the 2008 policy replaced the 2005 policy.

96. The pleadings made no distinction between the Manual and the particular policy now relied on or indeed the payment section. If it had been the case that the intention of the parties was for the 2005 redundancy policy to be continued it would have contained express reference to that matter in the 2008 policy.

97. While attention had been directed to the Revised Terms letter of October 2002 (J100/104) which states "details of all the Terms and Conditions can be found in the HR Manual" that phrase was not included in any of the claimant's contracts or relied on them in any of their witness statements. It was therefore irrelevant and should carry no weight. No individual who gave evidence had worked under that contract.

98. The contracts which were relied upon contained "entire agreement clauses" which advised that the terms and conditions were "contained in this contract" and made no reference to HR Manual. Reliance was placed on *Rock Advertising Limited - v – MWB Business Exchange Centres Limited [2018] UK SC 24 (paragraph 16)* which held the parties in a contract are free to decide on their future dealings, and that any limitations on it (such as one of these clauses) must be enforced, if necessary by invalidating any subsequent agreement not conforming to the limitation agreed on. The absence of the HR Manual from the scope of the "entire agreement clause" could therefore be relied upon by the respondent to invalidate any assertion that the HR Manual was contractual.

99. The Bulletin document produced by TSSA (J167) made no mention of redundancy entitlement being contractual. Mr Hall's evidence that the union would only consult on contractual policies was implausible considering that he stated most policies were non contractual; the slides produced by Thomas Cook for the 2013, consultation (J133) states that the policies and schemes presented are a combination of contractual and non-contractual items and the proposal was to consult on these with a view to agreeing any changes; and

no notes or minutes had been produced at the consultation meetings over 2018/2019 to dispute that the redundancy terms agreed were for a non-contractual policy. The 2017 and 2018 policies reflected the non-contractual nature of the redundancy policy.

100. While the claimants may argue that the 2005 redundancy policy was apt for incorporation it was submitted that the case of *Keeley – v-Fosroc International Limited [2006] ECWA 61277* could be distinguished. In that case there was no dispute that the staff handbook was contemporaneous and relevant whereas in this case the respondent's position was that the 2005 HR Manual was outdated, often updated and latterly replaced with the online policies. There were "multiple degrees of separation" in this case between the 2005 policy and the 2019 redundancy. In essence the HR Manual 2005 was no longer in existence and the claimants could not rely on a document that had been replaced.

101. Similarly, the case of *Harlow - v – Artemis International [2008] IRLR 629* could be distinguished as that case dealt with a policy that was still within the "HR Policies and Procedures" Folder (paragraph 18 and 15 of the Judgment) whereas in this case the 2005 policy had been replaced in 2008, 2013, 2017 and 2018.

102. Additionally, in this case there was no indication that the employee was asserting that they objected to a change which had been effected. The 2005 policy had been amended on many occasions before 2019 and the evidence from the claimants was that there had been redundancies effective on many occasions over the years. There was no evidence that the 2005 HR Manual was used in these cases. The representatives in the TUPE consultations were aware that the respondent regarded the policy as non-contractual. In this case the claimants were aware from the TUPE transfer that there would a strategic review and changes would occur. Redundancies were a real possibility. The claimants continued to work and it should be held that they had accepted the position that the redundancy terms were non-contractual.

103. While Mr Hall had refuted that the contract referred to in his witness statement was his contract of employment he produced no other contract and relied on the sample contract (J86). Neither expressly incorporated the 2005 HR Manual as forming part of his terms and conditions of employment. Additionally, Tanya Coleman relied upon her contract (J311 and the Appendix J89) but neither document incorporated the HR Manual of 2005. Alaina Lametti had no contract produced. Her evidence was that she had accepted a "legacy pack which included the 2005 policy". However, she stated she received this in 2000 which could not possibly have contained the 2005 policy. There was no evidence to explain how the 2005 HR Manual or any of its individual policies including the redundancy policy could be expressly incorporated.

104. In so far as implied incorporation was concerned the custom and practice must be "reasonable, notorious and certain". The onus of proof fell upon the employee. It had been stated (*Henry -v- London Channel Transport Services [2002] IRLR 472)* that the relevant custom and practice must be "so universal that no workmen could be supposed to have entered into the employment without looking to it as part of the contract" and that implied terms should be found on the basis that the courts are "spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain".

105. It was submitted the facts did not support that proposition as it was accepted that the 2005 policy was replaced in 2008; Thomas Cook and the respondent stated the 2018 Redundancy Policy was the applicable policy at the time of the TUPE transfer; evidence was that the employees were relying on the 2018 redundancy policy in the 2018/2019 consultation; and there was no documentary evidence of payments being made without fail under the 2005 regime up until 2015. In those circumstances it could not be said that the 2005 redundancy policy was unhesitatingly relied upon. If so why was there was no reference to enhanced redundancy payments in the Manuel Cortes letter of 2019 and the Q and A's.

106. It was submitted that the factors referred to in the case of *Harlow* (as found in *Albion Automotive Limited -v- Walker [2002] EWCA 946*) were not factors that were found in this case. The claimants had insufficient evidence of custom and practice. There were clear express policies, contradicting the practice and it was clear that the alleged practice was not universal.

107. The Recognition Agreement which was produced was outdated and there was nothing in the Recognition Agreement to indicate a contractual right. Albeit the 1999 and 2005 Redundancy policies stated that agreement had been reached between Thomas Cook and TSSA, the absence of such wording in later versions was not evidence that there was no agreement. It was clear that Thomas Cook in 2013 negotiated with the union on both contractual and non-contractual policies. It was incumbent upon the claimants to show that the redundancy policy was or remained contractual at that time and they had failed to do that.

108. In essence it was submitted that the claimants had not shown the 2005 HR Manual was a contractual document; they had not shown that the 2005 HR Manual was expressly incorporated into their contracts; and it was not shown that the 2005 HR Manual was incorporated by custom and practice.

109. It was further submitted that there was no concession made that at some point, the redundancy terms were contractual. The ET3 (paragraph 14) reflected an "understanding" and was not a concession that at some point the position changed. The position of the Respondent was that there was never a contractual right to enhanced redundancy payments; and even if that had been the case in 2005 it changed in 2013 to being discretionary.

110. **Conclusions**

Many employees are entitled upon redundancy to contractual payments in excess of the statutory payments made under Section 162 of The Employment Rights Act 1996 being "enhanced" redundancy payments. An employee's contract of employment or written statement of particulars may contain an express term that entitles him or her to an enhanced redundancy

payment. Alternatively, a term to that effect may be implied by virtue of the parties' conduct or by the custom and practice of a particular employer.

111. It was common ground that the "TUPE transfer" in 2018 of the contracts of employment of Thomas Cook employees into the respondent business carried with it a right to an enhanced redundancy payment were that to be a contractual right. The respondent's position was that there was no contractual right for Thomas Cook employees to enhanced redundancy payment terms. They had been provided by Thomas Cook the 2017 and 2018 policies on redundancy which contained provision that the enhanced terms were "discretionary". The respondent's position was that they had relied on that information and the lack of evidence from TSSA and workplace representatives which would counter that position. The task therefore was essentially to identify whether employees of Thomas Cook had a contractual right prior to transfer to enhanced redundancy payments either by express or implied term.

Express Incorporation

112. Various Statements of Terms and Conditions; Contracts of Employment; and offers of employment were produced along with an "Appendix to Offer of Employment Letter" as narrated. I accepted that these were statements of terms and conditions which were in force from time to time between Thomas Cook and their employees. The earliest is the offer letter of 30 January 1998 (J86-89) through to the Contract of Employment between Thomas Cook and Lorraine Sutherland of 8 December 2012 which related to an employment which was to commence on 2 January 2013 (J421-433).

113. I accept that these statements, offers and contracts were in force from time to time between Thomas Cook and their employees. None of them makes specific preference to redundancy procedure, any policy on redundancy, or payments which might be made in the event of redundancy.

114. It was common ground that the redundancy policy of Thomas Cook was contained within their Human Resource Manual (hard copy or online) ("HR

Manual"). There was no express incorporation of the HR Manual within the various sample and individual contracts which were produced. However there were various references to that Manual.

115. In the offer letter of 30 January 1998 employees are referred to the HR Manual in respect of holiday entitlement (J86) and shift premium (J88). That offer letter makes reference to the "Appendix" containing more details "of your conditions of employment with Thomas Cook". The Appendix (J95/96) makes reference to the HR Manual in connection with overtime, holidays, sick leave, disciplinary procedure, grievance procedure and that a copy of the Agreement with the TSSA applying to "role levels 1 to 5" is within the Human Resource Manual. That Appendix also advises that the employees are "entitled to refer to any sections of the Human Resources Manual held in each department. If you wish to refer to the Manual speak to your Manager or Personnel Manager/Officer".

116. The amendment to contract of employment of 29 November 1999 (J97/99) makes reference to the HR Manual in relation to bank holidays.

117. The Revised Terms and Conditions of Employment of 29 October 2002 (J100/102) makes reference to a review of terms and conditions and sets out the main "details of the terms and conditions review ". It states if the "new terms are better than your existing then your terms will be changed to reflect this otherwise you will retain your existing terms and conditions" In that document reference is made to the HR Manual as regards career break and that "details of all terms and conditions can be found in the HR Manual".

118. The contract document in the name of John Hall (289/296) contains reference to the HR Manual in respect of public holidays and again that a copy of the "agreement" with TSSA applying to role levels 1 to 5 is within the HR Manual. Again, reference is made to the HR Manual in relation to disciplinary and grievance procedures and notice periods.

119. Within the Offer Letter to Tanya Coleman of 28 January 2000 (J311/313) reference is made to the "appendix to this letter" giving more details of

conditions of employment which as stated above makes reference to the HR Manual. Specific reference is made in the letter to the HR Manual in relation to bank holidays. Thereafter in an amendment to her contract of 7 March 2000 (J314/316) again reference is made to the appendix (which in turn makes reference to the HR Manual).

120. In the Offer Letter to H Feney (J334/336) reference is made to the HR Manual in respect of holiday entitlement and shift premium. Also, reference is made to the "appendix to this letter". Within the letter confirming her transfer to permanent employment (J345/346) there is again reference to the "appendix to this letter" containing more detail of conditions of employment and specific reference to the HR Manual in relation to shift premium. Similarly in the Offer Letter to Jeanette Kerr (J477/484) and A Hughes (J465/468).reference is made to the HR Manual in relation to shift premium and the appendix to the letter.

121. Within the contract between Thomas Cook and Jennifer Murray (J362/369) of 19 February 2009 there is reference to the HR Manual in relation to public holidays and absence from work owing to sickness/injury and the "discretionary sick pay" available. Again, reference is made to the agreement with TSSA being found within the HR Manual along with disciplinary and grievance procedures; and provisions on notice period. There are similar references in the contract for Lisa Dale (J377/382); Pauline Jack (J394/403); Lynsey Anderson (J452/458); and Grace Shaw (J440-447)

122. A change in terms is evidenced within the contract of Lorraine Sutherland, of 8 December 2012 (J423/433) in respect of employment which began 2 January 2013. In relation to discretionary sick pay it is stated that the employee should comply with procedures detailed in the sickness absence policy on "HR Online" and while there is reference to the agreement with TSSA the fact that it could be found within the Human Resource Manual is deleted. Reference is made to disciplinary matters being dealt with under the disciplinary procedure "available on HR Online" as well as the grievance

procedure. However in each case it is now stated that these procedures do not form "part of your contract and is not intended to be contractually binding".

123. As the Court of Appeal noted in *Keeley – v – Fosroc International Limited [2006] IRLR 961* even if an HR Manual were to be incorporated into an employee's contract of employment it did not necessarily follow that all of its terms would be incorporated and amount to legally enforceable rights. Certain terms were "particularly apt" for incorporation and the Court identified provision for redundancy as being a widely accepted and important feature of an employee's remuneration package.

124. Here there is no express incorporation of the HR Manual into the employee's contracts of employment and so it cannot be said that on the face of the contracts alone the particular provision regarding redundancy was expressly incorporated in that way.

125. However I do not consider that the matter of express incorporation is thereby concluded. The situation here is similar to that in *Allen & Others –v– TRW Systems Limited [2013] IRLR 699* where employees received a statement of main terms and conditions which from time to time made reference to the employee handbook for example in respect of holidays and holiday pay; but there was no general statement that terms and conditions were to be found in the employee handbook. That handbook contained a wide variety of provisions, supplementing the statement and setting out rules and procedures and additional entitlements. It also included a statement to the effect that in the event of redundancies "the Redundancy Policy will be implemented".

126. The EAT advised that: -

"It is important to keep in mind that the fundamental question is whether the circumstances in which the enhanced redundancy package had been made known or had become known supported the inference that the employers had intended to become contractually bound by it".

127. That was to be determined on an objective examination of the circumstances and one consideration which the EAT considered employment tribunals

should keep "firmly in mind " was that provision for redundancy is a "widely accepted feature of an employee's remuneration package" and Tribunals should "scrutinise with care" arguments by employers that payments which were intended to be part of an employee's remuneration package, once "promised and communicated, were merely matters of policy and discretion". In that case it was stated that it was an error in law to fail to consider whether the promise in an employee handbook was contractual. The handbook was "capable of being a source of contractual obligation and the tribunal ought to have considered it" Simply because there is no express reference to incorporation of the HR Manual in the various contracts would not mean that no contractual obligation arises out of the HR Manual. I would not accept then the proposition that because the offer letters, statement of terms and contracts of employment in this case did not incorporate expressly that the HR Manual or any particular policy within it is incorporated as a contractual term means that there cannot be found within the HR Manual contractual terms.

128. The approach that an employee handbook (in this case HR Manual) is capable of being a source of contractual obligation is highlighted by (1) the references cited above to the HR Manual giving detail of particular terms and containing further terms and (2) the presentation to TSSA by Thomas Cook in March 2013 under their "Employment Cost Review 2012/13 and Structure Proposals to Support UK Transformation" (J119/152). That document indicated that there was a need to review policies and benefits and that: -

> "The policies and schemes presented are a combination of contractual and non-contractual items and therefore the proposal is to consult on these with a view to agreeing any changes. The Consultation is proposed for a period of 90 days unless agreement is reached earlier on appropriate items".(J133)

The policies and benefits under review (J134) included matters which were within the HR Manual eg sickness, overtime and annual leave, maternity, travel benefits (J110/113) and significantly in this case redundancy. There was therefore a recognition that there were certain policies and schemes

which were contractual and some which were non-contractual to be found within the HR Manual. That recognised the normal position that contractual conditions in the employment context can come from a variety of sources and very much to the fore in that respect is an employment handbook or HR manual. As was stated in *Harlow - v- Artemis International Corporation Limited [2008] IRLR 629* employment contracts consist of many "materials put together by human resource officers, rather than lawyers and designed to be read in an informal common-sense manner in the context of a relationship affecting ordinary people in their everyday lives". Also in *Briscoe – v- Lubrizol Limited [2002] IRLR 607* the Court of Appeal stated: -

> "It is of course frequently the case that details of an employee's contract and the benefit to which he is entitled by virtue of his employment are largely to be found in the Handbook …. for this purpose and depending upon the circumstances, incorporation by express reference in the statutory particulars of employment will not usually be required by the Court. Again, it is frequently the case that, in the employment context the language of a Handbook, while couched in terms of information and explanation, will be construed as giving rise to binding legal obligations as between employer and employees…

129. It was submitted that the case put forward by the claimants in their ET1 was that the "terms and conditions of employment with Cooks and hence the Respondent incorporated the provisions of Cooks HR Manual as at 2005." It was stated that the terms of the Manual were incorporated into individual contracts of employment either expressly or by custom and practice or both. It was submitted that as the claimants had failed to show that the "HR Manual as at 2005" had been incorporated then the case must fail. I do not consider that to be the case. I accept that the claimants have not been able to demonstrate that the terms and conditions incorporated the "provisions of Cooks HR Manual as at 2005" and that is an overstatement. However, it is clear from the particulars of claim that the particular contractual obligation being founded upon was the policy which made available enhanced redundancy payments. There was no suggestion that the Respondent was

prejudiced by the claimant seeking to rely on that single policy rather than the whole Manual. There was no application for adjournment for lack of notice of the particular policy at issue. It was clear that the case referred to enhanced redundancy payments. I do not think it a bar to considering whether the particular policy within the HR Manual was contractual on the basis that the claimants had failed to deliver on their statement that the whole Manual was incorporated as part of their terms and conditions.

130. The issue then becomes whether the particular terms on enhanced redundancy to be found in the HR Manual were contractual. As it was put in *Allen - v -TRW Systems Limited* (paragraph 70):-

> *"*Standing back for a moment from these authorities it is important (we think) to keep in mind that the fundamental question is the one which Lord Coulsfield identified in *Quinn* – namely, whether the circumstances in which the enhanced redundancy package had been made known or had become known supported the inference that the employers intended to become contractually bound by it".

131.

The Redundancy Policies

132. As was recognised in *Keeley -v- Fosroc International Limited [2006] IRLR 968* provision for redundancy is "particulary apt" for incorporation and:-

> "The fundamental starting point in a consideration of whether a term is apt to be contractual is the wording of the provision itself and the aptness of the provision in its own right to be a contractual term. If put in clear terms of entitlement it may have a life of it's own, not to be snubbed out by context immediate or distant in the document of which it forms part. Where the wording of the provision, read on its own, is clearly of a contractual nature and not contradicted by any other provision in the documentary material constituting the contract, context is not all"

The 2005 policy

133. In the first instance it is of importance in my view that the 2005 policy (J105/109) is stated to be agreed between Thomas Cook and TSSA who have collective bargaining rights for employees in role 1-5 being those affected in this case. That agreements is communicated to employees by means of the HR manual to which employees are directed and is available.

134. Also I consider that the terms of anticipated payment are mandatory. The 2005 policy makes reference to the general policy on redundancy under the headings "consultation; selection for redundancy; appeal; alternative employment; resettlement provisions, voluntary service and periods of notice". As regards redundancy payments it states that:-

> "For redundant employees for whom there is no suitable alternative employment and who remain in employment until the agreed effective date of redundancy, payments will be based on years of continuous service and the age of the employee at the date of severance. The table on page 5 shows the number of weeks pay which will be granted according to age and service…"
>
> The language is mandatory and of a promise. It is not that payments "may be made" on a particular basis but that payment "will" be made on a particular basis.
>
> The policy goes on to deal with other considerations namely reduction in the case of those close to normal or opted retirement age and then indicates: -
>
> "The payment made by Thomas Cook includes any statutory entitlement as set out in the Employment Rights Act 19996, as revised and in every case, exceeds this i.e. the state scheme has lower factors and has a limit of a week's pay".
>
> Again, the language is that of a definite promise indicating that payments will "in every case" exceed the statutory amount.

Again in not recognising the limit on a week's pay, the policy indicates the promise that : -

"A week's pay is as defined in the Employment Rights Act 1996 except that the upper limit will not apply…"

135. There is attached to the policy a table indicating the number of weeks' pay due depending on an employee's age and length of service. On this table the maximum number of weeks payable is 50 for those aged 50 and above and with 20 years' service. There is a very measurable and definite method of calculation.

136. That policy replaced the previous policy of August 1999 (J90/94) which was in similar mandatory terms and also included the statement that agreement was reached between Thomas Cook and TSSA. The difference in the 1999 policy was no provision for appeals and on the table there was contained a statement which identified the maximum number of weeks pay to 70 rather that 50 in the 2005 policy. Those revisals in the 2005 policy were agreed with TSSA (J108)

137. I consider that can be no other inference that the 2005 policy was intended to be contractual. The wording is mandatory; it was agreed with a union recognised by Thomas Cook as having bargaining rights on behalf of employees; there is no hint that the enhanced payments are discretionary; the provision is apt for incorporation as an important term affecting an employee's remuneration package; the policy terms including the important provision on payments were communicated to employees through the freely available HR Manual. I consider that the words of the provision itself and the conduct of Thomas Cook in agreeing the provision with the recognized trade union on behalf of the employees and its communication means that objectively construed a contractual right was granted by Thomas Cook..

138. Additionally, the evidence from Mr Hall, which I accept, was that over a lengthy period of time payments were made on that basis to employees who were affected by redundancy. He retained a copy of table attached to the 2005 policy to advise employees of their entitlements. However, he indicated that whenever a redundancy situation arose he was not generally speaking asked for confirmation as the company made payments based on that entitlement and that continued to be the case until 2018.

The 2008 Policy.

139. The 2008 policy (J114/117) has certain differences from the 2005 policy. It covers the same ground as the 2005 policy but the right of appeal requires to be triggered by lodging an appeal letter within 7 calendar days (in place of 10 working days) and in place of an Independent Appeal Board the details of "who to appeal to" will be contained within the written confirmation of redundancy.

140. So far as redundancy payment is concerned, the clause states:-

"In the event of redundancy, Thomas Cook offers enhanced payments above the statutory entitlement (excluding those on temporary contracts or business areas where specified). All payments are inclusive of the statutory redundancy pay entitlement and will be advised to the individual as part of the notification".

141. There is a statement of what would be included in "base pay" which would reflect changes in allowances but no table or other wording which would specify how those payments are to be calculated. There is no reference within the document that it is agreed between Thomas Cook and TSSA. The evidence from Mr Hall and Mr Wheeler was that they had no recollection of any consultation which would lead to any change in the enhanced redundancy provisions of the 2005 policy. The 2008 policy continues the "promise" of enhanced redundancy payments and I consider that is a reference to the method of calculation contained within the 2005 policy. I do not consider there has been any change to the contractual entitlement. There is no wording

which would indicate that what was contractual has become non-contractual and even if it did how that variation was reached.

142. For the ordinary employee already entitled to enhanced redundancy terms under the 2005 policy. I do not consider that they would read that 2008 policy as affecting their entitlement which continued on the basis of the 2005 policy. That was the evidence of Mr Hall and former employee witnesses which is accepted.

143. That interpretation is enhanced in my view by the terms of the consultation around Policies and Benefits in March 2013. In so far as consultation and redundancy is concerned at that time it is stated that the "new" policy is to "take effect from 1 April 2013 for all new joiner" and there is a proposal to introduce the "new" policy for all existing employees with effect from 1 October 2013 and "retention of existing schemes for current employees until October 2013" (J136). I consider that the consultation at that time was based on the rights to enhanced redundancy terms as laid out in the 2005 policy and which had been unaffected by the 2008 policy. The payment terms of the 2005 policy continued as a contractual entitlement. There was no evidence of any new terms being agreed between 2005 and 2013.

2013 Consultation

144. The proposal as laid out within the consultation document (J136) of 2013 was to bring into effect a new scheme from 1 April 2013 in respect of those who became employees beyond that date and with effect from 1 October 2013 in respect of existing employees (with existing employees retaining their entitlements until that time).

145. The proposal was to offer those under 22 years 0.5 x number of week's pay; those between 22 years and 41 years 1.0 x number of weeks' pay; and those beyond 41 years at 1.5 x number of weeks' pay. That reflected the statutory scheme.

146. The Company enhancement proposed was a weekly pay uplift of 1.25 x in the redundancy pay calculation without any statutory cap applied to a week's pay.

147. The only outcome document in relation to this proposal was the intimation by the TSSA on the result of the consultation on benefits (J167/169). That document covered various policies under review. It was stated that over the last 13 week period "TSSA and Thomas Cook had been in regular meetings negotiating changes" and after "a lot of give and take on both sides. It was considered that the representatives can "now accept the offer on the table".It is stated "(J169):-

> "Going forward if anyone has concern for issues over what the Reps have accepted on your behalf…."

That language signifies that there has been negotiation over the proposed changes to redundancy and that there has been a negotiated variation and change to the redundancy payment terms.

Negotiated Change

148. The change was only to affect "new starts". Existing employees would remain on their "existing Redundancy Policies" and the changes proposed would only come into effect for "new starts" beyond 1 April 2013 (subsequently agreed as 1 July 2013) whose entitlement would be based on the proposal in the Review document..

149. I accepted the outcome of negotiation was as narrated within the intimation from TSSA to employees. That process of negotiation and agreed change was entirely in line with the inference that there was a contractual right to redundancy payment in line with the 2005 policy and that discussion and agreement was required to change the existing enhanced payment terms. I also accepted the evidence that from that date existing employees (ie those employed prior to I July 2013) received redundancy payments based on the

2005 policy. The agreement reached in 2013 did not alter the contractual nature of the redundancy payment terms.

2017 and 2018 Policy

150. There was placed on the "HeartBeat" section of the Thomas Cook intranet the 2017 policy in August of that year (J170/179).The 2017 policy on payments followed the terms of the 2013 negotiation in making a distinction between those employed subsequent to 1 July 2013 and existing employees. However, there is substantial change to the wording. The whole policy is stated to be "non-contractual" and not part of "employees' terms and conditions of employment and may be amended at anytime". Additionally, within the section regarding redundancy payments it is stated that enhanced redundancy payments above the statutory entitlement are available to existing employees who started before 1 July 2013 and that pay is " calculated using the discretionary redundancy payment model which is a non-contractual arrangement". There is no reference to what that model is and where it is to be found. For those starts after 1 July 2013 they are to receive "ordinary statutory weeks but multiplied by 1.25 uplift (again in line with the 2013 agreement) but that uplift is "non-contractual".

151. There was no evidence as to how this policy was communicated to employees other than being placed on the "Heartbeat" intranet. There was no evidence that it was accompanied by any statement to employees that there had been a change to redundancy payments and that in place of a contractual right it was now "discretionary and non-contractual". I considered that such an important change would require to have been an agreed variation of the contractual term.

152. The 2018 policy was in similar terms to the 2017 policy and placed on HeartBeat in March 2018. The only change was to the tax treatment of

termination payments. Again there was no evidence of any negotiation on the issue of the policy being designated "non contractual and discretionary" or how that was communicated other than placing the policy on the intranet.

2018 TUPE Consultation

153. That employees did not accept their entitlement to enhanced redundancy payments was "non-contractual" was evidenced within the Tupe Consultation Meetings of 11 and 18 September 2018 (J506-515 and J182/188) and the "Note of Actions" from meeting of 11 September 2018 (J191). It is stated in the "actions from the last meeting on 11 September 20018" that the HR representative of Thomas Cook was to provide "TSSA with details to confirm redundancy policy with TC is non-contractual – sent 17-09-18". This was challenged at the meeting of 18 September 2018 with the Union advising that the policy was still contractual. The representation from the HR Representative of Thomas Cook that these changes were "consulted with the Union" was not accepted. The HR Representative of Thomas Cook stated "I will send you the letter from 28 June 2013 that confirms when the process changed". The HR Representative was asked if she could read out that letter but it was not read out and Mr Hall requested that he be sent "a copy and a document that all Reps have signed" (J183). It is clear at this point that there is a dispute between the HR Representative of Thomas Cook and the TSSA Representatives that there has been any agreed change to the terms of the redundancy policy to make it "non-contractual and discretionary". The position of the HR Representative of Thomas Cook at the time is "that there was a letter sent in 2013 stating discussion took place within the Union. This confirmed it is "non-contractual". However the evidence was that letter was never produced. The evidence of Mr Hall was that he received "snippets" and not the whole letter. The evidence from Rhonda Lloyd was that the letter had never been seen by her or read out at any meeting. It was not part of the documents in the case. The evidence from the TSSA Union representatives (Gary Kelly, John Hall and Tony Wheeler) was that there had never been any consultation or discussion which would render an agreed change to the redundancy policy to make it non -contractual. There was no reference to that

matter within the intimation from TSSA consequent upon the consultation on policies and benefits beginning March 2013.

154. I considered in line with the submission made for the claimants that it was incumbent on the respondent to produce evidence of an agreed variation of the 2005 policy if that was within the negotiation and agreement which followed the consultation of March 2013. The only evidence was an assertion in the Minutes that there had been an agreement with the TSSA in 2013 and a letter confirming that the enhanced payments were "non-contractual" but nothing was produced to demonstrate that was the case and the respondent could not speak to having sight of any such agreement. There appeared to be no letter produced to TSSA at the time.

155. The 2018 TUPE Consultations appeared to leave the question of whether or not the redundancy policy was now non-contractual in abeyance. However there is no dispute that the contracts of employment of the employees transferred to the respondent and in my view those rights included a contractual right to the enhanced redundancy payments in terms of the 2013 agreement which did not contain a provision that right was "non-contractual and discretionary".

Collective Redundancy Consultation Meetings

December 2018/January 2019

156. The evidence on this consultation process does not in my view impact on the issue of the contractual/non contractual nature of the enhanced payments. The minutes are clear in recording continued dispute on the issue and also clear that an agreement was reached which was not to set a precedent in order to allow matters to "move on". While the enhanced payments were in line with the 2013 agreement that was subject to terms on performance, attendance, conduct, timekeeping which conditions were not in the agreed terms. Neither side in the negotiation wanted the terms to be founded on in the future.

157. It was suggested by Mr Hall in his evidence that the terms offered within this redundancy consultation were in the end better than what was considered to be the contractual entitlement within the enhanced terms of the 2005 policy and so able to be accepted. That position however was not clear within the documentation. From the documentation I could not discern the advantage over the terms agreed and what the representatives considered "contractual"

158. In any event it was clear that this was a "one-off" agreement; did not set any precedent on the contractual/non-contractual nature of enhanced redundancy payments; and there was no concession that enhanced payments were "discretionary"

Redundancy Consultation of September 2019

159. Following the demise of Thomas Cook, redundancy consultation commenced 25 September 2019 given the respondent was to do no further work for Thomas Cook. Discussion ensued on how to minimise redundancy of employees and in that meeting Mr McKenna described the "method of calculating redundancy payments" albeit stressing that the focus was to protect jobs and maximise redeployment. At that time he outlined that the redundancy payments would be based on the statutory formula. Again, there was dispute over whether the enhanced redundancy terms were contractual or non-contractual. The respondent reiterated their belief that the terms were non-contractual and never transferred to the Respondent as a contractual entitlement with Thomas Cook. The position of the representatives was that they were contractual. (J258) The subsequent meeting of 2 October 2019 again discussed that issue.(J266/267) A further meeting of 9 October 2019 outlined that legal advice had again been taken on this issue and the terms of that advice summarised (J273/275). Again it was clear in the note of the discussion (J275) between Mr McKenna and Mr Hall that there was disagreement on the issue of whether the enhanced payments were contractual. The claimants were all dismissed by reason of redundancy on payments in line with the statutory formula and thereafter these proceedings were raised.

160. From the documentation and evidence I was satisfied that in respect of the TUPE Consultation; redundancy consultation of December 2018/early 2019 and further redundancy consultation from September 2019 there was no agreed variation by way of concession or otherwise by TSSA or other representatives of the employees of the position agreed in 2013.

161. I then accepted the submission that the wording of the 2017 and 2018 policies did not show that there was any agreed change to the redundancy policy agreed in 2013. It would not appear that there was any agreed variation with TSSA and/or employee representatives and/or employees that the redundancy terms would become "discretionary and non-contractual". This was a unilateral variation.

Implied acceptance of change

162. It was submitted for the respondent that given the 2017 policy stating the payments were discretionary had been on "HeartBeat" since August 2017, and repeated in 2018 and available for scrutiny that employees must have accepted their terms. It is questionable whether simply placing a policy on a website without intimation to employees of specific changes would be sufficient to imply acceptance from employees. I think it unrealistic to expect that employees on any regular basis check a Company intranet to see if any new policy has appeared on the website, or that existing wording has been altered, without any intimation or indication that changes were being made to either policies or terms and conditions of employment. The evidence was it came as a surprise to find these policies had terms indicating they were "discretionary" when introduced at the TUPE Consultation of 18 September 2018. There was no evidence that Thomas Cook had ever effected redundancy without enhanced payments which might have alerted employees to a change.

163. In any event, as was stated in *Harlow – v – Artemis International Corporation Limited [2008] IRLR 631* "where an employer purports unilaterally to change the terms of the contract which do not immediately impinge on the employee at all (and changes in redundancy terms do not impinge until an employee is

in fact made redundant) and the fact an employee continues to work knowing that the employer is asserting that a change has been affected does not mean that the employee can be taken to have accepted the variation". In this case the evidence was that when the employees were advised that the enhanced payments were deemed to be non contractual in the TUPE consultation and succeeding redundancy consultations they made objection which would make for a stronger position than that put in *Harlow*. However I find that the relevant terms in the redundancy policy were apt to be contractual terms and formed part of the claimant's contract with Thomas Cook and thus the respondent. I consider that any unilateral change did not impinge on these claimants until they were in fact being made redundant. Until that time it was always maintained that they had a contractual right to enhanced redundancy payment terms and never accepted otherwise.

164. Of course the respondent always acted in good faith in their consideration that the terms were non-contractual. They very much based that position on the advice being given to them by Thomas Cook that the redundancy terms were discretionary and non-contractual as in the 2017 and 2018 policies. However as explained I consider that the 2005 policy terms on payments was an express contractual entitlement for employees engaged prior to 1 July 2013 and that the terms for those beyond that date were enhanced by 1.25 x uplift on weeks with no statutory cap on a week's pay.

Were the enhanced terms incorporated by "custom and practice"?

165. I accepted the evidence that for those employees engaged prior to 1 July 2013 with Thomas Cook there was consistent payment between 2005 and that date of redundancy payment on enhanced terms. That appeared in the evidence of Mr Hall. There was criticism that there was no documentary evidence made available. However, neither was there any counter to that position. He had kept the 2005 table so that he could advise individuals of their entitlement in terms of that 2005 policy. He narrated that subsequent to the 2005 policy being agreed there were various consultations and redundancies over the years and that payment terms were clear. Individuals only required to look at

the table within the HR Manual to ascertain their entitlement and there was no real need for him to be asked of the payment terms.

166. After 2008, when there was no table within the redundancy policy and if he was asked of the entitlement and he would give information based on the 2005 table. He also stated that in 2013, a number of people were made redundant and they received enhanced payments in line with the 2005 policy. He advised that after 2013 many redundancies took effect with stores being reduced from 900 in 2015 to around 650 in 2018. Reference was made to multiple redundancies over the years in the consultation meetings beyond 2013. Payment was always made on enhanced terms.

167. In 2005, agreement had been reached with the Union as to how redundancy payments would be calculated. The evidence would indicate that the custom of paying enhanced redundancy payment based on the 2005 table up to 2013 was “reasonable, notorious and certain”. The terms were not arbitrary or capricious and were established and well-known. There was a table which detailed how the calculation was to be made.

168. There was a proposal to change that position in 2013. TSSA communicated the result of that negotiation to the employees by way of the intimation discussed. There was then a difference between those employed prior to 1 July 2013 and those employed thereafter in relation to the enhanced payments which were available. Employees were aware of the terms. They had been communicated and they could then have a reasonable expectation that they would receive enhanced payments if made redundant. These redundancy terms when first applied had been the outcome of negotiations with the union who had collective bargaining rights and the 2013 change also a result of such negotiation; the terms had subsequently been applied to further redundancy exercises; the availability of the enhanced terms had been drawn to the attention to the employees and the policy followed for an extensive period of time. I considered that after 2013 the terms were “reasonable , notorious and certain”

169. In those circumstances I considered that even if the employees whose service with Thomas Cook preceded 1 July 2013 did not have an express contractual right, they had an implied right by custom and practice to redundancy payment based on the 2005 policy.

170. That was the position notwithstanding that certain claimants may have no contractual documentation. I find that term was incorporated into their employment conditions either as an express term to be found within the HR manual or by custom and practice.

Entire agreement clause.

171. The respondent relied on "entire agreement clauses" in the employment contracts indicating that as contracts changed from time to time it would be agreed that "these terms and conditions shall supercede and replace all earlier terms and conditions of my employment with the Company whether express or implied". It was maintained that as there was no reference to the 2005 policy or the HR Manual being incorporated within the contracts then it could not be asserted that the redundancy policy was contractual.

172. The case relied on (*Rock Advertising Limited - v- MWB Business Exchange Centres Limited [2008] UKSC24* was a very commercial contract between two parties of equal bargaining strength and very different from the employment context. The clause in that case dealt with whether terms could be altered by any other means than in writing (as identified in the clause) and different from the terms of this particular clause.

173. The parties here were not of equal bargaining strength. Employees had been provided with various statements over the years none of which had reference to redundancy in particular and that accepting such a term would only indicate an update on terms previously provided. There was nothing to alert an employee that an important contractual right was being taken away. This particular term came from another source.

174. In any event I would accept that even if that clause did bite to the point at which employees signed then that would take the position to 2012 at latest

(Contract of Lorraine Sutherland) with dates of other such contracts stretching back to pre 2005. It would not take away rights established after date of signing. The evidence that the enhanced redundancy payments were paid on such a regular basis by Thomas Cook from 2013 onwards meant that there was a term incorporated into the contracts by custom and practice of enhanced redundancy payments (separating those who were engaged prior to 1 July 2013 and those engaged thereafter) for those whose contracts contained such a clause (if effective).

Letter from Manuel Cortes

175. I did not consider the letter from Manuel Cortes impacted on the issue. It was sent to members in Thomas Cook shortly after insolvency and covered a wide range of matters. It contained no detailed examination of the redundancy policies and outlined the method of recovery of statutory payments through the Redundancy payments scheme. Any contractual payments not coming within the statutory formulation would be ordinary claims in the liquidation. Simply because there was no mention of rights to enhanced payments did not in my view defeat the claims made. It would seem that the Q and A document was issued by KPMG who would not have detailed knowledge of this issue.

176. It was agreed that this judgment would deal with liability only. In the event it is necessary to fix a hearing on remedy then parties should make that application to the Tribunal.

Employment Judge: Jim Young
Date of Judgment: 10 May 2021
Entered in register: 11 May 2021
and copied to parties