Appeal No. EA-2020-000068-BA (previously UKEAT/0090/20/BA)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 5 May 2021
Handed down on 21 September 2021

Before

GAVIN MANSFIELD QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

MR A THOMAS & OTHERS — APPELLANTS

FW FARNSWORTH LIMITED (TRADING AS PIZZA FACTORY) — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR LEE BRONZE (Of Counsel) Instructed By: Linder Myers Solicitors 126-150 Washway Road Sale Point Manchester M33 6AG
For the Respondent	MR BRIAN NAPIER (One of Her Majesty's Counsel) Instructed by: Squire Patton Boggs 6 Wellington Place Leeds LS1 4AP

SUMMARY

CONTRACT OF EMPLOYMENT

The Claimants were made redundant by the Respondent in 2017 and received statutory redundancy payments. They claimed that they were contractually entitled to enhanced redundancy payments, on the basis that either a 1999 collective agreement had been incorporated into their contracts, or in the alternative, a term for such payments had been implied into their contracts by custom and practice. The Employment Tribunal rejected both claims. The Claimants appealed on the custom and practice issue only.

Held, dismissing the appeal, the Tribunal had correctly applied the principles set out in the leading case of **Park Cakes Ltd. v Shumba** [2013] IRLR 800. Contrary to the Claimants' argument, the Tribunal's reasons did not indicate that it had misapplied those principles. The weight to be attached to particular factors was a matter for the Tribunal (absent perversity). In the light of the available evidence, the Tribunal's factual findings and its assessment of the weight to be attached to particular facts was not perverse. The Respondent in this case and the Respondent in the **Shumba** case had at one time been part of the same group of companies. However, the Tribunal was not bound by the factual findings in **Shumba**, as opposed to the legal principles. The Tribunal did not err by failing to have adequate regard to the facts and evidence presented in that case.

GAVIN MANSFIELD QC, DEPUTY JUDGE OF THE HIGH COURT

INTRODUCTION

1 This is an appeal against the judgment of the Employment Tribunal (Employment Judge Camp sitting alone) arising from a hearing on 25-27 November 2019. A reserved judgment and reasons were sent to the parties on 7 December 2019 ("the Reasons").

2 Mr Thomas is the lead Appellant of the 27 Appellants listed in the Notice of Appeal. They were the Claimants in the Tribunal. The Respondent to this appeal, as below, is their former employer, known as the Pizza Factory. I will refer to the parties as they were below – i.e. as Claimants and Respondent.

3 The Claimants were all made redundant by the Respondent in January and February 2017. They were paid the statutory redundancy payments to which they were entitled, plus, it appears, an additional 10% payment negotiated between Unite, their union, and the Respondent.

4 The Claimants' claims were for breach of contract. They claimed that they were contractually entitled to an enhanced redundancy payment. They claimed they were entitled to an enhancement with the following components: double the number of weeks' pay provided by the statutory scheme; no cap on a week's pay; the statutory 20 year maximum to be applied; subject to a minimum of four weeks' pay inclusive of any pay in lieu of notice.

5 The Tribunal dismissed the claims. It found that there was no legal obligation on the Respondent to make enhanced redundancy payments.

6 The Claimants now appeal against that decision. The appeal was sifted by the President, who gave permission for three grounds to proceed to a Full Hearing. The President made an order under r.3(7) that no further action be taken on one further ground; no rule 3(10) application was made in respect of that ground.

THE CASE BELOW AND THE DECISION OF THE ET

7 The parties were represented before the Tribunal by the same counsel who appear on the appeal today: Mr Bronze on behalf of the Claimants, and Mr Napier QC on behalf of the Respondent.

8 In its Reasons, the Tribunal set out in some detail the procedural complexities prior to and at the November 2019 hearing. By the end of that hearing, the issues for the Tribunal were as follows:

a. Was a document known as the "1999 Redundancy Agreement" incorporated into the Claimants' contracts of employment, and did it apply to anything other than a specific redundancy exercise in 1999? [Issue 1 part 1].

b. In the alternative, was a term as to enhanced redundancy pay implied into the Claimants' contracts by custom and practice? [Issue 1 part 2].

c. In either case, was any incorporated or implied term superseded by a later Recognition Agreement between Unite and the Respondent? [Issue 2].

9 As the Tribunal recorded at paragraphs 8-10 of the Reasons, the custom and practice issue had not been pleaded in the Claim Forms, and was raised for the first time in the Claimants' counsel's Skeleton Argument for the November 2019 hearing. The Tribunal noted at paragraph 56.6 of the Reasons that the custom and practice argument was introduced as a "fall back" position in case the primary argument (i.e. Issue 1 part 1) failed. The Respondent did not object to the argument being run, and the Tribunal determined it.

10 The Tribunal decided:

a. The 1999 Redundancy Agreement was not incorporated into the Claimants' contracts.

b. No term was implied by custom and practice.

c. If there had been any enhanced redundancy term, the Recognition Agreement would have had no effect on it.

11 The only issue live in this appeal is the question of the implication of a term by custom and practice.

THE TRIBUNAL'S DECISION ON CUSTOM AND PRACTICE

12 The Tribunal set out the material documents, in chronological order, at paragraph 18 of the Reasons. At paragraphs 19-24, the Tribunal found that the facts were "*essentially agreed*" and that the most significant evidence it had was the documentary evidence. Before turning to the witness evidence in detail it highlighted the lack of certain evidence it would have expected to have seen in a case of this nature. It found that the witnesses gave their evidence honestly,

genuinely believing what they said was true. Nonetheless, it found there were significant limitations with the witness evidence on both sides. It gave little weight to the Claimants' evidence where it was controversial and not supported by documentary evidence (paragraph 22). It noted that the Respondent's sole witness had no direct personal knowledge "*of anything important*" and that the useful part of his evidence was a "*walk through*" of the documents.

13 Overall, the Tribunal described the evidence (both oral and documentary) as "*patchy*".

14 At paragraphs 24-25 the Tribunal described an overview of the Respondent and its history. That is material, given the reliance in this appeal (at Ground 2) on an authority dealing with enhanced redundancy terms in another, related, company. The Respondent is a long established company. It was a subsidiary of the Northern Foods group ("Northern Foods"). There were references in the evidence to other companies within the Northern Foods group of companies, in particular Lenton Foods and Gunston Bakery. There was a lack of clarity as to whether the Claimants were employed by the Respondent or by Northern Foods itself. However, at paragraph 25.7 the Tribunal recorded that it was agreed that from around November 2008 onwards the employer of the Claimants was the Respondent.

15 In paragraphs 26-30 the Tribunal set out the facts in relation to enhanced redundancy payments. For the purposes of this section of the Reasons, it took taken Issue 1 in the round, i.e. covering both the "incorporation" argument (Issue 1 part 1) and the "custom and practice" argument (Issue 1 part 2).

16 The Tribunal's "*Summary and conclusion on the facts relevant to issue 1*" are at paragraph 30. I note the following material findings:

a. For more than 10 years before 2009, when companies in Northern Foods made redundancies they made enhanced redundancy payments, on similar terms to those set out in the 1999 Redundancy Agreement, but potentially with important differences in the formula.

b. Particular exercises were governed by "informal, ad hoc agreements" of which the 1999 Redundancy Agreement was one.

c. There were only two specific exercises where the Tribunal was satisfied that enhanced redundancy was paid: in 1997 and 1999. There were some others, but the Tribunal could not tell what and when.

d. The Tribunal was not satisfied that enhanced redundancy on the same or similar terms was paid after 2008. They were not paid to at least some employees in Pork Farms in 2010.

e. The fact that enhanced payments had been made in the Respondent in 1999 led the Claimants to believe they would have a right to an enhanced payment along the line of what was paid under the 1999 Redundancy Agreement.

f. That belief persisted after 2008.

g. The possibility that an employer might consistently make enhanced redundancy payments without being legally obliged to do so never occurred to the Claimants' witnesses.

h. The first time anyone suggested to the Claimants they may not have a legally enforceable right was in 2016.

17 The Tribunal then set out the law on Issue 1 at paragraphs 46-49. Paragraphs 48-49 deal with the principles relevant to incorporation of terms by custom and practice. The Tribunal referred to, and adopted, a summary of the law as set out at paragraph 20 of **Peacock Stores v Peregrine and ors** [2014] UKEAT 0315_13_2503. The Tribunal referred to the leading case of **Park Cakes Ltd. v Shumba and ors** [2013] EWCA Civ 974, [2013] IRLR 800.

18 In paragraphs 58-61 the Tribunal rejected the Claimants' primary case, that the 1999 Redundancy Agreement was incorporated into their contracts (Issue 1 part 1). There is no appeal against that finding.

19 Paragraphs 63 to 67 set out the Tribunal's reasons on the custom and practice issue (Issue 1 Part 2). It directed itself that deciding whether a term is implied into a contract of employment by custom and practice is not a tick box exercise, all of the relevant circumstances, looked at as a whole, must be taken into account. It stated that it had found it helpful to go through "*the (non-exhaustive) list of potentially relevant circumstances*" set out in paragraph 36 of **Shumba**. The Tribunal then considered each of those factors at paragraph 64 before finding (paragraph 65):

> **"In summary, in relation to the six factors in para 34 of Shumba they are all either broadly neutral, or point towards enhanced redundancy payments being made as a matter of discretion".**

20 The Tribunal then concluded (paragraphs 66-67):

> **"66. Consistent payment of enhanced redundancy by an employer over a period of time does not in and of itself suggest that there is a legal obligation to pay. It only does so if one takes the view that employers are solely interested in their short-term profits and would never make payments they were not legally obliged to make. I do not take such a cynical view. In my experience, some employers - particularly ones like those in what was the Northern Foods Group, which the claimants themselves attested had a reputation for being good to its employees - often choose to do things to help their staff that are not in the company's short term interests, for a variety of reasons: a benevolent company culture, driven by owners and/or senior management; a belief that generosity to employees makes for a happy and more productive**

workforce; a desire to make customers and potential customers think better of the company and buy more of its products; improving industrial relations; no doubt there are others.

67. To the extent the evidence shows that the respondent and related companies had a practice of paying enhanced redundancy payments along the lines of what was payable under the 1999 Redundancy Agreement, that practice is *"equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation"*. On the facts of this case, the claimants cannot win unless they can point to something more in the evidence than consistent payment. Unfortunately for them, there is nothing more of substance than that. Their claims therefore fail."

GROUNDS OF APPEAL

21 There are three grounds of appeal:

a. GROUND 1: The Tribunal's finding that all of the **Shumba** factors are broadly neutral or point towards enhanced redundancy payments being made as a matter of discretion represents a misapplication of **Shumba**. In the alternative, the finding is perverse. Ground 1 comprises five sub-grounds.

b. GROUND 2: The Tribunal erred in not taking into account, or not taking adequately into account, the fact that the EAT and the Court of Appeal had already found there was an implied right to enhanced redundancy terms "from this employer" in **Shumba**.

c. GROUND 3: There was a misdirection in respect of the finding that the 2007 Redundancy Policy altered the terms of the Claimants' contention for enhanced redundancy payments.

THE LAW: CUSTOM AND PRACTICE

22 The parties agree that the leading authority setting out principles for incorporation of terms by custom and practice is the Court of Appeal's decision in **Park Cakes Ltd. v Shumba** [2013] EWCA Civ 974, [2013] IRLR 800, the leading judgment in which was given by Underhill LJ.

23 There is no criticism by the Claimants of the summary of the law in paragraphs 48-49 of the Reasons. The appeal alleges that the Tribunal erred in its application of the principles.

24 The key statement of principles in **Shumba** is to be found at paragraphs 34-36 in the judgment of Underhill LJ:

> **"34 As will have appeared, although the authorities reveal a fair degree of consensus as to the types of consideration that are likely to be relevant in deciding a question of this kind, there is rather less analysis of the nature of the exercise. But what Leveson LJ makes clear in *Garratt* is that the essential object is to ascertain what the parties must have, or must be taken to have, understood from each other's conduct and words, applying ordinary contractual principles: the terminology of "custom and practice" should not be allowed to obscure that enquiry.**
>
> **35 Taking that approach, the essential question in a case of the present kind must be whether, by his conduct in making available a particular benefit to employees over a period, in the context of all the surrounding circumstances, the employer has evinced to the relevant employees an intention that they should enjoy that benefit as of right. If so, the benefit forms part of the remuneration which is offered to the employee for his work (or, perhaps more accurately in most cases, his willingness to work), and the employee works on that basis. (The analysis by reference to offer and acceptance may seem rather artificial, as it sometimes does in this field; but it was not argued before us that if the employer had indeed sufficiently conveyed an intention to afford the benefits claimed as a matter of contract he would not thereby be bound.) It follows that the focus must be on what the employer has communicated to the employees. What he may have personally understood or intended is irrelevant except to the extent that the employees are, or should reasonably have been, aware of it.**
>
> **36 In considering what, objectively, employees should reasonably have understood about whether a particular benefit is conferred as of right, it is, as I have said, necessary to take account of all the circumstances known, or which should reasonably have been known, to them. I do not propose to attempt a comprehensive list of the circumstances which may be relevant, but in a case concerning enhanced redundancy benefits they will typically include the following:**
>
> > **(a) *On how many occasions, and over how long a period, the benefits in question have been paid*. Obviously, but subject to the other considerations identified below, the more often enhanced benefits have been paid, and the longer the period over which they have been paid, the more likely it is that employees will reasonably understand them to be being paid as of right.**
> >
> > **(b) *Whether the benefits are always the same*. If, while an employer may invariably make enhanced redundancy payments, he nevertheless varies the amounts or the terms of payment, that is inconsistent with an acknowledgment of legal obligation; if there is a legal right it must in principle be certain. Of course a late departure from a practice which has already become contractual cannot affect legal rights (see *Solectron*); but any inconsistency during the period relied on as establishing the custom is likely to be fatal. It is, however, possible that in a particular case the evidence may show that the employer has bound himself to a minimum level of benefit even though he has from time-to-time paid more on a discretionary basis.**
> >
> > **(c) *The extent to which the enhanced benefits are publicised generally*. Where the availability of enhanced redundancy benefits is published to the workforce generally, that will tend to convey that they are paid as a matter of obligation, though I am not to be taken as saying that it is conclusive, and much will depend on the circumstances and on how the employer expresses himself. It should also be borne in mind that "publication" may take many forms. In some circumstances publication to a trade union, or perhaps to a large group of employees, may constitute publication to the workforce as a whole. Employment tribunals should be able to judge whether, as a matter of industrial reality, the employer has conducted himself so as to create, in Leveson LJ's words, "widespread knowledge and understanding" on the part of employees that they are legally entitled to the enhanced benefits.**

> **(d)** ***How the terms are described*****. If an employer clearly and consistently describes his enhanced redundancy terms in language that makes clear that they are offered as a matter of discretion – eg by describing them as ex gratia – it is hard to see how the employees or their representatives could reasonably understand them to be contractual, however regularly they may be paid. A statement that the payments are made as a matter of "policy" may, though again much depends on the context, point in the same direction. Conversely, the language of "entitlement" points to legal obligation.**
>
> **(e)** ***What is said in the express contract*****. As a matter of ordinary contractual principles, no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary can be understood.**
>
> **(f)** ***Equivocalness*****. The burden of establishing that a practice has become contractual is on the employee, and he will not be able to discharge it if the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation. This is the point made by Elias J at paragraph 22 of his judgment in** ***Solectron*****."**

25 It is clear from paragraph 35 of **Shumba** that the factors set out by Underhill LJ are not exhaustive. Nor will all of the factors necessarily be relevant in any particular case. In this case the Tribunal analysed the facts by considering the **Shumba** factors each in turn, while recognising (paragraph 63) that it was not a tick-box exercise and the circumstances, looked at as a whole, must be taken into account. Neither party says the Tribunal was wrong to take this approach. Neither party says the Tribunal should have considered other factors outside the typical factors listed in **Shumba**. The appeal in this particular case turns on how the Tribunal applied the **Shumba** factors to the facts of the case. Addressing the grounds of appeal requires me to consider the **Shumba** factors each in turn, but in doing so I am by no means suggesting that the decision in **Shumba** should be treated as if it were statute, or as a mandatory checklist. My approach is conditioned by the particular grounds raised in this appeal.

26 **Shumba** is also relied on by the Claimants, in Ground 2, for its facts. The Claimants in **Shumba** had at one time been employed by a Northern Foods subsidiary. The findings in **Shumba** are said to be evidentially significant for the current case. Given the way Ground 2 is put, it is necessary to consider carefully exactly what was decided in **Shumba**.

a. The Claimants were employed by a company within Northern Foods. They were within a class of employees known as "non-negotiated employees" (para 6), as distinguished from those on whose behalf the union had negotiating rights.

b. In 2007 the factory at which they worked was sold and the Claimants TUPE transferred to Park Cakes. The relevant redundancies were made in 2009.

c. It was not in dispute between the Claimants and Park Cakes that Northern Foods had a "group-wide policy" of paying enhanced redundancy terms and that in the case of non-negotiated staff the terms were those alleged by the Claimants. Park Cakes claimed that these payments were made as a matter of policy not as a result of a contractual entitlement.

d. Before setting out a detailed analysis of the documents and the evidence of practice within Park Cakes, Underhill LJ said this at paragraph 10 (my emphasis added).

> **"Thus the essential issue between the parties was not the existence of a policy of paying enhanced terms to redundant employees but whether that policy reflected any contractual obligation. The evidence which the tribunal heard was significant to the extent that it cast light on that issue, I need to summarise it fairly fully in order that the grounds of appeal can be understood; but it is not my intention to perform my own evaluation of the extent to which it supports either party's case. I will summarise that evidence under three headings – (1) the explicitly contractual documents; (2) the non-contractual documents; and (3) the evidence of practice and knowledge."**

27 In summary, the decisions in the case were as follows:

a. The Employment Tribunal held that the Claimants had not proved on the balance of probabilities that there was an implied term entitling them to an enhanced redundancy payment. (Tribunal reasons paragraph 110 – quoted at paragraph 38 of Underhill LJ's judgment).

b. The decision and reasoning of the EAT are summarised in paragraph 41 of Underhill LJ's judgment. In the EAT the Claimants challenged the Tribunal's finding that it was unable to infer that the enhanced redundancy payments were paid without exception. It was argued that all the evidence went the other way. The EAT (by a majority) found that the Tribunal's conclusion was not open to it without an explicit and reasoned rejection of the evidence of a particular witness. The EAT held that whether the payments were made without exception was a factor of central importance and the Tribunal's decision was flawed. However, the EAT went on to hold that the fact that the Tribunal should have found that payments were made without exception did not mean that the Claimants were bound to succeed. The consistency (or "invariability") of payment was only one factor, albeit an important one. So the claim was remitted to the Tribunal for rehearing.

c. Park Cakes appealed to the Court of Appeal. The Court of Appeal dismissed the appeal and upheld the decision the EAT. As a result the claim remained remitted to the Tribunal. At paragraphs 56-57 Underhill LJ said as follows (my emphasis added):

> **"56 … It will appear from what I have already said that the particular flaw on which the EAT fastened does not stand alone: the fact-finding and the reasoning are, I have to say, unsatisfactory in other respects. This is significant to the question of remittal. I might in other circumstances have been tempted by a proposal that we should avoid the cost and delay of a remittal by deciding for ourselves whether the claimed benefits were indeed contractual. But neither party asked us to take that course, and in truth the findings in the Reasons are too abbreviated, and in places obscure, for an appellate court to be confident about reaching its own conclusions based on them. Remittal is accordingly, however regrettably, inevitable. It is also fair to say that this is the kind of case where the expertise of lay members is likely to be particularly valuable.**
>
> **57. I should make it clear that in upholding the decision of the EAT I am not to be taken as expressing any view as to what should be the eventual outcome. Cases of this kind often involve difficult questions of judgment, and it will be apparent from the summary which I have given of the evidence and submissions that there are points to be made on both sides of the argument. Although I have at one or two points expressed a view on particular aspects of the evidence (most obviously in relation to the £600), the tribunal on remittal should give those views weight only to the extent that they appear to be supported by the evidence before it."**

28 The Court of Appeal's decision, therefore, was that the EAT was entitled to find that the Tribunal's treatment of the evidence had been flawed, and the case would have to be reheard. I do not know what happened to the case after the Court of Appeal's decision. Neither party in this appeal made submissions based on evidence relied on or findings made when **Shumba** was remitted to the Tribunal. In the circumstances, very limited weight can be attached to the facts of **Shumba**. I return to this below in addressing Ground 2.

29 The decision of the EAT (Langstaff P) in **Peacock Stores v Peregrine** UKEAT/0315/13 was referred to by the Tribunal in the Reasons, and is relied on by the Claimants. In that case the Tribunal had found that a contractual term was to be inferred from the evidence. The EAT held that the Tribunal was entitled to reach that conclusion. The summary of the legal principles by Langstaff P at paragraphs 20-22 derived from **Shumba** and I do not need to address it in detail. I note that at paragraph 23 Langstaff P said as follows:

> **"None of this law was in dispute. It leads to the conclusion that the question is whether an employer has, objectively viewed, so conducted himself by word or deed that it is to be inferred that a term has been agreed between the parties. This was what the Judge concluded. He was entitled on the material before him, to do so. It is not suggested that he applied the law wrongly, but rather that he did not fully appreciate the force of some of the facts. This is question of weight: procedural irregularity apart, such questions are quintessentially matters of assessment by the fact-finding tribunal and do not give rise to an error of law, save only if the heights of perversity are scaled. …"**

30 The weight to be attached to any particular fact is a matter for the Tribunal. The Claimants in this appeal must establish either that the Tribunal failed to apply the relevant principles (to which the Tribunal had directed itself) or that the conclusions it reached were perverse.

GROUND 1

31 Ground 1 is that the Tribunal's finding that the **Shumba** factors were all either neutral or pointed towards enhanced redundancy payments being made as a matter of discretion represented

"a misapplication" of the principles in **Shumba**, or were perverse. Ground 1 was broken down into five sub-grounds:

a. The Tribunal misdirected itself in respect of its decision, as it did not take into account the fact that the enhanced redundancy policy had always been followed.

b. The Tribunal placed undue weight on "slight variations" in the redundancy scheme when considering whether the benefits are always the same.

c. The Tribunal misdirected itself when considering the extent to which the enhanced benefits are published generally.

d. The Tribunal misdirected itself when considering how the terms are described.

e. The Tribunal erred in applying the final limb of the **Shumba** factors.

<u>The Tribunal misdirected itself in respect of its decision, as it did not take into account the fact that the enhanced redundancy policy had always been followed</u>

<u>The Tribunal placed undue weight on "slight variations" in the redundancy scheme when considering whether the benefits are always the same</u>

32 It is convenient to take the first two points together, as they both turn on the evidence as to the history of payments made by the Respondent.

33 The Appellant argues that:

a. The evidence showed that a redundancy payment which paid double the statutory terms had "never not been paid". The Tribunal found that for more than 10 years prior to 2009 enhanced terms were paid. The Tribunal failed in its obligation to make a finding as to when the payment of enhanced redundancy ceased and what caused that.

b. The Tribunal misapplied **Peacock Stores**. In that case a term as to enhanced payments was established even though in later years the payments had become "more generalised". There was no evidence to show that the term established had been lawfully varied when the later "generalised" payments were made.

c. **Shumba** and **Peacock Stores** show that "slight variations" in what was paid are not fatal to the establishment of an implied term.

34 The Respondent submits:

a. The factual finding was that enhanced redundancy payments had been made on "more than two occasions" over a 10 year period ending more than 8 years before the dates to which the claims relate. There was at least one occasion when enhanced payments were not made.

b. The criticism of the Tribunal for not making a finding as to when and why enhanced payments ceased is misplaced. The Tribunal was entitled to find that the evidence was consistent with payments being made on a discretionary basis. A finding that the Respondent ceased making discretionary payments does not support the Claimants

A

case, and therefore it was not necessary to make a finding as to when and why those payments stopped.

B

c. The Tribunal found that the payments that were made prior to 2009 were similar to those set out in the 1999 Redundancy Agreement but "potentially with important differences." Those differences showed that there was a lack of certainty and consistency for a contractual term to be established. There were no findings as to the terms of any payments made after 2009, save that enhanced payments were not made to some employees of Pork Farms (another group company) in 2010.

C

D

d. The variations in payments on different occasions (and between the payments set out in the various documents) were not minor but showed a lack of consistency in the payments made. In any event, whether the variations were minor or not was a matter of assessment for the Tribunal which can only be challenged on perversity grounds.

E

35 I can see no misdirection on the part of the Tribunal, and the decision reached is certainly not perverse. I reject the Claimants arguments on the first two sub-grounds of Ground 1.

F

a. The Tribunal made findings of fact which it was entitled to make, particularly in the light of what it quite properly described as "patchy" evidence. The Tribunal correctly identified the legal principles, by reference to **Shumba**, and applied those principles to the facts it had found. The assessment of the relevance of the facts, and the weight to be attached to them, was a matter for the Tribunal and I can see no error in its approach.

G

H

b. The Tribunal did not err in misapplying **Peacock Stores**. The decision in that case was that the Tribunal had been entitled to reach the conclusion that a term was to be implied. But the facts were very different to the facts of the current case. The facts led the Tribunal to conclude that a term had been implied by a particular date, and that later departures from the requirements of that term did not affect the term: they did not lawfully vary a term which had already been established. In this case, the Tribunal made no such finding, nor was it obliged to do so. The evidence throughout was "patchy". The onus was on the Claimants to prove the existence of the custom and practice, and they failed to do so. Even in the period when payments had been made, there were few of them and the terms of payment varied. There was one instance of payment not being made to redundant employees.

c. A lack of consistency in the payments made is a factor to which the Tribunal was entitled to have regard. The second factor in **Shumba** is "*whether the benefits are always the same*". The Tribunal was entitled to form the view that, on the evidence available, that the payments made differed and therefore there was insufficient certainty for a custom and practice to give rise to a contractual term. Whether the variations in enhancements were minor or significant was a matter of assessment for the Tribunal. However, I would say not only was the Tribunal entitled to form its view, it was plainly right. The Claimants argument is that all the enhancements involved double the statutory maximum, and the other components of the payment were "minor" or "slight" variations. That is wrong. All of the components of a redundancy calculation affect the amount to be paid, potentially significantly. The Tribunal's example demonstrates the point: whether or not the 20 years' service cap

is applied or not could make a significant difference to the size of payment to some employees.

The Tribunal misdirected itself when considering the extent to which the enhanced benefits are published generally.

36 At paragraph 63.3 the Tribunal addressed the **Shumba** factor *"The extent to which the enhanced benefits are publicised generally".* It said:

> **"There is almost no evidence I have accepted of the availability of enhanced redundancy benefits being publicised generally. However, I accept that those employed at the time were well aware of enhanced redundancy benefits being offered in 1999. I am also prepared to accept that, largely because of the 1999 redundancy exercise, many, perhaps most, of those engaged subsequently thought they would be entitled to some kind of enhanced payment if made redundant, even if they didn't know the details."**

37 The Claimants argue that the Tribunal misdirected itself in failing to regard this as a factor that supported the Claimants' case. They argue that the Tribunal failed to take due consideration of the decision in **Duke v Reliance Systems Ltd**. [1982] IRLR 347. It is said that **Duke** highlighted the importance of a positive act of communication by the employer.

38 I cannot see how **Duke** assists the Claimants. In **Duke** a female employee had been dismissed at age 60 and complained of unfair dismissal. The employer defended the claim on the basis that there was an implied term that the normal retirement age for women was 60: that was the company's policy. The Tribunal accepted there was such a term, but the EAT held that it erred in doing so. It held that a policy unilaterally adopted by management cannot become a term of employees' contracts on the grounds of custom and practice unless it is at least shown that the policy has been drawn to attention of the employees or has been followed without exception for a substantial period.

39 **Duke** was one of the cases taken into account by Underhill LJ in **Shumba** in formulating the typically relevant considerations for assessing a custom and practice. It is clear from **Duke** itself, and from **Shumba**, that communication of a policy or custom is not conclusive, but a factor to be weighed by the Tribunal. It is clear from paragraph 63.4 of the Reasons (quoted above) and from the factual findings in particular at paragraphs 29-30 that the Tribunal made careful factual findings and weighed those findings in reaching its conclusions. It made factual findings on the basis of the documents available and the oral evidence of the witnesses, particularly the Claimants' witnesses. In saying there was "almost no evidence I have accepted" of the availability of enhanced redundancy payments being accepted generally the Tribunal recognised there was some evidence. It was a matter for the Tribunal to evaluate that evidence and the weight to be attached to it.

40 The Claimants further argue that this finding was perverse. They rely on three pieces of evidence:

a. The Northern Foods May 2007 Redundancy Policy and Procedures, which says at paragraph 9 "The Northern Foods enhanced redundancy scheme is published, known to employees and has been applied over a number of years".

b. The Respondent's witness Mr Parker, whose evidence was that knowledge of the policy was widespread.

c. The Respondent's undated internal advice document which is said to imply that the policy towards enhanced redundancy payments was well known.

41 None of these pieces of evidence renders the Tribunal's finding perverse.

a. None are direct evidence of a communication of any terms, let alone the terms contended for, to employees.

b. The Tribunal was entitled to have regard to the absence of clear documentary evidence and the vagueness of the witness evidence about how they knew about enhanced redundancy payments. The Tribunal analysed that in detail in paragraph 29 of the Reasons. While the Claimants' witnesses believed they were entitled to some form of enhanced payment, it appears that none were clear as to its terms. None appear to have given evidence that any particular terms were published within the company.

c. None of the documents referred to by the Claimants is sufficiently powerful evidence to render the Tribunal's finding perverse. The May 2007 Redundancy Policy and Procedures, for example, was found by the Tribunal to set out different terms to the term alleged by the Claimants (Reasons paragraph 27.3). In any event, as the Claimants allege in Ground 3 of this appeal, the 2007 document did not apply to the Claimants. The 2007 document pre-dated the Claimants' redundancies by 10 years; a later iteration of the document in 2009 set out different terms again.

d. The Tribunal had found that Mr Parker had almost no direct knowledge of anything important in the case and that nothing that had happened when he was in post made a difference to the custom and practice issue (paragraph 23).

e. The Tribunal considered the internal advice document carefully at paragraphs 34-35 and found that it did not advance the case.

The Tribunal misdirected itself when considering how the terms are described

42 The Tribunal considered the **Shumba** factor "*How the terms are described*" at paragraph 63.4. It held:

> **"The only sets of enhanced redundancy terms I am satisfied were applied to particular employees use the words "ex-gratia". Whatever the claimants may have understood those words to mean, objectively they mean the opposite of something done out of obligation."**

43 The Claimants allege that there was an "over reliance" on the phrase ex gratia which was treated as being determinative.

44 There is no merit in this point. It is clear from the Reasons that the Tribunal, having made its findings of fact, considered all of the **Shumba** factors and then reached an overall conclusion at paragraphs 65-67. There is nothing in paragraph 63.4, nor in any other paragraph, to indicate that use of the term "ex gratia" was treated as being determinative by the Tribunal. The weight to be attached to the use of the expression was a matter for the Tribunal to assess. I can see no error of law in relation to this point.

The Tribunal erred in applying the final limb of the **Shumba** factors

45 The final **Shumba** factor is equivocalness. Underhill LJ expressed it in this way:

> **"The burden of establishing that a practice has become contractual is on the employee, and he will not be able to discharge it if the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation."**

46 The Tribunal expressly considered this factor at paragraph 64, and further at paragraphs 66-67. The Tribunal held that there was nothing in the evidence that was inconsistent with enhanced payments being made as a matter of discretion. The Claimants relied on two factors:

first, the enhanced redundancy payments were "never not paid"; second, what was paid was the same every time.

47 The Tribunal's overall assessment of these factors was that neither pointed strongly in the Claimants' favour.

a. As to the first point, the Tribunal accepted the proposition on a qualified basis: i.e. in relation to the period from the mid-1990s to 2008, and in the light of its findings as to the limited exercises proven to have taken place in that period.

b. The Tribunal rejected the second point. The Tribunal had already found that there were material differences in what was paid on different occasions, and in the different documents. The Tribunal then went on to say:

> **"64.2.2. … Even if I did [accept the point as a matter of fact], the kind of employer that is generous enough to make enhanced redundancy payments as a matter of discretion is likely to be the kind of employer that tries to be fair and consistent in what it pays."**

48 This proposition is challenged by the Claimants. They argue that the Tribunal gave no reasons for it (or inadequate reasons for it) and or that the finding was perverse.

49 In my judgment there is no merit in either argument. The Tribunal set out more of its reasoning at paragraphs 66-67 of the Reasons, which I have quoted above at paragraph 20 above. In these paragraphs the Tribunal evaluates whether the payments made are consistent with discretion, or only with legal obligation. In doing so, it forms a view of the Respondent based upon the Claimants' own evidence; and it applies to that its own experience. The Tribunal's views seem to me to be unremarkable, and were matters to which it was entitled to have regard. The

reasoning is clear: the Tribunal drew on the Claimants' evidence and its own experience. The finding is not perverse.

50 In any event, it is clear from paragraph 64.2 that the proposition to which the Claimants now object was a secondary reason. The Tribunal's primary reason was that the Claimants' argument that what was paid was the same every time was factually incorrect – as explained in detail in the factual findings and at paragraph 63.2.

Conclusion on Ground 1

51 Having considered each of the sub-grounds of Ground 1 in turn, and also looking at the matter in the round, in my judgment it is clear that the Tribunal did not misapply the **Shumba** factors, and did not reach any perverse findings. It appropriately applied the law to the facts as it found them. It made no error of law, and this ground fails.

GROUND 2

52 The Claimants argue that the Tribunal erred (or reached a perverse decision) in not taking into account, adequately or at all, the findings of the EAT and Court of Appeal in **Shumba** itself, given that **Shumba** concerned the Northern Foods policy.

53 The Claimants argue in the alternative that the Tribunal did not adequately give reasons for distinguishing **Shumba**.

54 The Respondent submits:

a. The facts in **Shumba** do not bind the present Tribunal in a case between different parties.

b. The Tribunal correctly applied the legal principles set out in **Shumba**; it did not need to distinguish the facts.

55 I accept the Respondent's submissions on Ground 2.

56 The Tribunal was not bound by the factual findings in a case between different parties. The Claimants, of course, are not the same Claimants as in **Shumba**. The Respondent in **Shumba** was a different to company to the Respondent in this case.

57 As the Respondent points out, even by the time of the redundancies in **Shumba** (in 2009) Park Cakes was not part of Northern Foods: it had not been since 2007. The Respondent has not been part of Northern Foods since 2011. Therefore, by the time of the Claimants' redundancies, the Respondent and Park Cakes had not been in the same corporate group for ten years. In those circumstances, findings of fact as to custom and practice in Park Cakes in 2009 had no material bearing on the analysis of this case, concerning redundancies by the Respondent in 2017.

58 Further, the Claimants in **Shumba** were "non-negotiated" employees – a different category of employees to the Claimants in this case.

59 In any event, as I have indicated above at paragraphs 28-29 above, the decision of the EAT in **Shumba** was that the Tribunal had erred in its approach to the evidence as to whether particular payments had been made "without exception" and the case was to be remitted to the

Tribunal for rehearing. The Court of Appeal upheld the EAT's decision. Beyond the statement of legal principles, there is nothing that could be said to be binding or persuasive in this case.

60 The Tribunal in this case was entitled to base its decision on the evidence before it, not on the Court of Appeal's summary of the evidence that had been led in a case involving redundancies made by a different company some 10 years before the redundancies in issue in this case.

GROUND 3

61 The Claimants argue that the Tribunal misdirected itself in respect of its finding (Reasons paragraph 63.2) that the 2007 Redundancy Policy altered the terms of the Claimants' "contention for" enhanced redundancy payments.

62 At paragraph 63.2 the Tribunal considered (in accordance with **Shumba**) whether the benefits paid were always the same. The Tribunal had found as a fact (paragraph 30.3) that there were only two specific redundancy exercises (in 1997 and 1999) where the benefits paid were in all relevant respects the same. The Tribunal acknowledged that it was possible that the parties had by implication agreed to a minimum entitlement consistent with the "least generous parts" of the three agreements that had applied from time to time. However, the terms of the three agreements were all different, so that it could not be said that there was a custom and practice of paying the same ascertainable amounts, and there was insufficient certainty as to which parts of which agreement formed the custom and practice.

63 The Tribunal found that the existence of the 2007 Redundancy Policy suggests that on at least some occasions enhanced redundancy payments were made that were materially different from those made in 1997 and 1999.

64 The Claimants makes two points:

a. First, the 2007 Redundancy Policy supports the Claimants' case, as it states that statutory multipliers should be doubled.

b. Second, and in the alternative, if the 2007 Redundancy Policy does not support the Claimants' case, then that policy it is irrelevant. It did not apply to the Claimants. It applied to a different group of employees: i.e. "non-negotiated employees" rather than "negotiated employees". It is argued that it would be illogical for non-negotiated employees' terms to be worse than those of negotiated employees.

65 The Respondent's core point is that the Tribunal was entitled to have regard to the fact that the existence of different agreements and policies dealing with enhanced redundancy payments indicated that there was no clear custom of making payments calculated in the same way.

66 As to the Claimants' second point, the Respondent argues that there was no evidence before the Tribunal as to the difference in treatment between negotiated and non-negotiated employees. Further, it was not suggested to the Tribunal that it should disregard the 2007 Redundancy Policy on the basis that it was not relevant to the Claimants.

67 I reject the Claimants' appeal on Ground 3.

68 As I have set out above in considering Ground 1, the Tribunal was entitled to have regard to the fact that there were differences between the formulae applied in different exercises (and

set out in different documents). The Tribunal was entitled to form the view (indeed it was plainly right to do so) that the differences were material, and not minor or slight. The 2007 Redundancy Policy does not support the Claimants' case once one appreciates the material differences between the formula in that document and the term now alleged by the Claimants.

69 Further, there is an uncomfortable inconsistency in the Claimants' reliance on the 2007 Redundancy Policy. The Claimants' primary position is to rely on the 2007 Redundancy Policy as supporting their case. As it is put in the Skeleton Argument at paragraph 18, the "crucial point" is that the 2007 Redundancy Policy evidences the doubling of statutory redundancy payments. I have rejected that argument, as did the Tribunal. In an effort to avoid the consequences of the lack of consistency between the various documents, the Claimants argue that the 2007 Redundancy Policy (and its successor the 2009 Policy) did not apply to the Claimants at all.

70 Even if that were right, I cannot see how it would assist the Claimants. In that scenario, there is no applicable agreement or statement of policy as to enhanced redundancy payments for negotiated employees after 1999, some 18 years prior to the redundancies in issue. Yet at the same time, there was a policy applicable to non-negotiated employees, in different terms to those sought by the Claimants. It is difficult to see how the term the Claimants allege would come to be implied in those circumstances.

CONCLUSION

71 Having considered all three grounds of appeal carefully, it is clear to me that the Tribunal made no error of law and its conclusions were not perverse. I dismiss the appeal on all grounds.