EMPLOYMENT TRIBUNALS

Claimant: Mr C Armstrong and others

Respondent: British Airways Avionic Engineering Limited

Heard: by video **On:** 9 December 2021

Before: Employment Judge S Jenkins

Representation
Claimant: Ms M Tether (Counsel)
Respondent: Mr T Brown (Counsel)

RESERVED JUDGMENT

The Claimants' original claim included a contention that the term of their contracts, which they contend was breached by the Respondent, had arisen through incorporation from documents as well as by implication through custom and practice. The final hearing will therefore proceed on that basis.

REASONS

Background

1. The Claimants, who are twenty-eight in number, have brought claims of breach of contract. Those claims arise from the dismissals of the Claimants by reason of redundancy in 2020, and relate to the redundancy payments they received. The Respondent paid redundancy payments to the Claimants on the statutory basis, whereas the Claimants contend that they were contractually entitled to payments calculated on a more generous basis.

2. An earlier preliminary hearing had taken place on 3 September 2021 before Employment Judge Brace, at which she identified that an issue had arisen as to how the breach of contract had been pleaded. She noted that the Respondent indicated that it had defended the claim, and had undertaken disclosure, on the basis of a claim that the enhanced redundancy terms had arisen as an implied term only, and not, in the alternative, that the terms had been incorporated into the Claimants' contracts of employment by

virtue of a collective agreement.

3. Judge Brace directed the Claimants to provide further particulars of their breach of contract claim, and directed the Respondent to confirm whether, in its view, the further particulars amounted to an amendment of the claim, requiring the Tribunal's permission, and, if so, whether the Respondent consented or objected to such an amendment.

4. The Claimants provided the further particulars, and the Respondent responded, indicating that it considered that the further particulars involved amendments to the initial claim, which required the Tribunal's permission, and to which it objected. This hearing was then listed to consider the matter.

5. Subsequently, on 3 December 2021, following the engagement of Ms Tether by the Claimants on 30 November 2021, the Claimants sought to further amend their further particulars. Although no notice of hearing was issued to the parties confirming that that issue would also be discussed at this hearing, the Respondent, whilst noting that it objected to the further application, noted that it would be sensible for it also to be considered at this hearing. I therefore proceeded to consider both the initial further particulars and the amended further particulars.

6. I had the benefit of helpful skeleton arguments from Ms Tether, on behalf of the Claimants, and Mr Brown, on behalf of the Respondent. I also considered the representatives' supplemental oral submissions and the cases to which they referred me.

The dispute

7. The focus of the dispute between the parties is on the nature of the contractual term that the Claimants contend has been breached. The parties' differences can perhaps most straightforwardly be demonstrated by reference to the content of the agendas they submitted to the Tribunal in advance of the preliminary hearing before Judge Brace. In relation to the question, "What are the issues or questions for the Tribunal to decide?", the Claimants' representative said:

    1. *Is the Redundancy Policy contractual?*
    2. *Has the calculation of the redundancy payments in accordance with the Redundancy Policy become contractual by custom and practice?*
    3. *If the Policy is found to be contractual have BAAE breached the Policy?*

8. Whereas the Respondent's representative said:

    1. *Is the Redundancy Policy contractual? The Claimants contend (the burden being on them) that the Redundancy Policy was a term of the Claimants' contracts implied by custom and practice.*
    2. *If the Policy is found to be contractual, have BAAE breached the Policy?*

9. Looking at the dispute in more detail, the Respondent contends that the initial claim form pleaded only that a term had become implied into the Claimant's contracts. Whilst not specified, it appeared to be accepted that

that is said to have arisen through custom and practice. The Respondent notes that it has defended the case, both in terms of its response and its approach to disclosure and witness evidence, by reference only to an argument that the enhanced redundancy terms had been incorporated through implication.

10. The Claimants contend in their further particulars however, that the initial claim form not only included a contention that the enhanced terms had been contractually implied through custom and practice, but also, in relation to Claimants below management level (understood to be all bar three of them), that the enhanced terms had become incorporated into their contracts of employment through being included in a redundancy policy which they contend amounted to a collective agreement, as defined in section 178(1) of the Trade Union and Labour Relations (Consolidation) Act 1992.

11. The Claimants further contend, in the amended further particulars, that the initial claim form also included a claim that the contractual term was incorporated into the contracts of employment of all of them, by virtue of the redundancy policy having been incorporated through the wording of an "Associate Handbook".

12. In the alternative, the Claimants contend that if it is considered that the alternative bases of incorporation were not included in the initial claim form, then they should be permitted to amend their claims to include them.

Issues

13. The initial issue for me to consider therefore was whether the Claimants' contention, that the contractual terms which they contend were breached had arisen through incorporation as well as by implication, had been included in their claim form, or whether it had only included a contention that the terms had been incorporated by implication.

14. If I considered that the claim form had only referred to the term arising through implication, I would then need to go on to consider whether either or both of the Claimants' further particulars and amended further particulars should be allowed as amendments to the initial claim form.

Law

15. Whilst the parties' counsel both made comprehensive submissions to me on the law relating to amendments, they did not focus their attention on what I have described as the initial issue, i.e. were all the Claimants' asserted bases for the enhanced terms being part of their contracts of employment included in the claim form. Having looked at the prevailing law, I could see that that would seem to be because there appears to be a paucity of appellate authority on the issue, other than in relation to matters not relevant to this case, i.e. that, when considering whether the ET1 contains a particular complaint that the claimant is seeking to raise, reference must be made to the claim form as a whole (Ali v Office of National Statistics [2005] IRLR 201); and that it is particularly inappropriate for a tribunal to adopt a technical approach when deciding whether an ET1, completed by

an individual without professional assistance, raises a particular claim (Burns International Security Services (UK) Ltd v Butt [1983] ICR 547).

16. I did however note that the NIRC, in Cocking v Sandhurst (Stationers) Limited [1974] ICR 650, had pointed out that the Tribunal Rules did not require that the complaint as presented should be free of all defects or should be in the form in which it finally came before the tribunal for adjudication.

17. With regard to applications to amend, both representatives were in agreement that the test to be applied involves the assessment of the balance of injustice and hardship of allowing or refusing the amendment. Both referred to Selkent Bus Company Ltd v Moore [1996] ICR 836, which reiterated that point, which had previously been made in Cocking, and noted the non-exhaustive list of relevant circumstances which would need to be taken into account in the balancing exercise, namely the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend. Those points have subsequently been encapsulated within the Employment Tribunals (England & Wales) Presidential Guidance on General Case Management (2018), Guidance Note 1.

18. Both counsel also referred to the recent Employment Appeal Tribunal decision of Vaughan v Modality Partnership (UKEAT 0147/20), which had given detailed guidance on applications to amend tribunal pleadings. That had confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application, but noted that the focus should be on the real practical consequences of allowing or refusing the amendment.

Conclusions

19. I first considered whether the Claimants' claim form had included references to the enhanced terms arising by way of incorporation, as well as by way of implication.

20. I considered the wording of the Details of Claim attached to the claim form closely. It was divided into sections under the following headings, "The Parties", "Narrative", "ACAS Early Conciliation" and "The Claim", and it was the "Narrative" and the "Claim" sections which were relevant.

21. The "Narrative" section contained the following relevant paragraphs:

> "*3. In or about 2000, in the context of pay negotiations, Unite and BAAE agreed that BAAE would adopt a redundancy policy which entitled BAAE employees who were made redundant to receive 2 week's pay per year of service."*
>
> *4. Redundancy Payments calculated with reference to 2 weeks' pay for each year of service were paid by BAAE on the 3 occasions of redundancies prior to the 2020 redundancies, in or around August 2009, in 2001 and in or around 2000.*

5. *Employees of BAAE are termed Associates. An Associate Handbook sets out rules, policies and procedures, which are said to be subject to change at the discretion of the Company following consultation with the Associate Council…*

6. *The Associate Handbook sets out that BAAE recognises and has worked in partnership with Unite the Union under a Single Union Agreement dated 2000 and that Unite the Union is granted recognition and bargaining rights for all Associates who are union members, below management level.*

7. *Section 3 is headed "Company Rules and Code of Conduct". The introduction to Section 3 states, "BAAE maintain electronic copies of its policies and manuals, which can be accessed via BAAE Policies and Information link within the shared drive on the company computer system." Under the sub-heading "Redundancy" in section 3 it says: "To minimize the impact of such reductions, the Redundancy Policy, which can be found on the company intranet, will be adhered to."*

8. *At paragraph 10 under a hearing "Procedure" the RP states:*

   "Associates with two or more years' service will receive compensation for loss of employment due to redundancy. Company redundancy pay will be two weeks' basic pay per year of service, which takes account of statutory entitlement.

   Redundancy payments will be based on an Associate's basic gross weekly earnings and length of service."

22. The "Claim" section contained the following relevant paragraphs:

"*13. The Claimants make a breach of contract claim. The Claimants assert that there was an implied term in the Claimants' contracts of employment requiring BAAE to pay a contractual redundancy payment…*

14. The language used to describe the redundancy payment calculation in the BA Redundancy Policy does not suggest that the redundancy payment is discretionary. The use of phrase "will receive" in the BA Redundancy Policy indicates that the redundancy payment is an entitlement.

15. There is no express term in the contract saying that the BA Redundancy Policy is not contractual (although there is an express term saying that he Disciplinary and Grievance Policies are not contractual).

16. In all the circumstances, including (but not limited to) the past practice of BAAE paying redundancy payments calculated in accordance with the Redundancy Policy the Claimants reasonably understood that they were legally entitled to be paid redundancy payments calculated in accordance with the Redundancy Policy."

23. I noted the particular wording of paragraph 13, "*The Claimants assert that there was an implied term…*" There was no qualification of that by reference to the implied term arising solely by virtue of custom and practice.

24. In the main, terms are contended to become implied into contracts of employment by reference either to: business efficacy, the term being necessary in order to enable the relationship between the parties to operate; custom and practice; the conduct of the parties, demonstrating, by the way in which the contract has been performed, an intention to include the term; or the "officious bystander" test, i.e. that the term is so obvious that the parties must have intended it to be included.

25. However terms can be impliedly incorporated from collective agreements. Indeed, the IDS Employment Law Handbook on Contracts of Employment (Volume 3) includes a section on "*Implied incorporation*", which states as follows:

> *5.39 Courts and tribunals are sometimes willing to imply the incorporation of the terms of collective agreements, in particular into individual employees' contracts of employment in cases where there is no express statement that they will be incorporated. What needs to be shown is either a collective custom and practice that the terms of collective agreements are incorporated into individual contracts or that the circumstances are such that it is obvious that they must be…. So, for example, in Henry and ors v London General Transport Services Ltd 2001 IRLR 132, EAT, the EAT held that the test for establishing that terms in a collective agreement had been impliedly incorporated by custom and practice is identical to the test for implying terms in individual contracts on the same basis — namely, whether the custom and practice in question is 'reasonable, certain and notorious'. On further appeal, the Court of Appeal affirmed the EAT's approach but remitted the case to the employment tribunal for reconsideration on a technicality (Henry and ors v London General Transport Services Ltd 2002 ICR 910, CA).*

26. I noted the particular wording of paragraphs 3 to 8 of the Claimants' Details of Claim which referred to the following:

    a. That the Respondent and the relevant trade union had agreed a redundancy policy in 2000, which provided for enhanced redundancy terms (paragraph 3).

    b. That redundancy payments were paid with reference to those enhanced terms in 2000, 2001, and in 2009 (paragraph 4).

    c. That an Associate Handbook, i.e. what was, in effect, the staff handbook applicable to all employees, contained a section stating that the Redundancy Policy "*will be adhered to*." (Paragraph 7).

    d. That the written Redundancy Policy referred to the enhanced terms (paragraph 8).

27. I also noted that, whilst paragraph 13 of the Details of Claim refers to there

being an implied term in the Claimants' contracts of employment, as I have already noted, it was not qualified by reference to implication by custom and practice. Also, paragraph 16 went on to say, "*In all the circumstances, including (but not limited to) the past practice of BAAE paying redundancy payments calculated in accordance with the Redundancy Policy the Claimants reasonably understood they were legally entitled to be paid redundancy payments calculated in accordance with the Redundancy Policy*".

28. In my view, the case as set out in the claim form, whilst it could have been set out more systematically, was not confined to implication by custom and practice. Indeed, the assertion that the Claimants' case is based on custom and practice is only really apparent in paragraph 4 of the Details of Claim, by way of the reference to the enhanced terms being applied on three occasions, and in paragraph 16, by way of the reference to the past practice.

29. The other elements of the Narrative section make reference to sections of documents; the agreement in 2000 (although not expressly referred to within the Details of Claim as a documented agreement I have presumed that it was), the Associate Handbook, and the Redundancy Policy.

30. The other paragraphs of the Claim section, i.e. paragraphs 14 and 15, also refer to documents, noting that the Redundancy Policy does not suggest that the redundancy payment is discretionary, and that there is no express term in the contract saying that the redundancy payment is not contractual.

31. In my view therefore, the Details of Claim did not only plead the Claimants' claim that the contractual term, which they assert was breached, arose impliedly through custom and practice. It also pleaded that the contractual term arose impliedly, through incorporation via the Redundancy Policy and/or via the Associate Handbook.

32. I concluded therefore that it was not necessary for the Claimants to seek to amend their claims, and that the further particulars, both initial and amended, are simply that, further particulars of the claim.

33. In the circumstances, it was not necessary for me to consider the other issues.

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Employment Judge S Jenkins
Date: 13 December 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
14 December 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche