# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Helstrip and others (Schedule attached)

**Respondent:** Nestlé UK Ltd

**Heard at:** Leeds **On:** 8 August 2022

**Before:** Employment Judge D N Jones

**REPRESENTATION:**

**Claimants:** Mr D Helstrip, the first claimant
**Respondent:** Ms C Millns, Counsel

# JUDGMENT

The respondent breached the contracts of employment of the claimants by failing to include the annual wage rise for the year 2021 in the calculation of their voluntary redundancy payment payments and by failing to pay arrears to include that increase for the months of April to December 2021.

# REASONS

**Introduction**

1. 18 claimants say they were unlawfully deprived of the annual wage increase for the financial year 2021 to 2022 in respect of the calculation of the voluntary redundancy payments they received and for the months April 2021 to December 2021 for which they say they were entitled to back pay.

**The Issues**

2. The issue for the Tribunal to determine is whether there had been an agreement to vary the contracts of employment of the claimants to include the annual wage increase for the year 2021 to 2022, or whether that increase did not apply to those who left employment by 31 December 2021.

3. The issue of remedy is to be dealt with at a further hearing.

## The Evidence

4. One claimant, Mr Jez Ventress, gave evidence. The respondent called Mr Simon Barker, Factory Engineering Manager for York and Girvan and Ms Zoe Pugh, Lead Human Resources Business Partner at the York factory.

5. A bundle of documents of 472 pages was produced.

## Background/facts

6. The claimants were all engineering technicians who were employed at the York factory of the respondent.

7. On 28 April 2021 the respondent announced a proposal to reduce the number of engineering technicians at York, initially by 37. Collective consultation commenced with the recognised trade union, Unite. Mr Barker led the consultation for the respondent. Following collective consultation, the numbers were reduced to 27 although that would involve the selection of 17 technicians for redundancy as, by October 2021, the balance of posts were vacant. Individual consultation commenced on 1 November 2021. Expressions of interest for voluntary redundancy were invited, including when that should take effect, December 2021 or December 2022. 24 technicians expressed an interest in voluntary redundancy.

8. The claimants were selected and provided with written notice of redundancy on 30 November 2021, to take effect from 31 December 2021 with payment in lieu of notice.

9. The recognised trade unions for pay negotiations were Unite and GMB. In recent years annual wage rises have been negotiated nationally, by a National Forum Negotiating Committee. This affects nine factories and sites. The national negotiation in 2019 was concluded in April 2019 with payment implemented in the June 2019 payroll. The 2020 negotiations took much longer, concluding in October 2020 with the changes taking effect in January 2021. For the year relating to this claim, negotiations began in January 2021 and concluded on 5 November 2021. A joint communication from both trade unions and the respondent was sent on 5 November 2021 recommending acceptance of "*3.5% increase on all basic rates of pay in 2021 backdated to the site local pay anniversary date for this year AND a further 3.5% increase on all basic rate of pay in 2022 from the site local pay anniversary date*". A balance of the trade union membership took place and the offer was accepted, with 81% voting in favour.

10. A joint communication was sent from the two recognised trade unions and the respondent, dated 29 November 2021. It was signed by Mr Brian Golding the Nestlé UK national convener and Ms Sarah Merwood, Head of Employee Relations and Engagement. It recorded the vote and that the majority had voted to accept the offer and the national pay deal and continued, "*the 2021 pay changes will be implemented with the January 2022 payroll which will include back payments. The 2022 pay changes will be effective from your normal anniversary date".*

11. On 14 December 2021 the claimants submitted a collective grievance in which they complained that this pay increase should have been backdated to April and included in the calculation of voluntary redundancy. The grievance was investigated by Mr Jez McInerney, Factory Manager at Buxton. He dismissed the

complaint and said that the claimants were not entitled to back pay or recalculation of redundancy payments because they had left employment before the increases were applied. He said this was in accordance with agreements reached with Unite and drew attention to a Q&A which had been issued on 12 November 2021 in the course of the redundancy consultation.

**The Law**

12. To identify what the terms of a contract were, a court or tribunal must determine what the common intention of the parties to the contract was. That is not the subjective intention of either party but is the meaning "*to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract",* see **Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1) [1998] 1 WLR 896**. If the terms of the contract are expressed in writing, the task is to construe the meaning of the words used. Words should be given their natural and ordinary meaning unless the court concludes that something has gone wrong with the language and that it does not reflect the common intention. The court may consider the background circumstances, but previous negotiations and subjective intentions are inadmissible, save in an action for rectification.

13. Employment contracts may be in writing or both verbal and in writing and the true agreement will have to be gleaned from all the circumstances of the case, see **Autoclenz Ltd v Belcher and others [2011] ICR 1157.**

**Analysis and conclusion**

14. The employment contracts of the claimants expressly incorporated collective agreements between the respondent and their recognised trade unions.

15. The York factory employee handbook contained the relevant collective agreements. The **Security of Employment Agreement** contained the policy in respect of redundancy.

16. By Section 2, *NOTICE:*

> *(a) The formal individual notice of dismissal on grounds of redundancy required by the individual Contract of Employment or by the Employment Protection (Consolidation) Act 1978, Section 49, (or later amending legislation), The Employment Rights Act 1996 Section 86 (1) whichever is the greater, will be given and worked in all cases where this is practicable.*
> *(b) Payment in lieu of notice will be made only if the Company terminates employment before the individual's contractual notice period expires, and not if the employee leaves before expiry of notice or is dismissed for unsatisfactory work or conduct. PILON payments are made entirely at the discretion of the Company.*

17. In respect of severance payments:

> *(a) <u>Scale of Payment</u>*
> *Employees (other than seasonal employees on short term contracts) selected for and given notice of redundancy will*

> *receive payments on termination of their employment with the Company calculated to the following scale:*
> *Weeks Pay per Year of Service*
> *4 weeks pay for each full year of continuous service*
> *Maximum payment 80 weeks*
>
> *(b) Conditions of payment*
> *(i) The payments calculated under the above formula are inclusive of the statutory payment. In no case shall an employee receive less than the statutory minimum payment as laid down in the Employment Relations Act 1996 and any subsequent amendments thereto.*
> *(ii) "A week's pay" for the purpose of this Agreement shall be the employee's contractual wage current at the time of their leaving service modified, where relevant, as detailed below ...*
> [The modifications are not relevant to the issues in this case].

18. Having regard to the above, the relevant wage for the calculation of the contractual severance payment was *the employee's contractual wage current at the time of their leaving service*.

19. The respondent says that because all the claimants' contracts of employment were terminated without notice, with pay in lieu, on 31 December 2021, there was no entitlement to the annual wage rise as that only applied to those who were employment on and from 1 January 2022.

20. The notice sent to employees dated 29 November 2021 is the record of the agreement concerning the national wage rise for that year, although it can helpfully be read in conjunction with the earlier joint communication of 5 November 2021 which recommends acceptance of the offer. These are the communications to the workforce, the other parties to the contracts, from those who had entered into the agreement. I did not hear evidence from either signatory to those documents.

21. In my judgment the written communications are unambiguous. On 29 November 2021 a pay rise had been agreed. It was for years 2021 and 2022, 3½% for 2021 and 3½% for 2022. Each increase took effect on the normal anniversary date. For the York, and most other, factories that was April, so April 2021 for the first increase and April 2022 for the second. It was to be retrospective for the months from April 2021 in respect of the first negotiated increase. Reference to implementation with the January 2022 payroll was how the revised remuneration for the first increase with back pay was to be made. That is the natural and ordinary meaning conveyed by the words. The 5 November 2021 communication refers to a *3.5% increase on all basic rates of pay in 2021 backdated to the site local pay anniversary date for this year*. There is no qualification as to entitlement. The members are asked to vote on the offer which, for 2021, will be backdated; not backdated for those who remain in employment as of the implementation date.

22. Ms Milnns submits the definition of implementation in the Oxford English dictionary is to put a decision/plan/agreement into effect. She says the ordinary interpretation of the 29 November 2021 announcement is that only

those who were employed in January 2022 would receive the benefit of the increase because that is when it is put into effect and not those who ceased to be employed by that date. I reject that. I agree with Mr Helstrip that the agreement/plan/decision was that a wage rise for the 2021 year had been concluded upon its acceptance by the ballot and subsequent communication. The announcement of 29 November 2021 could only sensibly be interpreted as being that it applied to everyone as of then. Arrears (back payments) and for the next month of December would be in the January 2022 payroll. I do not agree with the argument of the respondent that *putting into effect* the pay rise is the same as giving entitlement to the pay rise. It means no more than taking the administrative steps to defray the new liability.

23. That meaning accords most naturally with the context. Wage rises for any year would start and conclude at different periods, but they remained for the specified year or years. Hence the inclusion of back pay. It would be open to the parties to negotiate for prospective pay increases, which would then avoid the need for back pay and arrears, but that was not the course they chose. That meant that during the relevant year the parties knew there may be an accruing underpayment which would require reconciliation at a future date. Implementation in January is no more nor less than identification of when that reconciliation was to take place. It is not a condition of entitlement. Such a qualification as contended for would have to be expressed in clear language. Implementation is not synonymous with entitlement.

24. Moreover if the respondent is correct there would be arbitrariness to the entitlement, vacillating from year to year, with the vagaries of not only when the negotiations concluded but for such additional periods as the clerical administration could accommodate the changes. Ms Millns correctly points out there was no entitlement to a wage rise because it was at the discretion of the respondent. But it does not follow from that, that entitlement would be as capricious as when any particular year's negotiations ended and were administered. The choice of the parties to negotiate for a wage rise for a particular year with consequential retrospectivity carries with it the expectation that it will crystalise when any agreement is reached. The communication of 29 November 2021 confirmed that expectation.

25. I therefore find the express terms of the contractual variation are clear. There is no need to seek any other material to clarify an ambiguity or look to imply a term. But as much time was spent focussing on what was said in the collective consultation meeting on 5 November 2021 and the Q&A document attached to the 12 November 2021 bulletin, I shall address those points for completeness.

26. The record of the collective consultation meeting includes a reference to the question raised by Ms Pugh: "*People have asked if we would pay more as the AWN [annual wage negotiation] has not been agreed yet and if they will get back pay".* Mr Golding, the National Convener (albeit from GMB, not Unite) is reported as saying: *"people leave on the salary they are on at the time of leaving and we have done that in the past. They do not get any more"*. Mr Barker asked about those leaving next year, to which Mr Golding said, "*Salary at the time of leaving"*. Ms Pugh clarified, "*so we are agreed they only get the*

*redundancy money based on their salary at the time of leaving?".* Mr Golding said yes.

27. The respondent says that this confirms their interpretation is correct, and that at the time of leaving the claimants' salaries did not include the annual wage rise. That is not a satisfactory interpretation of what Mr Golding was saying. The salaries at the date of leaving to which he refers must be the salary to which they were contractually entitled. That is clear from the redundancy policy, specifically paragraph b(ii) set out at paragraph 17 above. The salaries which were in fact paid to the claimants at the time of leaving were not their contractual salaries. That was because of the time lag between agreeing the 2021 increase and putting it into effect. Mr Helstrip's proposition that there was a knowing underpayment in the December salaries is correct. The only reason that the December payroll did not reflect the new annual wage increase, was because of the time it would take to input the new details across the 9 sites.

28. Nothing that was said by Mr Golding detracts from that. At the time of leaving, the salary could not have included the 2022 increase. That only arose from April 2022. Ms Pugh pointed out that the AWN had not been agreed. Neither she nor Mr Golding would have known then, on 5 November 2021, when the negotiations would end and be voted upon. That could have drifted on into the early months of 2022.

29. The joint communication which was issued on 12 November 2021 included the following Q&A's. ***We will get payment in lieu of notice?*** *This will be paid as in line the contractual terms and conditions for those leaving on 31/12/2021. For the two techs leaving next year, we would service [sic] notice and not a PILON?* ***Will VR payment be paid on current salary or the new AWN?*** *Redundancy is paid on the salary at the leave date. No backpay will be given.*

30. As with the observation of Mr Golding, this begs the question of what the salary was at the leaving date. For the reasons given, it is the contractual salary in accordance with the redundancy policy in the collective agreement at paragraph b(ii), set out at paragraph 17 above. The answer to the question avoided the two alternatives neither saying it was based on current salary nor including the new AWN.

31. The reference to back pay is unhelpful and confusing. There is no aspect of severance payment which adopts back pay. It is simply irrelevant to the question of voluntary redundancy payments. There is a self-standing entitlement to any negotiated increase which is retrospective, regardless of any voluntary redundancy payment.

32. I do not consider the remarks of Mr Golding at the collective consultation meeting or the Q&A's assist in clarifying any ambiguity, insofar as it is suggested there is one. Mr Golding could not know when the outcome of the annual wage negotiations would come into effect and so his reference to salary at the leaving date catered for that uncertainty.

33. The other evidence relied upon was that Ms Pugh said in her experience payments have always been made to those in service at the date the wage rise was implemented and not those who had left before implementation. In answer to a question from Mr Helstrip, she could not identify anyone who had been affected in a redundancy process in this way, because there had been no such redundancy exercise during her employment. In answer to a question from the Tribunal, she said that if someone resigned before the implementation date and were not required to work their notice beyond it, they would not be entitled to the increase. No example of that was provided in the documents. Whilst I recognise Ms Pugh's length of service of 11 years and her experience as a human resources officer at the respondent, I did not regard her opinion on this issue to reflect what a reasonable person would have concluded who had all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The Tribunal suggested to Ms Millns that what Ms Pugh suggested was an invitation to imply a term by custom and practice, but that was not advanced. The necessary notoriety to imply such a term would have been absent. In that respect, although no other, I would have had regard to the views of the claimants and the emails to them from the Unite officials, which were to the opposite effect.

34. Mr Helstrip relied upon an extract of guidance from a Government website in respect of the effect of a Pilon clause. This reflected a point which had arisen in an authority which the Tribunal drew to the attention of the parties; **Leyland Vehicles Ltd v Reston [1981] ICR 403. I**n that case the Employment Appeal Tribunal held that the claimants were not entitled to the benefit of an annual wage increase which had been negotiated after the employment had come to an end. It referred to the statutory framework and the uncertainty that would be created if agreements for wage increases after the employment had terminated were to be included. It was accepted that the facts of this case are distinguishable because by the time the claimants were made redundant the outcome of the negotiations was known and so the problem about uncertainty would not arise. Furthermore, the decision was specifically about the statutory scheme.

35. The EAT drew attention to a provision concerning notice, which is now contained in section 145(5) of the ERA. In summary that provides that the relevant date for calculating the statutory redundancy award, amongst other things, is less than the statutory notice period under section 86 of the ERA, the later date of statutory notice shall prevail. Had this been a claim for a statutory redundancy payment, Mr Helstip's submission about the effect of the Pilon would have be a good one; that is that his employment would be deemed to have ended at a later date than 31 December 2021 and as the respondent's case is that the increase would have applied to all those in employment after 1 January 2022, he would thereby be entitled to the salary inclusive of the 2021 pay rise.

36. This is not a claim for a statutory redundancy payment, but a contractual one. It is unnecessary for me to determine this point, as I have already found in favour of the claimants on the basis of the common intention of the parties to the contract. But I consider this argument would have provided an alternative basis on which to find for the claimants. The collective agreement concerning

notice, at paragraph 16 above, requires the statutory notice to be given and worked in all cases in which it was practicable. There is no suggestion that it was not practicable, but it appears that Unite agreed with the respondent that those who were to be made redundant would be paid in lieu of notice. Nevertheless, given this is intended to protect employees' entitlement to reflect no lesser than the statutory notice provisions in the ERA and it is an incorporated term of their employment, I am persuaded the relevant date for calculating the severance payment would be the end of the statutory notice period. On that basis the respondent would be liable to pay the annual wage increase in the severance payment as the end of the statutory notice periods all post-dated 1 January 2022.

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Employment Judge D N Jones

Date: 10 August 2022