



EMPLOYMENT TRIBUNALS

Claimant: Mr C Rumford
Mrs S Rumford

Respondent: City of York Council

Heard at: Hull (by video) On: 20 April 2023

Before: Employment Judge Miller

Representation

Claimant: Mr C Rumford

Respondent: Mr P Cairns (non-registered barrister)

RESERVED JUDGMENT

1. The Respondent made unauthorised deductions from Mr Rumford's wages and must pay him the gross sum of £577.50
2. The Respondent made unauthorised deductions from Mrs Rumford's wages and must pay her the gross sum of £641.66

REASONS

Introduction

1. The claimants, who are married, were employed by the respondent, who is a local authority, in the same department. The precise nature of their work is not relevant.
2. Both claimants retired on 30 September 2022. In November 2022 a national pay settlement was reached in respect of local authority workers which was backdated to 1 April 2022. The claimants both requested payment of

arrears of pay arising from the national settlement and the respondent refused to pay them.

3. The claimants both undertook early conciliation from 13 December 2022 to 4 January 2023 and both submitted claims to the Employment Tribunal on 11 January 2023 for the back pay.
4. The respondent defended the claim on the basis that the claimants were no longer employees of the Council by the time a settlement had been reached. This means, they said, that their contracts of employment no longer applied to them and the decision to pay back pay to people who had left before settlement was reached was entirely discretionary. On this occasion, the respondent said, they decided not to exercise their discretion.

The hearing

5. The hearing was conducted remotely by video. Mr Rumford provided a witness statement and gave evidence. He also presented the case on behalf of Mrs Rumford who was too ill to attend. Mr Cairns accepted that the cases stand or fall together and was content to proceed on the basis that Mrs Rumford's case was, effectively, the same as Mr Rumford's case.
6. A Mr Matthew Boxall – Head of Public Protection and Mrs Rumford's line manager – also attended to give evidence. Mr Boxall did not provide a witness statement in advance but Mr Cairns was content for me to take oral evidence from Mr Boxall and he was then able to cross examine him.
7. Ms Helen Whiting, the respondent's Head of HR, provided a witness statement and attended and gave evidence for the respondent.
8. It was agreed at the outset that the claim was put as one of unauthorised deductions from wages. The issues are addressed in the conclusions, below.
9. On the morning of the hearing, which started at 2pm, Mr Cairns sent Mr Rumford and the Tribunal a copy of the "National Joint Council For Local Government Services National Agreement On Pay And Conditions Of Service" (known colloquially as the Green Book). This is the detailed set of collectively agreed national terms of employment that apply, or potentially apply, to local government workers.
10. Mr Rumford objected to the very late provision of this document which is 245 pages long and made an application for it to be excluded. I refused that application in advance of the hearing, on the basis that it appeared to be relevant, but invited the parties to consider whether an adjournment was required.
11. At the hearing Mr Cairns said that he did not intend to refer to the Green Book at any length and it is a publicly available document and he was sure the claimant was familiar with it. Mr Rumford said, in the circumstances, that

he was happy to proceed if Mr Cairns was not intending to refer to it at any length.

12. The hearing was listed for two hours, which was always going to be challenging for a technical issue like this, and although I had time to hear evidence and submissions, there was insufficient time to consider the matter and provide a decision. I therefore reserved the decision.

Facts

13. The facts in this case are predominantly agreed. I only make such findings of fact as are necessary to decide the issues and where facts are disputed I have made the decision on the balance of probabilities. I have considered the written and oral evidence from the witnesses and such documents as I have been referred to in the agreed bundle of documents.
14. Mr and Mrs Rumford have both worked for the respondent for many years; Mr Rumford since 1 April 1996 and Mrs Rumford since 1 April 2000. They worked in the same department. Mr Rumford was Head of Regional Investigations and Mrs Rumford was a Senior Investigator. Although Mrs Rumford worked in Mr Rumford's department, separate line management arrangements had been set up to avoid a conflict of interest so that Mrs Rumford was managed on a day to day basis by Mr Matthew Boxall, Head of Public Protection. Mr and Mrs Rumford both retired, after giving notice, on 30 September 2022, that being their last day of work for the respondent.
15. Ms Whiting is the respondent's Head of Human Resources and Organisational Development. She has been employed by the respondent since 29 November 2021.
16. Mr and Mrs Rumford were both employed under standard terms of employment. I have only seen a copy of Mr Rumford's contract, but it is not suggested they were any different, except in level of pay. The relevant parts of Mr Rumford's contract say:

6.0 Pay

Your starting salary is £57,214.00 per annum (£34,019.14 pro rata) which is at level 4 within the salary post grade 12. This reflects the City of York Council pay structure from level 1 to 4. Details of current salary grades and levels are available on the Council's intranet or from your line manager.

Salaries are reviewed annually in accordance with the national pay bargaining arrangements for the National Joint Council for Local Government Services. [my emphasis]

In addition to the annual salary review, employees will progress through the salary scale for the job grade with service. Progression to the next salary level will take place either on the 1st April or 1st October following 12 months service in the grade.

A monthly paid employee's salary is paid in 12 equal monthly instalments, each instalment payable by credit transfer to your bank or building society account. Salary payments are made on the last working day of the month and are in arrears covering the period from the first to the end of the calendar month.

Where a part month salary payment is necessary e.g. a monthly paid employee starts or leaves mid month, the salary entitlement will be calculated on the following basis:

$$\text{Days to be paid} = \frac{\text{Monthly salary}}{\text{of days in month}} \times \text{No of days worked (inc Sat \& Sun)}$$

10.0 Deductions From Salary

The Council reserves the right to require you to repay, either by deduction from salary or any other method acceptable to the Employer any sums which you may owe the Council including, without limitation; any overpayments of salary, expenses or any other monies paid, any holiday pay paid to you in respect of holiday entitlement granted in excess of accrued entitlement. Any outstanding loans made to you by the Council, or the value of any property belonging to the Council which you fail to return upon request or upon termination of your employment. In the event of such sums being due to the Council on the termination of your employment, and if your final salary payment is insufficient to allow for the whole of any such deduction, you will be required to repay the outstanding amount due within one month of the date of the termination of your employment.

11.0 Collective Agreements

Your terms and conditions of employment are covered by the following collective agreements:

Single Status And Pay & Grading

Pay Protection

12.0 Terms and Conditions of Employment

Whilst working for the council, your Terms and Conditions of Employment will be considered in accordance with the collective agreements negotiated by the National Joint Council (NJC) for Local Government Services.

In addition to the above, the rules of the council, along with recognised trade unions, determine the local collective agreements.

Copies of the relevant agreements are available from Human Resources.

The NJC agreements directly affecting other terms and conditions of your employment currently cover:

Appointment and promotion

Maternity leave and pay

Travelling allowances

Trade Union membership

Payments to staff in the event of assault

The rules and local agreements made by the Council directly affecting other terms and conditions of your employment are available from Human Resources and will cover:

Provision for time off (other than holidays and sickness)

Access to personal files

Disciplinary and Capability procedures

Harassment in the workplace

Staff Complaints procedure

Flexible Working Hours

Relocation Assistance

Pay protection as a result of redeployment

Absence Management Procedures

Individual Grading Appeals

17. Mrs Rumford was paid at a different grade. Mr Rumford had, from 1 December 2021, reduced his hours from full time of 37 hours to 22 hours per week and Mrs Rumford had reduced her hours from 37 to 22 from 1 May 2022.
18. The underlined part (above) relates to the nationally agreed pay award, which is the national agreement in discussion in this case. Changes to local government pay are agreed nationally by the National Joint Council for Local Government Services (NJC). This comprises trade unions and local government representative organisations. The details of membership and bargaining framework are not relevant for these purposes. However, the negotiations result in a national pay award that applies, as far as is relevant, to local government employees
19. For 2021, the pay award was finally agreed on 28 February 2022. The local government pay rates were uprated by 1.75%. The communication sent to

Local Authority Chief Executives by the NJC said “Agreement has been reached on rates of pay applicable from April 2021”.

20. That communication also said

“Backpay for employees who have left employment since 1 April 2021. If requested by an ex-employee to do so, we recommend that employers should pay any monies due to that employee from 1 April 2021 to the employee’s last day of employment”.

21. The respondent had previously paid arrears of pay to former employees who had left between the date from which the pay rise was said to be applicable (eg April 2021) and the conclusion of pay negotiations (sometimes referred to as “leavers”). Mr Rumford said that this had happened every year during his employment – so from 1996. Ms Whiting was unable to give any further clarity on that as she had only worked for the respondent since 2021.

22. On 16 March 2022, Ms Whiting attended a meeting of the respondent’s corporate management team (CMT) at which the payment of arrears to employees who had left between 1 April 2021 and the date of the pay agreement (being 28 February 2022) was discussed. In respect of the 2021 pay award, Ms Whiting’s file note of the meeting records:

“CMT Discussion Note and Decision. The following was agreed and CYC’s agreement to be confirmed to the Trade Unions

2021 National Pay Award

Arrears of pay to be paid to leavers that request pay award arrears relating to 2021 Pay Award where they were in post on the date of National Agreement for 2021 (28th February 2022). Employee requests will be declined and they will not be eligible if they were not in post and employed by CYC on 28th February 2022. The cut-off date for a request for payment of arrears for the 2021 pay award for a leaver is 30th June 2022.

Arrears will also be applied to current WwY staff who continue to remain engaged with CYC.

This agreement applies to all staff groups (Chief Executive, Chief Officers, NJC, Youth and Community, Workshop for the Blind, Soulbury and any other staffing group covered by the National collective agreements)”.

23. The note also records a decision on future pay awards. It says:

“2022 and Future National Pay Awards

Any arrears requested by a former CYC employee (leaver) relating to the 2022 and future pay awards will not be paid. This is for budgetary reasons and there is no requirement in the National terms and Conditions to make

this payment, it also ensures that Council funds are spent on current employees. CYC's historic practice will cease from the implementation of the 2021 pay award agreement. Only those staff who are in post and employed by CYC will receive arrears of pay. This applies to all staff groups (Chief Executive, Chief Officers, NJC, Youth and Community, Workshop for the Blind, Soulbury and any other staffing group covered by the National collective agreements).

24. There are then a number of actions recorded:

“Action

1. Details to be included in the leavers checklist
2. Inform Trade unions to cascade to Members as appropriate
3. Inform Payroll for future payroll processing
4. Details to be posted on the intranet
5. To be signed off at CCNC meeting 16th June 2022”

25. No information about the decisions was to be sent directly to employees either by email or letter, and it was not.

26. Finally, underneath the decision part of the note, which is set out in bold in the original, there is some explanation for the decision. I accept Ms Whiting's evidence that the reason for the decision was to try to save money. This related not only to the cost of the arrears, but also to the administrative costs of implementing the payments and recalculating pension entitlements as a result of the pay award.

27. That part of the note also says:

“CYC [the respondent] formerly applied the National Purple Book and National terms guidance to pay leavers on request arrears of pay following an agreed national pay award. This is guidance only and Councils have the discretion whether or not to apply this. CYC have adopted this up to the 2020 pay award”.

28. I find, therefore, on the basis of Mr Rumford's evidence and the matters set out in this file note that the respondent paid back pay to leavers every year on request from the leaver, if that person left before the pay settlement was agreed but after the date from which the pay increase was said to operate.

29. I further find, on the balance of probabilities, that this payment was made as a matter of course prior to this decision on 16 March 2022. There was no individual exercise of discretion by the respondent either in respect of each applicant/leaver or in respect of each year. Ms Whiting said that the HR staff who processed the applications sometimes sought guidance about how and whether to pay and sometimes did not.

30. Mr Rumford and Mr Boxall both said that, as a Head of Service, they had never been involved directly with a decision about payment of back pay for leavers in these circumstances. However, Mr Rumford said that he was under the impression that the respondent always paid back pay. He had had, sometime before leaving, an informal discussion with an accountant in the Council who said that it wouldn't be paid automatically, but he would have to write in.
31. I find that Mr Rumford understood it to be respondent's policy that arrears were paid to leavers following a pay award. This understanding was shared by the accountant to whom he spoke, and was, on the balance of probabilities, also shared by members of the respondent's HR team who were responsible for implementing the policy. On the basis that Ms Whiting felt it necessary to take the decision to change this to the CMT and recorded in the note that the practice had previously been to pay the arrears, I also find that it was the respondent's corporate understanding that, prior to 16 March 2022, arrears arising from a pay award agreed after an employee left the respondent, but in respect of a period before they left, would be paid to the employee if they made an application to do so.
32. Following the meeting on 16 March 2022, Ms Whiting requested, on 23 March 2022, that some information be added to the respondent's intranet about this. The information appears to be the last item on a web page called pay scales, underneath a table and some links. It says:
- "Pay Awards
- National pay awards can sometimes be delayed and as such are not always announced before or in time for the start of the relevant pay year. If national negotiations are completed and the announcement is made after the start of a pay year, then the pay scales will be amended accordingly.
- Any back pay from the implementation date will only be paid to those staff who are in post and employed by CYC at the date of the agreement. It will not be paid to those who have left council service between the implementation date and the agreement date.
- If you have any queries, please contact Payroll Services (mailto:payrollservices@york.gov.uk)"
33. The information was not sent directly to any employees. I prefer Mr Rumford's evidence that he did not see this information.
34. The information was also to be included in the leaver's checklist. This is a list for managers to go through with employees who are leaving. I prefer Mr Boxall's and Mr Rumford's evidence that this information was not made available to them as managers. Mr Boxall was not aware he needed to discuss it with Mrs Rumford, so did not. Mr Rumford's manager did not raise it with him at any point.

35. Ms Whiting also informed the various Unions and it was discussed at a meeting between the respondent and the Unions on 16 June 2022. The Trade Unions were informed of the respondent's decision about back pay, the respondent's decision was not contingent on the Trade Unions agreeing to it.
36. Mr and Mrs Rumford retired with effect from 30 September 2022. They did not make any enquiries about back pay in the event of a successful negotiation and I prefer Mr Rumford's evidence that that was because he did not know there was something to enquire about. The respondent's decision was not brought to his attention by HR or his line manager. Mr Boxall was unaware and did not inform Mrs Rumford.
37. On 1 November 2022, agreement was reached between the Trade Unions and the employers in the NJC and, as far as is relevant, the salary grades that the claimants were each appointed to were increased by a fixed amount of £1,925. I note that the respondent's pay scales do not directly reflect those agreed by the NJC, but are a multiplier of them (I do not know if they are higher or lower). However, they are directly linked to them and it is not disputed that the fixed sum pay rise of £1,925 applied to the respondent's employees more generally as a result of the national agreement.
38. The notice provided to the respondent's Chief Executive (and Chief Executives of Councils generally) about this from the NJC says, as far as is relevant:
- "Pay
- Agreement has been reached on rates of pay applicable from 1 April 2022. The new pay rates are attached at Annex 1
- ...
- Backpay for employees who have left employment since 1 April 2022
- If requested by an ex-employee to do so, we recommend that employers should pay any monies due to that employee from 1 April 2022 to the employee's last day of employment".
39. On 16 November 2022, Mr Rumford emailed the respondent to ask what the arrangements were for receiving his back pay for the period from April to September 2022. Someone from payroll services for the respondent replied and quoted advice they had received from the respondent's legal and HR departments. That said:
- "Once an individual leaves the contract is ended and any entitlement to retrospective pay awards also ends. So we would not give back pay/arrears

or make any adjustments to payments/pension to anyone who has left prior to a pay award being agreed.

To clarify: "prior to a pay award being agreed" means the date that national announce an agreement, and a letter is published.

So for example the new award was signed on 1st November 2022.

If the effective date of termination/date of leaving was prior to 1st November 2022, they are not eligible for the pay award

If the effective date of termination/date of leaving is 1st November 2022 or later, payroll would need to backdate pay any allowances, and pension would be adjusted accordingly"

40. This reflects the decision made by the respondent's CMT on 16 March 2022. Eventually, the claimants' enquiries made their way to Ms Whiting who wrote to Mr Rumford on 21 November 2022 as follows (and as far as is relevant):

"We reached agreement regarding backpay in March 2022, and backpay is now only for current employees who are in post and employed by the Council on the date of a national agreement. The 2022/23 pay award was agreed on 1st November 2022.

This local agreement continues for all future pay awards too and the driver for the decision was budgetary pressures. This was discussed with the trade unions and it was accepted as the position.

For your information, the payment of backpay to former employees is discretionary, there is no contractual, legal obligation or National Term and Condition which states that the Council must make the payment outside of employment.

I am aware that you have referenced the LGA advice, but this is only guidance and not mandatory. As such there could not be a case of unlawful deduction of wages and legal advice was sought prior to the agreement being reached.

We have applied a consistent approach to all staff (including Chief Officers) for the 2021 and 2022 pay award and will do so for all future pay awards".

41. Although I recognise that it is important not to be too pedantic in interpreting correspondence, this email was written by the respondent's head of HR in circumstances where it is apparent that the claimant is considering taking legal action (hence the reference to unlawful deductions from wages) and it is clear that legal advice has been taken. In my view, therefore, and I find, that the reference to "the backpay is now only for current employees" reflects the obvious position as evidenced in the meeting note of 16 March 2023 and the witnesses' understanding, that before this decision back pay

was routinely paid by the respondent without any individual exercises of discretion.

42. I have not seen the email to which that is a response, and I note that Ms Whiting refers to the payment of arrears as being discretionary. However, that does not detract from my finding that Ms Whiting was recognising in this email that payment of arrears had, previously, routinely happened.

Law and conclusions

43. This claim is brought as an unauthorised deduction from wages claim. Section 13 Employment Rights Act 1996 says, as far as is relevant:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section 'relevant provision', in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

44. S 27 Employment Rights Act 1996 says, again as far as is relevant:

(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

45. Mr Rumford also referred to s230 of the Employment Rights Act 1996 which says:

(1) In this Act 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

...

(3) In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment...

46. Although Mr Rumford only referred to the definition of employee, for the sake of completeness, a worker includes an employee and the reference to

“or, where the employment has ceased, worked under” is the same in respect of employees and workers.

47. Mr Cairns submissions related to two points – firstly that the decision to pay arrears was discretionary so that no obligation to pay arose until the respondent made a decision to make a payment; and secondly that the respondent had no obligation to safeguard the economic well-being of the claimant. He referred to the case of *Scally v Southern Health and Social Services Board* [1991] IRLR 522. This was on the basis that Mr Rumford said in his witness statement that if he and Mrs Rumford had realised that they would jeopardise their back pay by retiring when they did, they could have delayed their retirement.

48. In respect of the second submission, the claimants were not putting their claim in this way. Both claimants were clear that they were bringing their claims on the basis that they had a legal entitlement to the back pay. I do not, therefore, address that aspect of the submissions any further.

49. Considering, therefore, the claim as an unauthorised deduction from wages claim, the first question for me arises under sections 13(3) and section 27(1). A deduction arises where “wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion”. Wages are defined as “any sums payable to the worker in connection with his employment, including any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise”.

50. I must, therefore, first determine what sums are properly payable.

51. Mr Cairns placed a great deal of weight on the fact that the decision to pay back pay once the settlement had been reached was discretionary.

52. Mr Cairns also referred to the case of *Leyland Vehicles Ltd v Reston and others* [1981] IRLR 19 as authority for the proposition that a retrospective pay award does not change the amount of pay payable under a contract at a particular date. In my judgment, that case was dealing very specifically with the provision relating to the calculation of redundancy payments. In fact, at paragraph 17, Slynn J recognised that the fact that a contractual right to the payment might arise would not impact on the issue about the calculation of redundancy pay. In my view, that case is distinguishable from this one.

53. Mr Rumford placed weight on the fact that the recommendation of the NJC was that arrears of pay should be paid.

54. In my view, none of these points quite get to the heart of the matter. The question for me is more simply that set out in ss 13 and 27 and, particularly, what amount was properly payable to Mr and Mrs Rumford as wages in connection with their employment on each relevant pay date.

55. I refer to the case of *Robertson v Blackstone Franks Investment Management Ltd* [1998] IRLR 376. That case concerned a claim for the payment of commission earned during a period of employment but not payable until a date after the claimant's employment had ended. It was submitted on behalf of the respondent that "those commissions were post termination payments payable in connection with the termination of his contract, not in connection with his employment: that they were not payable to him in his capacity as a worker, because he had ceased to be a worker on the termination of his contract; and that the commissions were not referable to work done by him as a worker".

56. Mummery LJ in the Court of Appeal said in that case:

"32. These submissions are inconsistent with the wide definition of 'wages' in s.7, as construed by the House of Lords in *Delaney v Staples* [1992] IRLR 191. The section refers to any sums and to any commission payable, without limit as to the time when it is payable or paid: the sum must be payable 'in connection with his employment', but the definition does not require it to be payable or paid during the currency of his contract of employment.

33. The sum must have the 'essential characteristic of wages ... consideration for work done or to be done under a contract of employment', per Lord Browne-Wilkinson in *Delaney v Staples* [1992] IRLR 191, *supra*, at 193, 11. See also 195, 29, where reference was made to:

'... the basic concept of wages as being payments in respect of the rendering of services during the employment, so as to exclude all payments in respect of the termination of the contract save to the extent that such latter payments are expressly included in the definition in s.7(1)'.

34. The commissions were payable to Mr Robertson in respect of services rendered during his employment and work done by him in his capacity as a worker under his contract of employment before it was terminated. Unlike the payment in lieu of notice in *Delaney v Staples* [1992] IRLR 191, the commissions were not payable in respect of the termination of the contract of employment. Wages for work done before termination may be payable and paid after termination without thereby losing their character as wages or becoming a payment in respect of the termination of the contract under which the work was done”.
57. In my judgment, this is clear. Payment properly payable for work done prior to the termination of a contract of employment is payable as wages under that contract regardless of when they become payable.
58. I refer now to the claimants’ contracts of employment. The relevant part is under part 6. That says what wages the claimants are entitled to . It says:
- “Your starting salary is £57,214.00 per annum (£34,019.14 pro rata) which is at level 4 within the salary post grade 12 [for Mr Rumford]. This reflects the City of York Council pay structure from level 1 to 4. Details of current salary grades and levels are available on the Council’s intranet or from your line manager.
- Salaries are reviewed annually in accordance with the national pay bargaining arrangements for the National Joint Council for Local Government Services.
- In addition to the annual salary review, employees will progress through the salary scale for the job grade with service”.
59. In my judgment, it is a term of the claimants’ contracts that their pay is the amount set out in the contract as varied from time to time in accordance with national pay arrangements. That is it an automatic change – a change of right - in accordance with the NJC agreement is reflected by the words “in addition to the annual salary review...”
60. The wording of the contract could be clearer. However, the acts of the parties in implementing pay rises when agreed nationally demonstrates their understanding of the contract term being that NJC awards will be implemented and this is wholly consistent with the normal reading of the clause.
61. Having regard to Robertson above, this means that the amount payable is, in the absence of any other contractual terms, the amount as agreed for a particular year, regardless of when that agreement was reached.
62. It would, in my view, have been open to the parties to agree a specific contractual term that excluded backdated pay awarded following NJC negotiations from the definition of pay, but they did not do so.

63. I refer also to paragraph 12 of the contract which says “Whilst working for the council, your Terms and Conditions of Employment will be considered in accordance with the collective agreements negotiated by the National Joint Council (NJC) for Local Government Services”.
64. I have considered whether that (and particularly the phrase “whilst working for the council”) is sufficient to exclude back dated pay awarded following NJC negotiations from the definition of wages. In my view, it is not. The terms applicable to the claimants while working remain, in respect of wages, the rates negotiated from time to time with the NJC. They are only applicable for periods during which the claimants were working for the respondent but, the applicability of the terms during periods of employment are not affected by the fact that any changes were made at a different time, provided they apply, even if retrospectively, to a period when the claimants were working for the respondent.
65. This is not inconsistent with Mr Rumford’s submissions about s230 of the Employment Rights Act 1996 that employee includes someone who worked under a contract of employment.
66. The remaining questions for me are, then, was the pay award referable to a period when the claimants were working for the respondent and when should payment have been made if it was required to have been made?
67. Both parties referred to the pay award notification sent to Local Authority Chief Executives on 1 November 2022. This says “Agreement has been reached on rates of pay applicable from 1 April 2022. The new pay rates are attached at Annex 1”.
68. This is the same document in which it is recorded that “If requested by an ex-employee to do so, we recommend that employers should pay any monies due to that employee from 1 April 2022 to the employee’s last date of employment”.
69. Both parties relied on this – the respondent to say that the NJC had made a non-binding recommendation, the claimants to say that the respondent should pay in accordance with the advice of the NJC.
70. In my judgement, the terms of the notification – the only document I have about the settlement – are clear. It says that the rate of pay applicable to any employee whose pay is set by reference to the nationally negotiated rates of pay is to be increased from 1 April 2022 to the new rates set out in the annex. That annex sets out various rates of pay by reference to grades.
71. Further, it must be the case that the Pay clause in the claimants’ contracts of employment represents the consideration (or part of the consideration) provided by the respondent to the claimants under their contracts. That consideration includes an obligation on the respondent to pay the salary as reviewed in accordance with the NJC negotiated review in respect of work done for the period for which the relevant pay scales are applicable.

72. It is not disputed that the payments were increased for employees who had worked from April 2022 and were continuing to work for the respondent. That can only be because the respondent recognised that it was money owed in respect of work done by those employees from April 2022 to November 2022.
73. Considering Robertson again, those retrospective payments referable to the period from April 2022 to November 2022 can only be retrospective payment owed, under the contract, for work done during that period. The fact that it only became payable after the end of the claimants' employment because of the delay in negotiations does not mean that it stopped being wages.
74. The concluded settlement recorded in the notice to Chief Executives date 1 November 2022 was therefore in respect of rates of pay for work done for a relevant Local Authority employer from 1 April 2022. As both claimants were employed by the respondent in the period from 1 April 2022 to 30 September 2022, the increased rates of pay were referable to a period when the claimants were working under their contracts of employment and the rate of pay to which they were entitled for that period has been increased accordingly.
75. Finally, in respect of this notification, I note that I give no weight at all to the "recommendation" set out in the annual notification to Chief Executives from the NJC. It is well known that public sector pay negotiations are long and can be difficult and that relationships between Trade Unions and employers can be sensitive and political. Particular words in the pay notification may have been chosen for any number of reasons and they cannot be relied on as any party's view of whether there is an obligation to pay back pay or not. They are also not binding on this Tribunal.
76. Next, then, when ought the payment to have been made?
77. Clearly, although the increased rate was contractually payable from 1 April 2022, that was not agreed until 1 November 2022. The only relevant written term is set out in the contracts of employment which says that wages are paid in arrears at the end of the month worked.
78. I find that there is a further contractual term that applied to the claimants. That is that any arrears of wages due as a result of a backdated pay increase following the reaching of agreement at the NJC will be paid to employees who leave the employment of the council before agreement is reached if they request the payment.
79. This is an implied term in the claimant's contracts of employment arising through conduct or custom. Mr Cairns referred to *Park Cakes Ltd v Shumba and others* [2013] IRLR 800. This related to a claim for an enhanced redundancy payment but the principles are relevant. Underhill LJ in the Court of Appeal said:

“...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*".

80. I address each of the headings a – f in respect of the potential obligation to pay arrears of pay as set out above.

- a. The payment of arrears had continued for many years – certainly since 1996 as I have found above, when pay awards were agreed.
- b. The benefits are always the same. Mr Cairns said that the amounts are different or the calculation is different (this year, unusually, a lump sum rather than percentage increase) but the benefit – namely the payment of arrears up to the date of leaving of increased pay as negotiated by the NJC – is always the same.

- c. The benefit was not publicised. It was, to all intents and purposes, hidden. It seems likely that the arrears were payable as of right, but the respondent did not publicise this fact. It only paid on application. Nonetheless, it was well known amongst council employees that this was the practice. Even, therefore, without deliberate publication by regularly and without the exercise of discretion or any formal decision the paying leavers on application, the respondent has created 'widespread knowledge and understanding' on the part of employees that they are legally entitled to the enhanced benefits. This is evidenced by the understanding of the HR officers, the accountant Mr Rumford spoke to, the report to CMT and the claimants. In fact, there was no evidence at all that anyone understood the position to be different.
 - d. Until the council made a decision to remove the benefit on 16 March 2022, there is no evidence at all to suggest that it was recorded as discretionary. I have found that payment was just made on application – there was no individual or annual consideration of any exercise of discretion so it cannot have been advertised as discretionary at the time. Further, had the decision really been discretionary each year, there would have been no need to make a decision not to pay in the way that a decision was made and had everyone understood it to have been discretionary, no one would have expected a CMT decision.
 - e. There is nothing explicit in the contract beyond that which I have set out above relating to entitlement to pay. On my interpretation of the contracts, payment of arrears on application is certainly not inconsistent with the substantive terms. The respondent may feel that they do not need to advertise that ex-employees are entitled to payment, but that does not mean that they are not entitled to the payment.
 - f. In light of my findings above in relation to the substantive contract terms, there is no reasonable way in which the practice could equally be called discretionary rather than a legal obligation. In reality, it might be argued, given my findings on the claimant's contracts of employment, that the benefit under this term is to obtain the arrears to which the claimant is legally entitled without having to take legal proceedings. I suppose that could at a stretch be described as the exercise of a discretion but, in reality, it is one that could be enforced so that in reality it is contractual.
81. It is not strictly necessary to consider the practice of paying arrears as a contractual term – the contractual obligation to pay arrears arises under the primary contract of employment. However, I would find in the alternative and applying the factors set out above, that there is an implied term to pay arrears to people who left the respondent before pay negotiations had concluded. It is necessary, however, to determine the date on which an obligation to make payment arises so that I can determine whether a

deduction has been made from that payment. The date on which the obligation to make payment arises is on application by the claimants in accordance with this implied term.

82. The amounts claimed by the claimants are pro rata proportions of the lump sum of £1925 that was payable for a whole year on the basis of a 37 hour week. Both claimants worked for some or all of the time for 22 hours per week and they both finished work on 30 September 2022. The undisputed amounts owed are, therefore:
 - a. Mr Rumford: £577.50
 - b. Mrs Rumford: £641.66
83. This is the additional amount that was properly payable to each claimant. It was not paid on application by the claimants and the respondent has not sought to argue that it was entitled to deduct this money for some other reason. It just said it was never owed.
84. For these reasons, therefore, the claimants' claims that they were subject to unauthorised deductions from wages are successful and the respondent must pay Mr Rumford the gross sum of £577.50 and Mrs Rumford the gross sum of £641.66.

Employment Judge Miller

4 May 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....
.....
FOR EMPLOYMENT TRIBUNALS