EMPLOYMENT TRIBUNALS

Claimant: Mrs C King

Respondent: City of York Council

Heard at: Hull (by Video) **On:** 26 April 2023

Before: Employment Judge Miller

Representation
Claimant: In person
Respondent: Mr P Cairns (non-registered barrister)

RESERVED JUDGMENT

The Respondent has made unauthorised deductions from the Claimant's wages and the Respondent must pay the Claimant the gross sum of **£585.52**.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a school business manager in a maintained primary school (Ralph Butterfield Primary School). She had worked for the Respondent from 1 February 2006 until her retirement on 31 August 2022.
2. In November 2022 a national settlement was reached in respect of local authority workers which was backdated to 1 April 2022. The Claimant expected to receive arrears of pay arising from the national settlement and she was initially told that she would receive the arrears owed for her period of employment. Subsequently, the Respondent said that she would not receive the back pay from April to August 2022.
3. The Claimant undertook early conciliation from 25 November 2022 to 4 January 2023 and she submitted a claim to the Employment Tribunal on 2 February 2023 for the back pay.

4. The Respondent defended the claim on the basis that there were no express or implied terms in the Claimant's contract of employment that mandated an award of back pay once employment had ceased and that the Claimant was only entitled to payment of the amount payable under her contract of employment when her employment ended.

The hearing

5. The hearing was conducted remotely by video. The Claimant provided a witness statement and gave evidence.

6. Ms Helen Whiting, the Respondent's Head of HR provided a witness statement and attended and gave evidence for the Respondent .

7. It was unclear whether the claim was made as a breach of contract claim or a claim for unauthorised deductions from wages and I was unable to obtain any clarity from the parties. In the event, the issues of substance are the same and ultimately, it did not alter the matters to be decided. I address these issues in my conclusions, below.

8. On the morning of the hearing, which started at 2pm, Mr Cairns sent the Claimant some additional case law. The Claimant objected to the late provision of this information. It also transpired that the Claimant had made an application to postpone the hearing to obtain legal advice. That application had not been put on the Tribunal file and I was not aware of it.

9. The Claimant had, in any event, been able to obtain some legal advice. I explained that it was normal practice to provide case law for the assistance of the tribunal and the other parties, but I invited Mr Cairns to explain the principles on which he was relying from the cases (namely *Park Cakes ltd v Shumba and others* [2013] EWCA Civ 974 and *Hellewell and McArdle v Axa Services Ltd and others UKEAT/0048/11/CEA*). He said at that stage that they related to section 13 of the Employment Rights Act 1996 but would expand on them in submissions.

10. In the event, the Claimant was content to proceed with the hearing and did not pursue her application for a postponement.

11. The hearing was listed for two hours 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.

Findings of fact

12. 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.

13. The Claimant was employed by the Respondent in a primary school as a school business manager. She was responsible in that role for running and managing the school budget; safeguarding; HR; and Payroll in school. Although the Claimant was employed by the Respondent, she worked

entirely within the school and was, for many practical purposes, separate from the Respondent.

14. Ms Whiting is the Respondent's Head of Human Resources and Organisational Development. She has been employed by the Respondent since 29 November 2021.

15. The Claimant was employed under standard terms of employment, a copy of which was provided to the Claimant on 13 January 2023. The relevant parts say:

"*6.0 Pay*

Your starting salary is £25,128.00 per annum (£23,769.73 pro rata) which is at level 2 within the salary grade 8. This reflects the City of York Council pay structure from levels 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:

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

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"

16. The underlined part (above) relates to the nationally agreed pay award. 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 the membership and bargaining framework are not relevant for these purposes. However, the negotiations result in a national pay award that applies to, as far as is relevant, local government employees.

17. 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 said "Agreement has been reached on rates of pay applicable from April 2021".

18. 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".

19. 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 (e.g. April 2021) and the conclusion of pay negotiations. The Claimant said, and I accept her evidence of this, that each year after the pay award was announced she sent a spreadsheet of "leavers" the school's payroll provider to process the back pay. "Leavers" are people, like the Claimant, who had left employment of the Respondent at the Claimant's school before the pay settlement had been concluded but after the date form which the pay settlement was said to be backdated. This meant that any person who worked at the school and had left the employment of the Respondent after pay negotiations had concluded would receive backdated pay to the date from which the new pay award ran (generally April, I understand) up to the date their employment finished.

20. It was not necessary for the leaver to ask for their payment, it was processed automatically by the Claimant and the school's payroll provider.

21. Although the Claimant's school was a maintained school under the control of the Respondent, the Respondent did not provide payroll or HR advice to the school. That function was given to North Yorkshire County Council. I do not know if the functions were formally delegated or there was a simple contracting arrangement. Communications about payroll and HR matters were communicated directly between the Respondent and North Yorkshire County Council. The Claimant was aware of this higher level communication and she received (for the school) payroll and HR advice from North Yorkshire County Council. I find that she had no reason to think that the advice, guidance or instructions she received from North Yorkshire County Council were not provided on the basis of instructions from the Respondent.

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 for that year's negotiations) 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 sent directly to employees either by email or letter.

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. In the event, Ms Whiting confirmed in cross examination that the previous practice of paying leavers on application was also continued for the 2021/22 pay award, despite what is set out in that note.

29. I find, therefore, that the Respondent *generally* 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.

30. This was in respect of employees of the Respondent generally. In the specific case of the Respondent's employees employed at the primary school at which the Claimant worked (Ralph Butterfield Primary School), however, payments of arrears for pay awards were paid automatically to people who had left the employment of the Respondent before the pay award was finalised.

31. It was the Respondent's case that the Respondent had simply exercised a discretion each year to pay arrears to leavers. The Respondent produced no evidence of this. Ms Whiting has only worked for the Respondent since 2021. She was unable to say what happened before then. In any event, Ms Whiting did not have authority to exercise any such discretion. Her evidence, which I accept, is that that is a function of the Respondent's Head of Paid Service. There are no formal records of any exercise of discretion by the Head of Paid service (either on an annual basis or in respect of individual employees) and the Respondent did not call the Head of Paid service to give evidence.

32. I conclude, therefore, that on the balance of probabilities there was no exercise of discretion by the Head of Paid service (prior to March 2022) to pay or not pay arrears and that arrears were always paid either on application by leavers or, for employees at the Ralph Butterfield School, automatically.

33. I further find that the Claimant understood it to be the Respondent's policy that arrears were paid to leavers following a pay award; that this was never clarified or questioned by North Yorkshire County Council on behalf of the

Respondent; and that the Claimant did not obtain, or believe that she needed to obtain, permission or consent from the Respondent or North Yorkshire County Council to arrange payment of arrears for leavers in the circumstances described.

34. 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 the CMT decision. 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)"

35. The information was not sent directly to any employees. I prefer the Claimant's evidence that she did not see this information and, in fact, did not have regular access to the Respondent's intranet. She was provided with information through a different system. She had a log in for the intranet but this was used only for finance purposes, not for accessing general information. There was no reason for her to go looking for information about this on the Respondent's intranet.

36. 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 the Claimant's evidence that there was no mention of this on her checklist that she went through with the Head Teacher on her resignation.

37. Ms Whiting also informed the recognised Unions about the Respondent's decision not to pay arrears and it was discussed at a meeting between the Respondent and those Unions on 16 June 2022. In her witness statement, Ms Whiting is explicit that the Trade Unions were <u>informed</u> of the Respondent's decision about back pay, there is no suggestion that the decision was not contingent on the Trade Unions agreeing to it.

38. The Claimant retired with effect from 31 August 2022. She did not make any enquiries about back pay in the event of a successful negotiation and I prefer the Claimant's evidence that she expected it to be paid automatically as had been done in previous years. It is relevant to note that, during her employment, it was the claimant who had been responsible for arranging payments of arrears to school employees including to leavers, following the national pay awards.

39. 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 grade that the Claimant was appointed to was 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.

40. The notice provided to the Respondent's Chief Executive 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".

41. The Claimant was initially informed by email from someone at the school in November 2022 that she would receive a payment of the arrears reflecting the increase. A copy of that email was not produced but it was not disputed. There was then further communication in which the Claimant was told that she would not in fact be receiving the payment. I have not seen a copy of that correspondence either.

42. The Claimant initially contacted her successor at the school, Ms Moss, to enquire about this and Ms Moss made further enquiries with the Respondent. Ms Moss forwarded the Respondent's reply to the Claimant which said

    "Whilst the National Employer's suggest back pay may be given to ex-employees who request this, there is no legal obligation to do so and we can confirm that the Council's position is that it does not make back payments to leavers (including retirements)".

43. Unsurprisingly, the Claimant was unhappy with the response and sought further clarification. Ms Moss said

    "I can confirm that clear direction has been issued, to all local authority-maintained schools, that back pay (to 1/4/22) is not being paid to staff who left on or before 31/10/22. It is those CYC staff who left on or after 1/11/22 who are entitled to back pay (if applicable to their role).

    CYC have made it very clear, this year, by sending a direct email to all maintained schools, clarifying that, as per their policy, their stance is as above".

44. This email further supports my conclusions that the decision of the Respondent in 2022 represented a change from the long standing practice of paying arrears to leavers.

45. There was further communication which did not resolve matters and eventually, the Claimant contacted Ms Whiting directly and a local councillor who, it appears, raised it with Ms Whiting. In her email to the claimant on 11 January 2023 Ms Whiting confirmed that the Respondent's policy had changed in March 2022. In her email to the councillor on 31 January 2023, Ms Whiting said that the Respondent's policy regarding payment of back pay changed in March 2022. She said

    "The policy is a head of paid services discretion and this was agreed with CMT and with the locally recognised trade unions. The local Unison officers also sought advice from their Regional and National Offices and confirmed that they were engaged and accepted the decision.

    The policy changed from leavers being able to request backpay after an agreement was in place (where it was not agreed prior to them leaving the Councils employment), to backpay only being for current employees who are in post and employed by the Council on the date of a national agreement".

46. Again, although Ms Whiting maintains her wholly understandable insistence in both emails that this is a discretionary policy, these communications again makes it clear that, until 2022, the Respondent had a long standing practice and policy of paying leavers their arrears following pay negotiations. I also note that Ms Whiting states repeatedly that there is no contractual, legal obligation or National Term and Condition which states that the Respondent is obliged to make payments to people who are no longer employed by it.

47. Although I recognise that this is Ms Whiting's and the Respondent's view, I must observe that I am not bound by that view, I must come to my own decision on whether there are any legal obligations to pay leavers.

48. The Respondent maintained its position and the Claimant therefore brought these proceedings. Before considering the legal position and reaching my conclusions, I address the oral evidence that the Claimant appeared to give that she accepted that the decision whether to pay arrears was wholly within the discretion of the Respondent. Mr Cairns took the Claimant to an email she sent to Ms Moss on 21 November 2022. In that email, the Claimant said

    "I find this extremely disappointing [referring to the decision not to pay her].

    Last year it was raised as discretionary and staff who left were paid. Following HR advice, this was the case".

49. It was suggested to the Claimant that as long ago as November 2022 the Claimant recognised that the decision to pay arrears to leavers was discretionary. In evidence, the claimant said that she was accepting that at that point the Council were saying it was discretionary but, effectively, this

correspondence (in November with Ms Moss) was the first she had heard of it.

50. Later, in the same email the claimant said

"The mere fact that the award made on 1st November is being backdated to 1st April is in itself an acknowledgment that anyone working from 1st April is entitled, as I would have thought, on a point of law, to he (sic) entitled to that same award".

51. I sought to clarify with the claimant in oral evidence whether she believed that the decision was or was not discretionary. I asked if the claimant accepted that the Council could have decided not to pay the arrears. The claimant said

"I do now, I don't doubt that's what I have been told. Don't doubt that the Council would say it was discretionary if it wasn't. Saying it is discretionary now., not in past tense as didn't know".

52. I then asked, if the Claimant accepted that it was discretionary, on what basis does she say she is entitled to it and the claimant said

"I'm trying to say that had I known CYC had taken stance that year for the pay award 21/22 that made stance not going to pay… Happened in March 22. I was still in employment then so I wasn't informed in any route of communication that I or any other members of staff who left before the pay deal was implemented wouldn't get pay award backdated".

53. I conclude from the claimant's evidence and this exchange that what the Claimant meant was that, effectively, if the decision was discretionary now, it had never been in the past and she had not been informed of the change of policy by the Respondent. I do not find that the Claimant accepted that the decision had always been discretionary. It is reasonably clear to me that the Claimant understood payment had always been made, but that the Respondent had unilaterally changed its policy on that in March 2022 and from that date, the Respondent believed, it was discretionary. The Claimant did not express a view whether the Council was entitled to do that, and that is in any event a legal question. The Claimant was clear however, and I find if it is not obvious already, that the Claimant did not know and had no reasonable way of knowing that the Respondent had changed its Policy in March 2022.

Law and conclusions

54. In so far as the claim is brought as a claim for unauthorised deductions from wages, 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.

55. 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,

56. I also refer to s 230 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, or…

57. 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.

58. Mr Cairns referred to the case of *Hellewell and others v Axa Services ltd and others* UKEAT/0084/11/CEA as authority for the proposition that before there can be a deduction, there must be an amount legally payable, whether under a contract or otherwise. At paragraph 23, the EAT said:

"So sections 13 (1) and (2) ERA only operate in relation to a sum, which in a particular case would be payable as a legal obligation and the question of whether a sum is so payable will depend on contractual or legal considerations in each case. There is therefore an exercise which has to be completed before section 13(1) and (2) ERA could apply with that preliminary stage being to consider whether there is a sum legally payable in accordance with section 13(3) ERA and it is only if the answer is in the affirmative, that there has to be a consideration as to whether there is a deduction from that sum so as to invoke sub-sections (1) and (2) of section 13 ERA".

59. Mr Cairns submitted that as the claimant had agreed in evidence that the payment of arrears was discretionary, there was no legal obligation to make payment so that the failure to pay the arrears, or any part of the arrears, could not amount to a deduction from wages.

60. Mr Cairns referred to other cases, but his argument was really just that as the Respondent had no legal obligation to pay, that was the end of the matter.

61. He did address the contractual provisions. He said there is nothing in the claimant's written contract about back pay at all. He also asserted the same in respect of the NJC collective agreement, although it was not produced in evidence. Mr Cairns properly accepted that the Claimant was probably seeking to rely on custom and practice and he referred to *Park Cakes Ltd v Shumba and others* [2013] IRLR 800. That case 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".

62. The Claimant submitted that there was an implied contractual term that the Respondent always paid back pay. The claimant also sought to rely on an implied duty of good faith on the part of the employer to ensure that she was aware of the change and the implications for her of its decision.

63. In respect of the Claimant's second argument (about an implied duty of good faith), this was not part of the Claimant's claim, as Mr Cairns identified, and the claimant did not make an application to amend her claim to include this. The claimant's claim was clearly put, in my view, on the basis that there was an obligation on the Respondent to pay the backdate, not an obligation to inform employees about its change of policy.

64. I also note, at this point, that in giving her submissions the claimant read out the legal advice she had received before the hearing. This included advice about the potential merits of her claim. That information was clearly privileged and not required to be disclosed to me and I have not taken that into account in reaching my decision.

65. Returning, then, to *Hellewell,* I must first determine what sums are properly payable.

66. As already indicated, 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.

67. Mr Cairns also produced the case of *Leyland Vehicles Ltd v Reston and others* [1981] IRLR 19 which is potentially 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, this case is distinguishable from this one.

68. The Claimant placed weight on the fact that the recommendation of the NJC was that arrears of pay should be paid.

69. The question for me is, in fact, simply that set out in ss 13 and 27 of the Employment Rights Act 1996 and, particularly, what amount was properly payable to the Claimant as wages in connection with their employment on each relevant pay date.

70. 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 in that case that "the 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 referrable to work done by him as a worker".

71. 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".

72. 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.

73. I refer now to the Claimant's contract of employment. The relevant part is under part 6. That says what wages the claimants are entitled to . It says:

"Your starting salary is £25,128.00 per annum (£23,769.73 pro rata) which is at level 2 within the salary grade 8. This reflects the City of York Council pay structure from levels 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".

74. In my judgment, it is a term of the Claimant's contract that her pay is the amount set out in the contract as varied from time to time in accordance

with national pay arrangements. That it is an automatic change – a change of right - in accordance with the NJC annual pay agreement is reflected by the words "in addition to the annual salary review…"

75. 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.

76. Having regard to *Robertson* above, therefore, I find that the amount payable as wages under the Claimant's contract is, in the absence of any other contractual terms, the amount as agreed for a particular year, regardless of when that agreement was reached.

77. It would, in my view, have been open to the parties to agree a specific contractual term that excluded backdated pay reviews from the definition of pay, but they did not do so.

78. 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".

79. I have considered whether that is sufficient to exclude back dated pay reviews from the definition of wages. In my view, it is not. The terms applicable to the Claimant while working remain, in respect of wages, the rate negotiated from time to time with the NJC. They are only applicable during periods when the claimant was working for the Respondent but the applicability of the terms during periods of employment is not affected by the fact that any changes were made at a different time, provided they apply to a period when the Claimant was working for the Respondent.

80. This is consistent with s 230 of the Employment Rights Act 1996 which says that employee includes someone who *worked* under a contract of employment.

81. The remaining questions for me are, then, was the pay award referable to a period when the Claimant was working for the Respondent and when should payment have been made if it was required to have been made?

82. 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".

83. 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".

84. The respondent says that the NJC had made a non-binding recommendation, the claimant says that the respondent should pay in accordance with the advice of the NJC.

85. In my judgement, the terms of the notification – the only document I have about the pay agreement – 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.

86. Further, it must be the case that the Pay clause in the Claimant's contract of employment represents the consideration (or part of the consideration) provided by the Respondent to the Claimant under the contract. 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.

87. It is not disputed that the payments were increased for employees who had worked from April 2022 and were continuing to work. 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.

88. Considering *Robertson* again, those retrospective payments referable 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 Claimant's employment because of the delay in negotiations does not mean that it stopped being wages.

89. 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 the Claimant was employed by the Respondent in the period from 1 April 2022 to 31 August 2022, the increased rates of pay were referable to a period when the Claimant was working and the rate of pay to which she were entitled for that period is increased accordingly.

90. 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.

91. Next, then, when ought the payment to have been made?

92. 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 contract of employment which says that wages are paid in arrears at the end of the month worked.

93. I find that there is a further contractual term that applied to the Claimant. 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 work at Ralph Butterfield Primary School and who leave the employment of the Respondent before agreement is reached.

94. I refer to the criteria set out in *Shumba* above.

95. 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 throughout the Claimant's employment as I have found above, when pay awards were agreed.

    b. The benefits are always the same - namely the payment of arrears up to the date of leaving of increased pay as negotiated by the NJC. The fact that the actual amount varies from year to year and person to person is not material.

    c. The benefit was not publicised. It was, to all intents and purposes, hidden. The arrears were payable as of right, but the Respondent did not publicise this fact. Nonetheless, it was well known amongst council employees and the Claimant, in her role as school business manager, paid it every year without question or input from the Respondent or North Yorkshire County Council. Further, the practice was adopted without question by the Claimant's successor until she was for the first time told differently by the Respondent in November 2022.

    d. Until the Respondent 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. There was no individual or annual consideration of any exercise of discretion so it cannot have been advertised as discretionary at the time.

    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 contract payment of arrears 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 so entitled.

    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 contract 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. This interpretation of the contract reflects the long standing practice of

the Claimant that went unremarked upon by the Respondent or North Yorkshire County Council for many years.

96. It is not strictly necessary to consider the practice of paying arears 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. Further, date on which the obligation to make payment arises is on conclusion of the pay negotiations at the NJC.

97. The amounts claimed by the Claimant is the pro rata proportion of the lump sum of £1925 that was payable for a whole year on the basis of a 37 hour week. The Claimant worked a 27 hour working week – being 73% of the full time equivalent of 37 hours per week. I agree with the Claimant's method of calculating the sum payable: £1925 x 73%(being her pro-rated hours) / 12 x 5 (being the proportion of the year the Claimant worked from 1 April to 31 August 2022) = £585.52.

98. This is the additional amount that was properly payable to the Claimant on 1 November 2022 (the date of notification of the pay award). It was not paid 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.

99. For these reasons, therefore, the Claimant's claim that she were subject to unauthorised deductions from wages is successful and the Respondent must pay the Claimant the gross sum of £585.52.

Breach of contract

100. It is not necessary to consider the claim as a breach of contract claim. However, for the same reasons as set out above, the contractual terms as described at length above applied to the claimant and the Respondent did not pay the Claimant the arears in accordance with those terms. In the alternative, therefore, the Claimant's claim for breach of contract would succeed.

1800843/2023

Employment Judge **Miller**

4 May 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19 May 2023

....

FOR EMPLOYMENT TRIBUNALS

EMPLOYMENT TRIBUNALS

Claimant: Mrs C King

Respondent: City of York Council

Heard at: Hull (by Video) **On:** 26 April 2023

Before: Employment Judge Miller

Representation
Claimant: In person
Respondent: Mr P Cairns (non-registered barrister)

RESERVED JUDGMENT

The Respondent has made unauthorised deductions from the Claimant's wages and the Respondent must pay the Claimant the gross sum of **£585.52**.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a school business manager in a maintained primary school (Ralph Butterfield Primary School). She had worked for the Respondent from 1 February 2006 until her retirement on 31 August 2022.

2. In November 2022 a national settlement was reached in respect of local authority workers which was backdated to 1 April 2022. The Claimant expected to receive arrears of pay arising from the national settlement and she was initially told that she would receive the arrears owed for her period of employment. Subsequently, the Respondent said that she would not receive the back pay from April to August 2022.

3. The Claimant undertook early conciliation from 25 November 2022 to 4 January 2023 and she submitted a claim to the Employment Tribunal on 2 February 2023 for the back pay.

4. The Respondent defended the claim on the basis that there were no express or implied terms in the Claimant's contract of employment that mandated an award of back pay once employment had ceased and that the Claimant was only entitled to payment of the amount payable under her contract of employment when her employment ended.

The hearing

5. The hearing was conducted remotely by video. The Claimant provided a witness statement and gave evidence.

6. Ms Helen Whiting, the Respondent's Head of HR provided a witness statement and attended and gave evidence for the Respondent .

7. It was unclear whether the claim was made as a breach of contract claim or a claim for unauthorised deductions from wages and I was unable to obtain any clarity from the parties. In the event, the issues of substance are the same and ultimately, it did not alter the matters to be decided. I address these issues in my conclusions, below.

8. On the morning of the hearing, which started at 2pm, Mr Cairns sent the Claimant some additional case law. The Claimant objected to the late provision of this information. It also transpired that the Claimant had made an application to postpone the hearing to obtain legal advice. That application had not been put on the Tribunal file and I was not aware of it.

9. The Claimant had, in any event, been able to obtain some legal advice. I explained that it was normal practice to provide case law for the assistance of the tribunal and the other parties, but I invited Mr Cairns to explain the principles on which he was relying from the cases (namely *Park Cakes ltd v Shumba and others* [2013] EWCA Civ 974 and *Hellewell and McArdle v Axa Services Ltd and others UKEAT/0048/11/CEA*). He said at that stage that they related to section 13 of the Employment Rights Act 1996 but would expand on them in submissions.

10. In the event, the Claimant was content to proceed with the hearing and did not pursue her application for a postponement.

11. The hearing was listed for two hours 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.

Findings of fact

12. 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.

13. The Claimant was employed by the Respondent in a primary school as a school business manager. She was responsible in that role for running and managing the school budget; safeguarding; HR; and Payroll in school. Although the Claimant was employed by the Respondent, she worked

entirely within the school and was, for many practical purposes, separate from the Respondent.

14. Ms Whiting is the Respondent's Head of Human Resources and Organisational Development. She has been employed by the Respondent since 29 November 2021.

15. The Claimant was employed under standard terms of employment, a copy of which was provided to the Claimant on 13 January 2023. The relevant parts say:

"*6.0 Pay*

Your starting salary is £25,128.00 per annum (£23,769.73 pro rata) which is at level 2 within the salary grade 8. This reflects the City of York Council pay structure from levels 1 to 4.

Details of current salary grades and levels are available on the Council's intranet or from your line manager.

<u>*Salaries are reviewed annually in accordance with the national pay bargaining arrangements for the National Joint Council for Local Government Services.*</u> *[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:

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

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"

16. The underlined part (above) relates to the nationally agreed pay award. 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 the membership and bargaining framework are not relevant for these purposes. However, the negotiations result in a national pay award that applies to, as far as is relevant, local government employees.

17. 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 said "Agreement has been reached on rates of pay applicable from April 2021".

18. 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".

19. 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 (e.g. April 2021) and the conclusion of pay negotiations. The Claimant said, and I accept her evidence of this, that each year after the pay award was announced she sent a spreadsheet of "leavers" the school's payroll provider to process the back pay. "Leavers" are people, like the Claimant, who had left employment of the Respondent at the Claimant's school before the pay settlement had been concluded but after the date form which the pay settlement was said to be backdated. This meant that any person who worked at the school and had left the employment of the Respondent after pay negotiations had concluded would receive backdated pay to the date from which the new pay award ran (generally April, I understand) up to the date their employment finished.

20. It was not necessary for the leaver to ask for their payment, it was processed automatically by the Claimant and the school's payroll provider.

21. Although the Claimant's school was a maintained school under the control of the Respondent, the Respondent did not provide payroll or HR advice to the school. That function was given to North Yorkshire County Council. I do not know if the functions were formally delegated or there was a simple contracting arrangement. Communications about payroll and HR matters were communicated directly between the Respondent and North Yorkshire County Council. The Claimant was aware of this higher level communication and she received (for the school) payroll and HR advice from North Yorkshire County Council. I find that she had no reason to think that the advice, guidance or instructions she received from North Yorkshire County Council were not provided on the basis of instructions from the Respondent.

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 for that year's negotiations) 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 sent directly to employees either by email or letter.

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. In the event, Ms Whiting confirmed in cross examination that the previous practice of paying leavers on application was also continued for the 2021/22 pay award, despite what is set out in that note.

29. I find, therefore, that the Respondent *generally* 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.

30. This was in respect of employees of the Respondent generally. In the specific case of the Respondent's employees employed at the primary school at which the Claimant worked (Ralph Butterfield Primary School), however, payments of arrears for pay awards were paid automatically to people who had left the employment of the Respondent before the pay award was finalised.

31. It was the Respondent's case that the Respondent had simply exercised a discretion each year to pay arrears to leavers. The Respondent produced no evidence of this. Ms Whiting has only worked for the Respondent since 2021. She was unable to say what happened before then. In any event, Ms Whiting did not have authority to exercise any such discretion. Her evidence, which I accept, is that that is a function of the Respondent's Head of Paid Service. There are no formal records of any exercise of discretion by the Head of Paid service (either on an annual basis or in respect of individual employees) and the Respondent did not call the Head of Paid service to give evidence.

32. I conclude, therefore, that on the balance of probabilities there was no exercise of discretion by the Head of Paid service (prior to March 2022) to pay or not pay arrears and that arrears were always paid either on application by leavers or, for employees at the Ralph Butterfield School, automatically.

33. I further find that the Claimant understood it to be the Respondent's policy that arrears were paid to leavers following a pay award; that this was never clarified or questioned by North Yorkshire County Council on behalf of the

Respondent; and that the Claimant did not obtain, or believe that she needed to obtain, permission or consent from the Respondent or North Yorkshire County Council to arrange payment of arrears for leavers in the circumstances described.

34. 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 the CMT decision. 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)"

35. The information was not sent directly to any employees. I prefer the Claimant's evidence that she did not see this information and, in fact, did not have regular access to the Respondent's intranet. She was provided with information through a different system. She had a log in for the intranet but this was used only for finance purposes, not for accessing general information. There was no reason for her to go looking for information about this on the Respondent's intranet.

36. 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 the Claimant's evidence that there was no mention of this on her checklist that she went through with the Head Teacher on her resignation.

37. Ms Whiting also informed the recognised Unions about the Respondent's decision not to pay arrears and it was discussed at a meeting between the Respondent and those Unions on 16 June 2022. In her witness statement, Ms Whiting is explicit that the Trade Unions were <u>informed</u> of the Respondent's decision about back pay, there is no suggestion that the decision was not contingent on the Trade Unions agreeing to it.

38. The Claimant retired with effect from 31 August 2022. She did not make any enquiries about back pay in the event of a successful negotiation and I prefer the Claimant's evidence that she expected it to be paid automatically as had been done in previous years. It is relevant to note that, during her employment, it was the claimant who had been responsible for arranging payments of arrears to school employees including to leavers, following the national pay awards.

39. 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 grade that the Claimant was appointed to was 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.

40. The notice provided to the Respondent's Chief Executive 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".

41. The Claimant was initially informed by email from someone at the school in November 2022 that she would receive a payment of the arrears reflecting the increase. A copy of that email was not produced but it was not disputed. There was then further communication in which the Claimant was told that she would not in fact be receiving the payment. I have not seen a copy of that correspondence either.

42. The Claimant initially contacted her successor at the school, Ms Moss, to enquire about this and Ms Moss made further enquiries with the Respondent. Ms Moss forwarded the Respondent's reply to the Claimant which said

    "Whilst the National Employer's suggest back pay may be given to ex-employees who request this, there is no legal obligation to do so and we can confirm that the Council's position is that it does not make back payments to leavers (including retirements)".

43. Unsurprisingly, the Claimant was unhappy with the response and sought further clarification. Ms Moss said

    "I can confirm that clear direction has been issued, to all local authority-maintained schools, that back pay (to 1/4/22) is not being paid to staff who left on or before 31/10/22. It is those CYC staff who left on or after 1/11/22 who are entitled to back pay (if applicable to their role).

    CYC have made it very clear, this year, by sending a direct email to all maintained schools, clarifying that, as per their policy, their stance is as above".

44. This email further supports my conclusions that the decision of the Respondent in 2022 represented a change from the long standing practice of paying arrears to leavers.

45. There was further communication which did not resolve matters and eventually, the Claimant contacted Ms Whiting directly and a local councillor who, it appears, raised it with Ms Whiting. In her email to the claimant on 11 January 2023 Ms Whiting confirmed that the Respondent's policy had changed in March 2022. In her email to the councillor on 31 January 2023, Ms Whiting said that the Respondent's policy regarding payment of back pay changed in March 2022. She said

"The policy is a head of paid services discretion and this was agreed with CMT and with the locally recognised trade unions. The local Unison officers also sought advice from their Regional and National Offices and confirmed that they were engaged and accepted the decision.

The policy changed from leavers being able to request backpay after an agreement was in place (where it was not agreed prior to them leaving the Councils employment), to backpay only being for current employees who are in post and employed by the Council on the date of a national agreement".

46. Again, although Ms Whiting maintains her wholly understandable insistence in both emails that this is a discretionary policy, these communications again makes it clear that, until 2022, the Respondent had a long standing practice and policy of paying leavers their arrears following pay negotiations. I also note that Ms Whiting states repeatedly that there is no contractual, legal obligation or National Term and Condition which states that the Respondent is obliged to make payments to people who are no longer employed by it.

47. Although I recognise that this is Ms Whiting's and the Respondent's view, I must observe that I am not bound by that view, I must come to my own decision on whether there are any legal obligations to pay leavers.

48. The Respondent maintained its position and the Claimant therefore brought these proceedings. Before considering the legal position and reaching my conclusions, I address the oral evidence that the Claimant appeared to give that she accepted that the decision whether to pay arrears was wholly within the discretion of the Respondent. Mr Cairns took the Claimant to an email she sent to Ms Moss on 21 November 2022. In that email, the Claimant said

"I find this extremely disappointing [referring to the decision not to pay her].

Last year it was raised as discretionary and staff who left were paid. Following HR advice, this was the case".

49. It was suggested to the Claimant that as long ago as November 2022 the Claimant recognised that the decision to pay arrears to leavers was discretionary. In evidence, the claimant said that she was accepting that at that point the Council were saying it was discretionary but, effectively, this

correspondence (in November with Ms Moss) was the first she had heard of it.

50. Later, in the same email the claimant said

"The mere fact that the award made on 1st November is being backdated to 1st April is in itself an acknowledgment that anyone working from 1st April is entitled, as I would have thought, on a point of law, to he (sic) entitled to that same award".

51. I sought to clarify with the claimant in oral evidence whether she believed that the decision was or was not discretionary. I asked if the claimant accepted that the Council could have decided not to pay the arrears. The claimant said

"I do now, I don't doubt that's what I have been told. Don't doubt that the Council would say it was discretionary if it wasn't. Saying it is discretionary now., not in past tense as didn't know".

52. I then asked, if the Claimant accepted that it was discretionary, on what basis does she say she is entitled to it and the claimant said

"I'm trying to say that had I known CYC had taken stance that year for the pay award 21/22 that made stance not going to pay… Happened in March 22. I was still in employment then so I wasn't informed in any route of communication that I or any other members of staff who left before the pay deal was implemented wouldn't get pay award backdated".

53. I conclude from the claimant's evidence and this exchange that what the Claimant meant was that, effectively, if the decision was discretionary now, it had never been in the past and she had not been informed of the change of policy by the Respondent. I do not find that the Claimant accepted that the decision had always been discretionary. It is reasonably clear to me that the Claimant understood payment had always been made, but that the Respondent had unilaterally changed its policy on that in March 2022 and from that date, the Respondent believed, it was discretionary. The Claimant did not express a view whether the Council was entitled to do that, and that is in any event a legal question. The Claimant was clear however, and I find if it is not obvious already, that the Claimant did not know and had no reasonable way of knowing that the Respondent had changed its Policy in March 2022.

Law and conclusions

54. In so far as the claim is brought as a claim for unauthorised deductions from wages, 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.

55. 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,

56. I also refer to s 230 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, or…

57. 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.

58. Mr Cairns referred to the case of *Hellewell and others v Axa Services ltd and others* UKEAT/0084/11/CEA as authority for the proposition that before there can be a deduction, there must be an amount legally payable, whether under a contract or otherwise. At paragraph 23, the EAT said:

"So sections 13 (1) and (2) ERA only operate in relation to a sum, which in a particular case would be payable as a legal obligation and the question of whether a sum is so payable will depend on contractual or legal considerations in each case. There is therefore an exercise which has to be completed before section 13(1) and (2) ERA could apply with that preliminary stage being to consider whether there is a sum legally payable in accordance with section 13(3) ERA and it is only if the answer is in the affirmative, that there has to be a consideration as to whether there is a deduction from that sum so as to invoke sub-sections (1) and (2) of section 13 ERA".

59. Mr Cairns submitted that as the claimant had agreed in evidence that the payment of arrears was discretionary, there was no legal obligation to make payment so that the failure to pay the arrears, or any part of the arrears, could not amount to a deduction from wages.

60. Mr Cairns referred to other cases, but his argument was really just that as the Respondent had no legal obligation to pay, that was the end of the matter.

61. He did address the contractual provisions. He said there is nothing in the claimant's written contract about back pay at all. He also asserted the same in respect of the NJC collective agreement, although it was not produced in evidence. Mr Cairns properly accepted that the Claimant was probably seeking to rely on custom and practice and he referred to *Park Cakes Ltd v Shumba and others* [2013] IRLR 800. That case 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".

62. The Claimant submitted that there was an implied contractual term that the Respondent always paid back pay. The claimant also sought to rely on an implied duty of good faith on the part of the employer to ensure that she was aware of the change and the implications for her of its decision.

63. In respect of the Claimant's second argument (about an implied duty of good faith), this was not part of the Claimant's claim, as Mr Cairns identified, and the claimant did not make an application to amend her claim to include this. The claimant's claim was clearly put, in my view, on the basis that there was an obligation on the Respondent to pay the backdate, not an obligation to inform employees about its change of policy.

64. I also note, at this point, that in giving her submissions the claimant read out the legal advice she had received before the hearing. This included advice about the potential merits of her claim. That information was clearly privileged and not required to be disclosed to me and I have not taken that into account in reaching my decision.

65. Returning, then, to *Hellewell,* I must first determine what sums are properly payable.

66. As already indicated, 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.

67. Mr Cairns also produced the case of *Leyland Vehicles Ltd v Reston and others* [1981] IRLR 19 which is potentially 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, this case is distinguishable from this one.

68. The Claimant placed weight on the fact that the recommendation of the NJC was that arrears of pay should be paid.

69. The question for me is, in fact, simply that set out in ss 13 and 27 of the Employment Rights Act 1996 and, particularly, what amount was properly payable to the Claimant as wages in connection with their employment on each relevant pay date.

70. 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 in that case that "the 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 referrable to work done by him as a worker".

71. 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".

72. 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.

73. I refer now to the Claimant's contract of employment. The relevant part is under part 6. That says what wages the claimants are entitled to . It says:

"Your starting salary is £25,128.00 per annum (£23,769.73 pro rata) which is at level 2 within the salary grade 8. This reflects the City of York Council pay structure from levels 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".

74. In my judgment, it is a term of the Claimant's contract that her pay is the amount set out in the contract as varied from time to time in accordance

with national pay arrangements. That it is an automatic change – a change of right - in accordance with the NJC annual pay agreement is reflected by the words "in addition to the annual salary review…"

75. 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.

76. Having regard to *Robertson* above, therefore, I find that the amount payable as wages under the Claimant's contract is, in the absence of any other contractual terms, the amount as agreed for a particular year, regardless of when that agreement was reached.

77. It would, in my view, have been open to the parties to agree a specific contractual term that excluded backdated pay reviews from the definition of pay, but they did not do so.

78. 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".

79. I have considered whether that is sufficient to exclude back dated pay reviews from the definition of wages. In my view, it is not. The terms applicable to the Claimant while working remain, in respect of wages, the rate negotiated from time to time with the NJC. They are only applicable during periods when the claimant was working for the Respondent but the applicability of the terms during periods of employment is not affected by the fact that any changes were made at a different time, provided they apply to a period when the Claimant was working for the Respondent.

80. This is consistent with s 230 of the Employment Rights Act 1996 which says that employee includes someone who *worked* under a contract of employment.

81. The remaining questions for me are, then, was the pay award referable to a period when the Claimant was working for the Respondent and when should payment have been made if it was required to have been made?

82. 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".

83. 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".

84. The respondent says that the NJC had made a non-binding recommendation, the claimant says that the respondent should pay in accordance with the advice of the NJC.

85. In my judgement, the terms of the notification – the only document I have about the pay agreement – 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.

86. Further, it must be the case that the Pay clause in the Claimant's contract of employment represents the consideration (or part of the consideration) provided by the Respondent to the Claimant under the contract. 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.

87. It is not disputed that the payments were increased for employees who had worked from April 2022 and were continuing to work. 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.

88. Considering *Robertson* again, those retrospective payments referable 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 Claimant's employment because of the delay in negotiations does not mean that it stopped being wages.

89. 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 the Claimant was employed by the Respondent in the period from 1 April 2022 to 31 August 2022, the increased rates of pay were referable to a period when the Claimant was working and the rate of pay to which she were entitled for that period is increased accordingly.

90. 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.

91. Next, then, when ought the payment to have been made?

92. 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 contract of employment which says that wages are paid in arrears at the end of the month worked.

93. I find that there is a further contractual term that applied to the Claimant. 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 work at Ralph Butterfield Primary School and who leave the employment of the Respondent before agreement is reached.

94. I refer to the criteria set out in *Shumba* above.

95. 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 throughout the Claimant's employment as I have found above, when pay awards were agreed.

    b. The benefits are always the same - namely the payment of arrears up to the date of leaving of increased pay as negotiated by the NJC. The fact that the actual amount varies from year to year and person to person is not material.

    c. The benefit was not publicised. It was, to all intents and purposes, hidden. The arrears were payable as of right, but the Respondent did not publicise this fact. Nonetheless, it was well known amongst council employees and the Claimant, in her role as school business manager, paid it every year without question or input from the Respondent or North Yorkshire County Council. Further, the practice was adopted without question by the Claimant's successor until she was for the first time told differently by the Respondent in November 2022.

    d. Until the Respondent 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. There was no individual or annual consideration of any exercise of discretion so it cannot have been advertised as discretionary at the time.

    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 contract payment of arrears 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 so entitled.

    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 contract 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. This interpretation of the contract reflects the long standing practice of

the Claimant that went unremarked upon by the Respondent or North Yorkshire County Council for many years.

96. It is not strictly necessary to consider the practice of paying arears 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. Further, date on which the obligation to make payment arises is on conclusion of the pay negotiations at the NJC.

97. The amounts claimed by the Claimant is the pro rata proportion of the lump sum of £1925 that was payable for a whole year on the basis of a 37 hour week. The Claimant worked a 27 hour working week – being 73% of the full time equivalent of 37 hours per week. I agree with the Claimant's method of calculating the sum payable: £1925 x 73%(being her pro-rated hours) / 12 x 5 (being the proportion of the year the Claimant worked from 1 April to 31 August 2022) = £585.52.

98. This is the additional amount that was properly payable to the Claimant on 1 November 2022 (the date of notification of the pay award). It was not paid 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.

99. For these reasons, therefore, the Claimant's claim that she were subject to unauthorised deductions from wages is successful and the Respondent must pay the Claimant the gross sum of £585.52.

Breach of contract

100. It is not necessary to consider the claim as a breach of contract claim. However, for the same reasons as set out above, the contractual terms as described at length above applied to the claimant and the Respondent did not pay the Claimant the arears in accordance with those terms. In the alternative, therefore, the Claimant's claim for breach of contract would succeed.

1800843/2023

Employment Judge **Miller**

4 May 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19 May 2023

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FOR EMPLOYMENT TRIBUNALS