



THE EMPLOYMENT TRIBUNALS

Claimant Mrs S Seddon
Respondent North Yorkshire Council
Heard at Newcastle upon Tyne Hearing Centre [by CVP video link]
On 24 January 2025 and 13 February 2025
Before Employment Judge Langridge

Representation:

Claimant Mr Matthew Rudd, counsel
Respondent Miss May Martin, counsel

JUDGMENT

The claimant's claim for breach of contract is not well-founded and is dismissed.

REASONS

Introduction

1. This was a breach of contract claim relating solely to an enhanced redundancy payment to which the claimant said she was entitled on the termination of her employment on the grounds of redundancy. Although the hearing dealt only with this single issue, it was far from straightforward in that it required the Tribunal to discern from a combination of written and oral evidence what, if any, implied contractual entitlement the claimant had to such a payment.
2. In her application to the Tribunal the claimant claimed the enhanced element of her redundancy pay amounting to around £34,000. She relied on her lengthy 34 years of service dating back to her employment with Hambleton District Council, and asserted that her entitlement to this payment survived her TUPE transfer to the respondent on 1 April 2023. The claimant relied on the express terms of the respondent's numerous policy documents and claimed that these terms had been implied into her contract of employment by custom and practice.
3. The claimant conceded that the Tribunal has jurisdiction to award compensation for breach of contract only up to the statutory threshold of £25,000 and so limited her claim to that sum.
4. The respondent disputed that the enhanced redundancy payment was a contractual entitlement, saying it was a discretionary payment requiring a sound business case for it to be made. The respondent relied on its own interpretation of the various policy documents in support of its argument.
5. The evidence was dealt with in a single day, with the claimant giving evidence on her own behalf. Ms Emily Wren, Principal HR Adviser, gave evidence for the respondent. An agreed bundle comprising around 300 pages was submitted, with some additional items being added to the evidence at short notice. These included a partial copy of the claimant's contract of employment and minutes of a relevant board meeting, neither of which had been included in the original bundle.
6. Understanding the issues was made somewhat more difficult by the fact of the respondent's policy documents being apparently overlapping and with some duplication. A particular problem with the evidence is that neither party had outlined in their witness statements a clear exposition of the relevant policies and procedures and how they related to each other. It was therefore necessary for the Tribunal to review these policies with great care in reaching this decision.

Issues & relevant law

7. The single issue to be determined was whether the claimant was contractually entitled to an enhanced redundancy payment according to a formula set out by Hambleton District Council in its various policy documents. There was no issue about any such contractual right – if it existed – having transferred under TUPE. The claimant argued that the respondent had taken on an implied contractual

obligation to make such a payment, by virtue of custom and practice during her previous employment with Hambleton District Council ("HDC").

8. Terms may be implied into a contract in a number of ways, though the claimant relied only on the custom and practice route to that conclusion. The general rule, put simply, is that an implied term is something the parties must have been taken to have agreed, even if they have not said so explicitly. The claimant bore the burden of proving that the term became implied into her contract as a result of the HDC's decision to adopt and apply its policy on enhanced redundancy payments. This question also entailed consideration of the respondent's conduct and how it communicated its intentions, as well as its actions after introducing the policy.
9. Some helpful authorities were referred to by both parties in their submissions.
10. Duke v Reliance Systems Ltd [1982] IRLR 347, EAT and Quinn & others v Calder Industrial Materials Ltd [1996] IRLR 126, EAT were both considered by the Court of Appeal in Albion Automotive Ltd v Walker and others [2002] EWCA Civ 946. All these cases were then discussed in the Court of Appeal decision in Park Cakes Ltd v Shumba [2013] IRLR 800, which helpfully summarises the authorities. The Tribunal also reviewed the decision in McAlinden and others v CSC Computer Sciences Ltd [2013] EWCA Civ 1435, CA.
11. Park Cakes dealt with the same point as arises in this case: whether the employer's policy reflected a contractual obligation to pay an enhanced redundancy payment. The Court of Appeal upheld the EAT's decision to remit the question back to the Tribunal, which had not addressed in its reasoning the fact of undisputed evidence of such payments being made without exception in the past. The Tribunal had heard evidence from the trade union's District Secretary to that effect, relating to an 18 year period.
12. The Court took account of the factors identified in Albion Automotive, outlined by counsel for the employees in his submissions, and accepted. Relevant factors include:
 - (a) whether the policy was drawn to the attention of employees;
 - (b) whether it was followed without exception for a substantial period;
 - (c) the number of occasions on which it was followed;
 - (d) whether payments were made automatically;
 - (e) whether the nature of communication of the policy supported the inference that the employers intended to be contractually bound;
 - (f) whether the policy was adopted by agreement;
 - (g) whether employees had a reasonable expectation that the enhanced payment would be made;

(h) whether terms were incorporated in a written agreement;

(i) whether the terms were consistently applied.

13. In Park Cakes the Court of Appeal said this on the question of implying a term into the employment contract:

“The essential object in a case of the present kind 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.”

14. It went on to say that the essential question in a case of this kind must be whether, by its 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, and the employee works on that basis. It follows that the focus must be on what the employer has communicated to the employees. What the employer may have personally understood or intended is irrelevant except to the extent that the employees are, or should reasonably have been, aware of it.

15. The Court stated that:

“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.”

16. Commenting on the Albion Automotive list of relevant factors, the Court said that while it is not unhelpful, it should not be treated as the last word on the proper approach to cases concerning enhanced redundancy benefits, or applied without thought as a kind of definitive checklist. The following is a summary of the Court's non-comprehensive list of factors which may typically be relevant in a case concerning enhanced redundancy benefits [paragraph 36]:

(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. [...] 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. [...] 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.

17. The above are the key authorities on implied terms in employment contracts. In addition, there is a statutory context for this claim which derives from the Local Government (Early Termination of Employment) (Discretionary Compensation) England and Wales Regulations 2006 ("the 2006 Regulations"). The relevant provisions are:

Regulation 5 Power to increase statutory redundancy payments

- (1) Compensation may be paid in accordance with this regulation to a person who is entitled two redundancy payment under the 1996 Act on the termination of his employment.
- (2) The amount which may be paid must not be more than the difference between—
 - (a) the redundancy payment to which he is entitled under Part 11 of the 1996 Act; and
 - (b) the payment to which he would have been entitled if there had been no limit on the amount of a week's pay used in the calculation of his redundancy payment.
- (3) The power to pay compensation is exercisable by the employing authority.

Regulation 6 Discretionary compensation

- (1) This regulation applies where a person—
 - (a) Ceases to hold his employment with an employing authority, and
 - (b) in respect of that cessation may not count an additional period of membership under regulation 52 (power of employing authority to increase total membership of members) of the Pension Regulations.
- (2) Where this regulation applies, the employing authority may, not later than six months after the termination date, decide to pay compensation under this regulation and in that event shall, as soon as reasonably practicable after the decision, notify the person in whose favour it has been made, giving details of the amount of the compensation.
- (3) The amount of compensation must not exceed 104 weeks' pay.
- (4) Chapter 2 (a week's pay) of part 14 (Interpretation) of the 1996 Act shall apply for the purpose of calculating a person's week's pay as it applies for the purpose of calculating redundancy payments but—
 - (a) with the substitution for references to the calculation date of references to the termination date; and
 - (b) without the limit on a week's pay imposed by section 227 of that Act.
- (5) If the person in whose favour a decision under paragraph (2) has been made receives a redundancy payment under part 11 of the 1996 Act or compensation under regulation 5 of these Regulations, the equivalent amount shall be deducted from the compensation otherwise payable to him under this regulation.
- (6) Compensation under this regulation shall be paid by the employing authority as soon as practicable after the decision under paragraph 2.
- (7) The compensation shall be payable in the form of of a lump sum.

Regulation 7 Policy Statements

- (1) Each employing authority must formulate, publish and keep under review the policy that they apply in the exercise of their discretionary powers under regulations 5 and 6.
- (2) If the authority decide to change their policy, they must publish a statement of the amended policy and may not give effect to any policy change until one month after the date of publication.
- (3) In formulating and reviewing their policy the authority must
 - (a) Have regard to the extent to which the exercise of their discretionary powers (in accordance with the policy), unless properly limited, could lead to a serious loss of confidence in the public service; and

- (b) be satisfied that the policy is workable, affordable and reasonable having regard to the foreseeable costs.

- 18. In summary, if these powers are adopted by a local authority employer, then it has the power under Regulation 5 to remove the limit on a week's pay for those who are entitled to a statutory redundancy payment. It may also invoke Regulation 6 on the termination of employment, either to make a compensatory payment or to augment the employee's pension fund through additional years' service. Any payment under Regulation 6 must not exceed 104 weeks' pay. There is an additional requirement for a council to formulate, publish and review the policy that it applies in the exercise of its discretionary powers under these regulations. Any change of policy must be published before it can take effect.

Findings of fact

- 19. At the time of her redundancy on 31 July 2024 the claimant was employed by the respondent as a Technical Support Manager. She had continuous local government service dating back to 25 September 1989. The claimant's prior employment with Hambleton District Council ("HDC") transferred to the respondent with effect from 1 April 2023, following the local government reorganisation which created the new unitary authority. Her terms and conditions of employment transferred under the TUPE Regulations and remained unchanged by that transfer. The claimant's written terms and conditions contained no express terms as to her entitlement to a redundancy payment. The most recent version of the claimant's contract was signed on 21 May 2014. Although the Tribunal was provided with only one page from this document, whose content had no bearing on the issues, the parties agreed that the claimant's written terms were silent on the issue of enhanced redundancy payments.
- 20. The claimant had previously been employed as a Performance Manager in charge of various teams in Central Services, where she directly line managed 20 staff. She had also jointly managed a team of 60 people in Waste Services. As a senior manager she was occasionally involved in redundancy situations arising at HDC, generally in the context of reorganisations. In all but one case it was possible to retain the employees through redeployment. When the risk of redundancies arose, the claimant was guided by the respondent's redundancy policies and by HR. She would also discuss such matters with the other senior managers in their small team.
- 21. Prior to the TUPE transfer HDC had adopted a policy on redundancy terms under the 2006 Regulations. These permitted the respondent to pay additional or enhanced redundancy payments by disapplying the statutory cap on a week's pay, and by awarding a compensatory sum up to a maximum of 104 weeks' pay. The regulations imposed a duty on the respondent to publish and keep under review any policy that it applied in the exercise of its discretionary powers. The key policies and procedures relevant to this case comprised:
 - a. Retirement and Redundancy Policy dated 15 July 2009
 - b. Redeployment and Redundancy Policy dated 15 July 2009

- c. LGPS Employer Discretion Policy dated 1 April 2009
 - d. LGPS Employer Discretion Policy dated 1 April 2019 and
 - e. Restructure and Redundancy Policy and Procedure dated November 2022
22. These five policy documents are referred to in this judgment as, respectively: the Retirement and Redundancy Policy, the Redeployment and Redundancy Policy, the Discretion Policy 2009, the Discretion Policy 2019 and the Restructure and Redundancy Policy. A sixth document is referred to in the Redeployment and Redundancy Policy and the Discretion Policy 2009 as Annex 5, a document titled “LGPS Discretion Compensation Policy”. It is referred to in this judgment as “Annex 5”.
23. Of these policies, only Annex 5 and the Restructure and Redundancy Policy make express reference to the 2006 Regulations, suggesting they were adopted pursuant to those regulations. That said, the Redeployment and Redundancy Policy (which forms part of the overarching Retirement and Redundancy Policy) sets out redundancy compensation based on the principles of Regulations 5 and 6. It also refers to Annex 5. The Discretion Policy 2009 introduces itself as a statutory scheme under the LGPS pension scheme, not the 2006 Regulations, and also refers to Annex 5.
24. The Retirement and Redundancy Policy was formally published. It went to the HDC Cabinet and full Council, and was published to the public and employees via the council’s website. The claimant was familiar with this policy during her employment with HDC. She was not aware that any update to it was formally adopted or published under Regulation 7, nor was any such evidence produced to the Tribunal. The claimant was, however, familiar with the later Restructure and Redundancy Policy dated November 2022, which she agreed was a more digestible statement of HDC’s policy. However, this was not put before the full Council or published publicly. It was intended to reiterate the content of the Retirement and Redundancy Policy but in a way that made for easier reading.
25. Relevant extracts from the policies are set out in the following paragraphs.

The Policies

Retirement and Redundancy Policy

26. The Retirement and Redundancy Policy dated 15 July 2009 is an overarching policy and refers to three other policies affecting retirement and redundancy. It does not say anything about whether it is, or is not, intended to have contractual effect. It post-dates the Discretion Policy 2009 which took effect from 1 April 2009.
27. The three named policies affecting retirement and redundancy are:

“2.1 Redeployment And Redundancy Policy

2.2 Retirement Policy And Procedure [not relevant]

2.3 Employer Discretion Policy” [This is the Discretion Policy 2009, which in turn incorporates Annex 5.]

28. The introduction to the Retirement and Redundancy Policy states:

“Key principles

The Retirement and Redundancy Policy is applicable to all employees, including part time employees.”

29. The next part of the policy says:

“2 POLICIES AFFECTING RETIREMENT AND REDUNDANCY

Detailed below is a list of the main policies that collectively make up the Retirement and Redundancy Policy.

The Redeployment And Redundancy Policy covers HDC's position with respect to redundancy [and] compensation.”

[...]

LGPS (Local Government Pension Scheme) Employer Discretion Policy (Hambleton District Council), including Annex 5 – LGPS discretionary compensation policy.”

30. The next policy referred to is the Redeployment and Redundancy Policy dated 15 July 2009.

Redeployment and Redundancy Policy

31. This states:

“Redundancy compensation

Redundant employees with more than two years’ continuous local government service are entitled to a redundancy payment.

Enhancement of redundancy payments

A multiplier will be applied to all payments, doubling the statutory formula in every case. This will mean that payments will be based on one week's pay for each year of service under age 22 years, two weeks’ pay for each year of service between 22 and 41 and three weeks’ pay for each year of service over 41.

Note:

- The statutory number of years allowable for the purposes of redundancy calculations, currently 20 years will not be applied.
- The maximum payment is fixed at the 104 weeks augmentation which should be inclusive of redundancy payments.

Also, one week’s pay will equate [to] an actual week’s pay where this [is] greater than the statutory redundancy pay.”

32. Beneath this follows:

“Additional Discretionary Compensation

Refer to Annex 2 and Annex 5 of the:

LGPS (Local Government Pension Scheme) EMPLOYER DISCRETION POLICY (Hambleton District Council) included later in this document”

33. Annex 2 deals with retirement and is not relevant.

The LGPS Employer Discretion Policy

34. The third policy referred to in the Retirement and Redundancy Policy is the Discretion Policy 2009 which refers also to Annex 5. This includes the following:

“Introductory Notes:

The Local Government Pension Scheme is a statutory scheme; that is, most of the rules and regulations are laid down by the Government of the day.

There are, however, some areas of the Scheme that are left to be decided by Employers – such as Hambleton District Council. These are known as ‘Employer Discretions’ and employers have to decide how they will operate these discretions and inform the North Yorkshire Pension Fund (NYPF) the Administrator of the Local Government Pension Scheme for HDC. Some of the areas covered in the following document and appendices are:

[...]

- Award of additional membership of the pension scheme
- Award of additional pension benefit

[...]

- NOTE: discretionary payments on redundancy/efficiency departures are also covered in the (LGPS) Discretionary Compensation Policy 2009 [ie Annex 5] and the HDC Redundancy and Redeployment Policy.

This document incorporates the Hambleton District Council policies under the following LGPS Regulations as at 1st April 2009. For ease of reference, each discretion in this document is marked ‘Ref A’, ‘Ref T’ etc to correspond with the relevant Regulation.”

35. The list of regulations to which these ‘References’ refer does not include the 2006 Regulations, only a variety of Local Government Pension Scheme Regulations.

36. There follows:

“The following is a statement of Hambleton District Council’s (HDC) policy on the exercise of discretions under the Local Government Pension Scheme Regulations (as detailed above). The policy represents clear guidance on the exercise of any particular discretion.

HDC retains the right to deviate from the policy in exceptional circumstances. HDC retains the right to amend these policies at any time. The policies confer no contractual rights. The policy in force at the time of a relevant event occurring will be the one that is applied.”

37. The Tribunal was not referred to the above ‘Pension Scheme Regulations’, nor were any of the discretions under those other Regulations set out in the document.

Annex 5

38. This provides information about the LGPS Discretion Policy:

**“LGPS EMPLOYER DISCRETION POLICY
ANNEX 5**

HAMBLETON DISTRICT COUNCIL STATEMENT OF POLICY

**LGPS DISCRETIONARY COMPENSATION POLICY
With effect from 1st April 2009”**

39. The document starts by referring to the 2006 Regulations. The opening paragraph is in very similar terms as the Introductory Notes of the Discretion Policy 2009:

“The following is a statement of Hambleton District Council’s (HDC) policy on the exercise of discretions under the above two Regulations as required by those Regulations. The policy represents clear guidance on the exercise of any particular discretion.

HDC retains the right to deviate from the policy in exceptional circumstances as well as the right to amend these policies at any time. HDC recognises that any change to the policies contained herein must be published within one month of the decision to amend the policy and that they must not give effect to any policy change until one month has elapsed since the date of such publication. The policies confer no contractual rights. The policy in force at the time of a relevant event occurring will be the one that is applied, notwithstanding the above proviso and any transitional protections that may be in force.”

40. In table form, Annex 5 sets out information about the power to increase statutory redundancy payments under Regulation 5. Alongside this heading is stated:

“Power to increase statutory redundancy payments

HDC uses actual salary in the calculation of redundancy payment as opposed to the statutory maximum [...]”

41. Beneath this is an entry relating to Regulation 6. This says:

“Discretionary compensation for redundancy

Where a member has not been awarded an additional period of Local Government service under Regulation 12 of the LGPS (Benefits, Membership and Contributions) Regulations 2007 (as amended), his employer may pay, not

later than six months after the date of termination, compensation under this regulation. That amount must not exceed 104 weeks' pay."

42. Alongside this entry is stated the following paragraphs:

"The Council has determined that it will make compensatory awards or award augmentation of service under regulation 52 of the 1997 LGPS Regulations.

Cabinet report 7/6/07:-

This provides for one of the following options subject to agreement on each case by COMT/Members as appropriate

- A cash lump sum to be paid under the '104 weeks provision', inclusive of any statutory redundancy payment made plus any increase in the redundancy payments above the statutory level
- OR
- For the employee to be given the option of converting any cash lump sum awarded into a period of membership in the LGPS. Individuals taking up this option will also be entitled to any statutory and enhanced redundancy payments."

43. No copy of the Cabinet report dated 7 June 2007 was provided to the Tribunal. No further relevant information or clarification is contained in Annex 5.
44. Separately from the Retirement and Redundancy Policy is the Discretion Policy 2019, which took effect from 1 April that year. It was intended to be an interpretation of the Discretion Policy 2009, not a replacement for it, but in a more accessible form.

LGPS Employer Discretion Policy

45. The Discretion Policy 2019 is headed "Hambleton District Council" but is said to be a statement by North Yorkshire County Council. Relevant extracts include:

"The regulations governing the application of the Local Government Pension Scheme allow each employer to determine how certain discretionary provisions of the scheme will be applied. The following is a statement of North Yorkshire County Council's (NYCC) policy on the exercise of these discretions.

Due to changes of the Scheme over time, different regulations and provisions may apply to pension benefits and pensionable service accrued under different arrangements. This policy sets out the relevant discretions in different sections. At the commencement of each section the applicable Regulations are detailed.

This document incorporates the Hambleton District Council policies under the following LGPS Regulations as at 1st April 2019. For ease of reference, each discretion in this document is marked 'Ref A', 'Ref T' etc to correspond with the relevant Regulation."

46. As in the Discretion Policy 2009, the list of 'References' refers to numerous pensions regulations but not the 2006 Regulations. This version contains other similar wording to the earlier policy:

"The following is a statement of Hambleton District Council's (HDC) policy on the exercise of discretions under the Local Government Pension Scheme Regulations (as detailed above). The policy represents clear guidance on the exercise of any particular discretion.

The decision-maker retains the right to deviate from the policy in exceptional circumstances. HDC retains the right to amend these policies at any time. The policies confer no contractual rights. The policy in force at the time of a relevant event occurring will be the one that is applied."

47. It was signed by the Chief Executive on 6 February 2020 and beneath his signature is the following:

Note

Unless otherwise stated, the application of these discretions will be in accordance with the Officers Delegation Scheme with advice from the relevant Director – and Chief Executive – who is accountable for the proper and consistent application of this policy on behalf of HDC."

48. There follows a detailed table which is prefaced by these words:

"This policy confers no contractual rights. Hambleton District Council retains the right to change the policies at any time without prior notice or consultation. The policy in force at the time of a relevant event occurring will be the one that is applied."

49. Most of the entries in the table relate to pension rights and are not relevant. The part which relates to the present case refers to discretions under the 2006 Regulations and the entries in the table show the following:

"Under the Discretionary Compensation Regulations, each authority [...] is required to formulate and keep under review a policy which applies in respect of exercising their discretion on the areas below.

Area

Redundancy pay on actual weeks pay

Discretion

To base redundancy payments on an actual weeks pay where this exceeds the statutory weeks' pay limit [Regulation 5]

Policy

HDC will base redundancy payments on actual weeks' pay

Area

Lump sum compensation

Discretion

To award lump sum compensation of up to 104 weeks' pay in cases of redundancy [or] termination of employment on efficiency grounds [...] [Regulation 6]

Policy

HDC will reserve the right to apply this award where there is a sound business case for doing so."

50. Under a column headed "Key", the document states "Mandatory". This reflects the requirement for the respondent to formulate and keep under review a policy under the 2006 Regulations. This entry compares with others in other parts of the table (not dealing with redundancy) where under "Key" the entry is stated as either "Recommended" or "Less common".
51. The fifth policy to which the Tribunal was referred was also a stand-alone policy, the Restructure and Redundancy Policy dated November 2022:

Restructure and Redundancy Policy and Procedure

52. The author of this document was Lynne Halls, Head of HR at Hambleton District Council. In the introduction it states that it should be read in conjunction with other policies and procedures including the Redeployment Policy and Procedure and the Employers LGPS Discretion Policy. Much of the content deals with the procedural handling of redundancies.
53. Part 19 deals with Termination Benefits and states in paragraph 19.3:

"... in line with the [2006 Regulations] the council has the authority to make additional severance payments. This includes the ability to pay an enhanced severance payment up to 104 weeks pay (including the statutory redundancy payments or discretionary redundancy payments) to an eligible employee. In addition, the council can calculate redundancy payments on an employee's actual weekly pay. Consequently, the council operates a more generous redundancy scheme than that set out in the Employment Rights Act.

The right hand column in the table below sets out the council's discretionary formula for calculating redundancy payments and illustrates the differences between the council's scheme and the less generous statutory formula.

In addition, the Council will in respect of the Chief Officers/Members of the Senior Management Team, who remain in service with the Council up to its abolition [...], but who do not transfer to North Yorkshire Council under TUPE consider compensation under Regulation 6 of the 2006 Regulations as referred to in the Council's LGPS Employer Discretion Policy provided all payments are within the statutory limit."

54. The table referred to is in paragraph 19.5 which begins:

"The council reserves the right to amend its redundancy policy and procedure should financial circumstances make it necessary.

55. Under the heading "HDC formula for redundancy payments" is a table setting out information under columns headed "weeks pay" and "age", showing also the statutory entitlements for comparison purposes. The HDC formula is shown as one week's pay for each full year of service where the age during the year is less than 22. This increases to two weeks' pay where the age during the years of service is 22 or above but less than 41. Three weeks' pay applies where the age during the years of service is 41 or over.
56. The formula includes actual weekly pay rather than the statutory capped rate.
57. Whereas the statutory maximum of 20 years' service or 30 weeks' pay applies in the column showing the statutory formula, the HDC formula shows this as being "Up to a maximum of 104 weeks pay".
58. There is no further explanation of how or when the HDC formula is applied.
59. In addition to the above policies, the Tribunal was provided with a note headed "Hambleton Redundancy Policy and Pension Discretions Document – practical interpretation for consistency June 2024". Although the note does not identify an author, it was prepared by Ms Emily Wren, the respondent's Principal HR Adviser. She was employed in the respondent's pay, policy and reward team, and although she had not previously worked for HDC, she was closely involved in the preparation for the TUPE transfer.
60. Ms Wren's note was prepared to deal with some queries that had arisen. It had become clear to her by this time that there was not a clear understanding of the policies, and there was some confusion about the position of employees who had transferred to the new authority. The Management Board discussed the note. Ms Wren was unable to confirm that it was shared with employees, though she believed it was, and this seems plausible.
61. The opening paragraph of the note suggests it was written in the context of the very circumstances in which the claimant's claim arose. It says:

"Question have been raised for staff being made redundant on Hambleton Terms and Conditions that they should be in receipt of the enhanced redundancy payments as described in the policy."

After discussion it is clear that there is a discrepancy between the redundancy policy and the pensions discretion document."
62. It says that the respondent had "taken the opinion that the enhanced redundancy payments are NOT made unilaterally and that they are considered on a case by case basis, in line with the pension discretion document. There needs to be a sound business case for the additional enhancement to be applied through the discretionary policy". The note points out that no other staff who transferred to the respondent in April 2023, except those previously employed by HDC, had "any

provision for any discretionary enhancement” to be applied to redundancy payments. It concludes:

“... as we have now identified the discrepancy between the two policies it is advisable to progress a change to the redundancy policy to reflect the process must be referred through Management Board and Members. The [2006 Regulations] require any change of policy to be published and not to give effect to any change of policy until one month after the date of publication.”

63. This last paragraph was intended to clarify the fact that the Discretion Policy 2019 requires there to be a sound business case to warrant a discretionary payment.

Chronology of events

64. Returning to the events the subject of this claim, preparatory steps were being taken in advance of the transition of employees from various local authorities to the respondent on the TUPE transfer taking effect on 1 April 2023. In the 18 months prior to the transfer Ms Wren was working closely with HR officers in the other councils whose employees were transferring to the new unitary authority, and gathering information about their terms and conditions of employment. It was her role to understand what was being transferred. She looked at the available written information to ascertain contractual entitlements. In this context, Ms Wren was engaged in email correspondence from September 2022 with officers at HDC about redundancy payments, which are dealt with below.

65. In anticipation of the TUPE transfer, the Chief Executive of HDC wrote to employees, including the claimant, on 30 September 2022 with some preliminary information. The letter indicated that there was a lack of clarity regarding the contractual status of employment and HR policies in the District and Borough Councils, such that the existing North Yorkshire County Council policies would be transferred to the new authority. The letter added that “pay policies and detailed pay elements” would be protected under TUPE and would transfer to the new authority. It attached a document headed “Summary of Protected Terms for Hambleton”. This identified a “Reorganisation and Redundancy Policy” and stated:

“Calculation of redundancy payment:

Weekly pay calc.	actual pay
Weekly multiplier	1 week under 22, 2 weeks 22-40 and 3 weeks 41+
Max weeks	104”

66. Particular arrangements were in motion in late 2022 for HDC’s Chief Executive and Chief Officers, as members of the senior management team. There was a concern that these officers should be given an inducement to remain in post pending the TUPE transfer, in order to maintain continuity of leadership and service provision. All those officers had the right to transfer their employment to the respondent but none wished to do so. Negotiations therefore took place with this senior team, with a view to entering into settlement agreements.
67. A detailed report dated 22 November 2022 was presented to Cabinet by Councillor Robson, Leader of the the council, in which he set out the proposals and rationale

behind them. Its purpose was to seek authorisation to enter into settlement agreements with those Chief Officers who did not wish to transfer to the new unitary authority in April 2023. This was to ensure the continuing management of HDC's business pending the transfer, amid the uncertainty about whether those officers might leave before the transfer date. In return for their commitment to remain employed until 31 March 2023, at which point they would waive their right to transfer their employment under TUPE, the Chief Officers in question would receive severance packages.

68. Councillor Robson's report noted that:

"All the Chief Officers are covered by the TUPE legislation and therefore can transfer to the new Council on 1 April 2023 on their current terms and conditions that include redundancy multipliers and pension strain arrangements".

69. Elsewhere the report says that the Chief Officers had:

"... made it clear that they do not wish to press for severance arrangements which would appear to be unreasonable in the circumstances, indeed none of the four officers has sought to press for enhanced termination payments under the Hambleton District Council Restructuring and Redundancy Policy which would be the basis of any settlement terms post transfer to the new council."

70. The report includes comments from an independent legal adviser. It states that:

"The Council is entitled to consider the basis of compensation in these circumstances, where the employment of an officer is to be terminated by reason of the interests of efficiency, as being based on the formula for redundancy. The Redundancy Policy provides that an enhanced redundancy payment under Regulation 5 of the Compensation Regulations can be made, based on actual weekly pay (rather than the capped statutory formula) and, depending on age, an employee could be entitled to three weeks' pay for each full year of service. [...] We are advised that the negotiated basis of settlement agreement financial measures is that none of the four officers will pursue entitlement to the sum available for compensation under the policy [...] and that they will waive any such entitlement as part of the settlement terms."

71. These proposals were discussed and approved by Cabinet.

72. At around this time, the redundancy package offered to the HDC Chief Executive was the subject of some publicity in the local press. In the Northern Echo Councillor Robson was quoted as saying: "We wouldn't be treating the Chief Executive any differently to what we would deal with any member of staff within this authority", referring to the existence of policies to ensure fair treatment of staff. In the Darlington & Stockton Times he was quoted as saying the redundancy package was "not a single penny more than we are contractually obliged to do to the position of Chief Executive".

73. These statements were repeated through the claimant's evidence, supported by an email from Councillor Robson to her dated 10 December 2024, though he did not himself give evidence to the Tribunal.
74. The email exchanges in which Ms Wren was involved covered the period between September 2022 and January 2023. She had looked at the written information relating to employees of various councils, including HDC's Discretion Policy 2019. She felt that the use of the word "discretion" was ambiguous. Approaches were made to Lynne Halls, Head of HR at HDC, to clarify the position.
75. In an email dated 30 September 2022 Ms Wren asked Ms Halls for clarification of some aspects of the pay arrangements at HDC in anticipation of sharing information with employees and the union. Her email ended as follows:
- "Specifically I'm not sure how I missed the super generous redundancy arrangements at Hambleton (104 weeks!!) – is that because they are discretionary rather than an automatic entitlement?"
76. The reply from Ms Halls said:
- "The redundancy arrangements are a discretion and are in line with the Discretions policy – I think it's page 13, see attached."
77. Ms Wren wrote back thanking Ms Halls for the information and saying she had in fact managed to find it herself since her previous message.
78. Further emails were exchanged in January 2023 between Ms Wren and Ms Halls, starting with an email dated 16 January following up a conversation from earlier that day. Ms Halls provided an illustrative example of the redundancy calculations which would apply to a hypothetical employee ("Bob"). She demonstrated the more generous calculations under the HDC policy and explained that "As the attached policy says – see extract below – this is our discretion and the discretion comes from the LGPS Discretions Policy". She added:
- "However, in line with the [2006 Regulations] the council has the authority to make additional severance payments. This includes the ability to pay an enhanced severance payment up to 104 weeks pay [...] In addition, the council can calculate redundancy payments on an employee's actual weekly pay. Consequently, the council operates a more generous redundancy scheme than that set out in the Employment Rights Act. In 99.99% of circumstances we would follow the [HDC formula], but we could make an additional payment up to the total of 104 weeks".
79. Other officers were copied in to this email. On 19 January Colin Winfield, Business & Transformation Manager at HDC, replied by reference to the hypothetical employee, saying:
- "What I understand from your example below is that as a basic entitlement, no discretionary decisions required, Bob under HDC T&C's stands to receive twice as much as he would on NYC T&C's".

80. In her reply of the same day, Ms Halls confirmed that this was correct. She added: "Almost park up the 104 weeks as that is an extreme exception".
81. The next email in the chain came from Ms Wren on 19 January, sent to the same recipients. She said:
- "Sorry all I have to disagree. I was confused with what you were saying Lynne when we met as it was at odds with what I had previously researched and understood, so I have gone back to the source documents you shared [...]"
82. Ms Wren went on to explain her understanding of the Discretions Policy 2019, by which actual salary would be used under Regulation 5, and
- "... under Regulation 6 which permits lump sum compensation of up to 104 weeks' pay in cases of redundancy [...] the stated policy is HDC will reserve the right to apply this award where there is a sound business case for doing so. So no automatic entitlement to the weeks accrual that are set out in the redundancy policy, just a discretionary option where there is a sound business case to do so.
- I've also discussed this with Unison who are of the view (my paraphrase of the discussion) that anyone who remains on Hambleton terms and conditions will be able to seek to make the argument that there is a sound business case, but that is as far as the discretion allows."
83. In her reply on 30 January, Ms Halls conceded the point and sent some proposed wording for the FAQs to be provided to employees. This included reference to there being "no automatic right to have an enhanced redundancy payment" and said that if this were paid it would be by reference to actual weekly pay and the maximum payment would be 30 weeks' pay. Ms Wren agreed that this stated the position correctly.
84. It was in March 2024 that the respondent carried out the restructuring exercise which led to the claimant's position becoming redundant. She received a statutory redundancy payment and all her express contractual entitlements on termination. During the process (about which the claimant had no complaint other than the failure to pay an enhanced redundancy payment), the claimant was familiar with the Retirement and Redundancy Policy but the Discretion Policy 2019 was not made available to her then. At this hearing the claimant said that the right hand column in Annex 5 was dealing with the pension scheme under the Retirement Policy and Procedure, and is not what she understood to be the respondent's redundancy policy. It was not something she was aware of during her employment and was not referred to during the redundancy process.
85. The claimant raised an issue about the non-payment of the enhanced redundancy pay and this was referred to the respondent's Management Board which discussed the matter on 16 July. The minutes record the following:

“Information provided by Assistant Chief Executive for HR and Business Support describe the interpretation of the [Restructure and Redundancy] policy alongside the discretion policy in which it says that the discretion can be applied where there is a sound business case.”

86. The Management Board noted that they had given the matter careful consideration and concluded that it was a discretionary decision and there was no sound business case to support the additional enhancement. The minutes noted that “discretionary payments have not been paid to date on any redundancy calculation from Hambleton”. It was Ms Wren’s understanding that it was unlikely there would ever be circumstances amounting to sound business reasons to award the additional weeks. On 18 July the claimant was advised of the Management Board decision.
87. The claimant also raised a grievance about the issue. This was investigated by Mr Gareth Bentley, the respondent’s Head of Licensing. He referred in his report to the enhanced rate being under HDC’s Retirement and Redundancy Policy. He noted that the claimant relied on the enhanced rates being applied to all staff rather than being applied differently to individual cases, and that this established a custom and practice. The claimant also referred him to the Restructure and Redundancy Policy as making similar statements about the enhanced formula, highlighting the phrase:

“Consequently, the council operates a more generous redundancy scheme than that set out in the Employment Rights Act.”

88. Mr Bentley spoke to colleagues in Business Support and HR (not including Lynne Halls or Emily Wren). He reviewed a number of documents including the Discretion Policy 2019 and Ms Wren’s note on “practical interpretation” dated June 2024.
89. Mr Bentley’s reasoning was based on his understanding of which policy applied at the time of the TUPE transfer, though he noted that all policies dealt with the same discretion being determined under the 2006 Regulations. He concluded that paragraphs 19.3 to 19.5 of the Restructure and Redundancy Policy was the most recently approved policy and in place at the time of the transfer on 1 April 2023. He noted the references for the need for a sound business case in the Discretion Policy 2019 but concluded that the section dealing with redundancy payments in that document was superseded entirely by the Restructure and Redundancy Policy in 2022. He replicated the table setting out the HDC formula for redundancy payments and noted that there was no business case test referenced in that policy. He concluded:

“That there is no discretion in deciding whether to apply this policy. The word ‘discretionary’ when used [in] this policy only applies to the discretion to adopt a policy. It does not infer any ability to apply discretion to an individual payment.”

90. Having concluded his investigation in the claimant’s favour, Mr Bentley delivered a report dated 23 July 2024 with a recommendation that she should receive the enhanced payment. The respondent, however, rejected his conclusions and

recommendation (as it was entitled to do), taking the view that a sound business case had to be established.

91. Those were the events that led to the present claim being submitted to the Tribunal. In other evidence produced by the parties, the Tribunal was given further information obtained after these events in preparation for the hearing. This dealt with the question of how many other redundancies HDC had carried out, and how the question of enhanced payments was handled.
92. The claimant was unable to give a figure for how many people were made redundant at HDC, though she was aware of one redundancy which happened in around 2012. She relied on the respondent's replies to Freedom of Information requests which revealed that:
 - a. One person was made redundant by HDC in the 7 years prior to the TUPE transfer, and that person received an enhanced redundancy payment;
 - b. Four others (three Chief Officers and the Chief Executive) all received payments "based on the HDC enhanced scheme or better", though these were payments "under settlement agreements/exit packages and not redundancies".
93. The claimant gave evidence about her personal involvement in other redundancy situations which arose in her time as a manager at HDC. She believes she would have looked at the redundancy policy on such occasions. She found the later version (the Restructuring and Redundancy Policy) easier to read, and it was accessible on the intranet. The claimant also relied on advice from HR, who provided her with a sample spreadsheet to help calculate financial entitlements. This was automatically populated with a formula enabling her to calculate both the statutory redundancy payments and the amount payable under HDC's policy. No guidance was provided as to how or when the enhanced rates would be applied.
94. The claimant dealt with a potential redundancy situation affecting the employees in Waste Services whom she managed. This arose as a result of a restructuring exercise, but did not lead to anyone being made redundant due to successful redeployments. On another occasion the claimant used the sample spreadsheet as part of the redundancy consultation with employees in the Committee Services team, so she could tell them what their entitlements would be if they were made redundant.
95. The claimant asserted that this spreadsheet was applied on every occasion where it became relevant over a 13 year period, though in practice those occasions were very few. The claimant was unable to be more specific, but believed that no employee was ever made redundant without the enhanced payment being made. In saying this, she was relying in part on the above information gleaned from the FOI requests. She also pointed to the fact that there was never any discussion among the group of managers to which she belonged, to the effect that anyone would be paid anything other than HDC's enhanced rate of redundancy payments. Had that arisen, it would have been discussed.

96. On 21 May 2024 the claimant had prepared a written note submitted as part of her grievance investigation. In this she referred to the respondent's staff consultation document with FAQs about redundancy payments, quoting the following passage:

“Redundancy calculations will be based on your current terms and conditions. Please note though that previous Hambleton enhanced redundancy terms were discretionary and therefore the statutory formula for redundancy payments will be used for any ex-Hambleton staff.”

97. The claimant's note continued:

“All of the other six district councils had policies for enhanced redundancy payments – above the statutory minimum.

- All base payments on actual salaries
- Many use enhanced multipliers”

98. The above was the extent of the evidence available on the subject of how other redundancies at HDC had been handled.

Submissions for claimant

99. The claimant's essential position was that, while the 2006 Regulations gave local authorities discretion to make enhanced redundancy payments, they did not state that the arrangements, once adopted, should be applied with any discretion in individual cases. The only time when discretion was exercised was in the decision whether to adopt the policy at all.

100. Mr Rudd submitted that the claimant's entitlement to an enhanced redundancy payment was incorporated into her contract of employment by custom and practice over many years, but especially from 15 July 2009 when it was set out in HDC's Retirement and Redundancy Policy. He referred to a number of authorities including Park Cakes and the cases of Quinn and Albion Automotive referred to in it. He set out the factors in the latter case, which are to be seen only as guidance and not to be adhered to too strictly. He referred also to Allen v TRW Systems Ltd [2013] IRLR 699, in which the EAT held that:

“Tribunals should scrutinise with care arguments by employers that payments which were intended to be part of an employee's remuneration package, once promised and communicated, were merely matters of policy and discretion”.

101. On the facts, Mr Rudd submitted that there was clear evidence of the custom and practice applied at HDC. He said that all HDC staff, unless they left pursuant to a settlement agreement, were paid at the enhanced redundancy rate from at least 2009 until the TUPE transfer in 2023.
102. He submitted that the statement that the policy “confers no contractual rights” was flawed because it appears in Annex 5 and this relates to the LGPS pension fund, not to enhanced redundancy payments. He submitted that the Discretion Policy 2009 (to which Annex 5 relates) is in mandatory terms, quoting the text which says

a multiplier “will be applied to all payments, doubling the statutory formula in every case”.

103. Referring to the Restructuring and Redundancy Policy, Mr Rudd pointed to the “HDC formula” for redundancy payments, which is not expressed as discretionary, as evidence of an established custom and practice. Dealing with paragraph 19.3 of that document, he said this referred to the 2006 Regulations and relates to HDC having exercised its discretion in relation to the formula it used to calculate redundancy pay.
104. As for the Discretion Policy 2019, Mr Rudd again submitted that this relates to the LGPS pension fund and not to enhanced redundancy payments. He highlighted the inclusion of the word “mandatory” under the heading “Key” in the table and said the need for a sound business case referred to the exercising of the discretion at the time of adopting or reviewing the policy.
105. Mr Rudd addressed a number of other documents in the evidence. He drew attention to Ms Halls’ understanding as expressed in the email exchanges with Ms Wren in advance of the TUPE transfer, to the effect that she understood that 99.99% of cases would receive an enhanced payment. He fairly acknowledged that she had a change of view when Ms Wren disagreed with her interpretation.
106. The only minute produced by the respondent in support of it exercising its discretion was dated 16 July 2024 and post-dated the claimant's last day at work. By contrast, the claimant provided a spreadsheet used when she carried out a redundancy exercise, which automatically calculated the enhanced redundancy payment and not the statutory one. The cabinet report dated 22 November 2022 relating to settlement agreements with Chief Officers and members of the senior team made clear that their employment would transfer to the respondent on their current terms and conditions that “include redundancy multipliers”. Elsewhere the report said these officers would not pursue an “entitlement” to the sum available under the redundancy policy.
107. Newspaper articles show that Councillor Robson, the former Leader of HDC, considered the enhanced payments to be a contractual entitlement. The Chief Executive’s letter of 30 September 2022 also said that pay would be protected on the TUPE transfer, identifying the HDC formula.

Submissions for respondent

108. For the respondent, Miss May directed the Tribunal to the 2006 Regulations permitting local authority employers to make redundancy payments at enhanced rates. She submitted, correctly, that the claimant bore the burden of showing that she was entitled as a matter of contract to the enhanced payment. The only route available to the claimant on the facts of this case was to assert an implied term based on custom and practice. Like Mr Rudd, she referred to the guidance in Park Cakes and Quinn.

109. Miss May submitted that the claimant was one of only 4 former HDC employees made redundant after April 2023, and the others were also paid only the statutory payment.
110. She referred to Annex 5 which includes the words: “The policies confer no contractual rights”. This clear express statement cannot be overridden by custom and practice. Furthermore, the policy has not been applied sufficiently regularly or consistently to create a custom and practice. Between 31 March 2016 and 1 April 2023 only one employee was made redundant, and that person received an enhanced termination payment. Payments made to other senior individuals were not redundancy payments but made under settlement agreements.
111. Miss May submitted that the only policy capable of being made under Regulation 7 of the 2006 Regulations is Annex 5 to the Discretion Policy 2009. It expressly states that it is made under these Regulations, and that a compensatory payment is “subject to agreement on each case”. The updated Discretion Policy 2019 expressly states that any payment of the enhanced amount is subject to a sound business case. The other policies the claimant refers to do not purport to be statements of the policies that are applied in the exercise of the discretionary power under Regulations 5 and 6.
112. The HDC formula set out in the more recent Restructure and Redundancy Policy dated November 2022 should be interpreted to mean that this calculation will be applied only when the discretion is exercised. Otherwise, the reference to “discretionary” would be redundant.

Conclusions

113. This case revolved around the single issue of whether the claimant had the benefit of a contractual entitlement to an enhanced redundancy payment, on the grounds that such a term had been implied into her contract by custom and practice. The core facts were not in dispute, though certainly the parties had quite different interpretations of both the policy documents and the import to be attached to statements made contemporaneously to these events.
114. The claimant submitted that the only discretionary feature of the HDC policies was whether or not to adopt them under the 2006 Regulations. Once adopted and published in accordance with Regulation 7 (as was the case with the Retirement and Redundancy Policy), no case-by-case decision was needed because the HDC formula was to be applied in every case. That formula was applied in the very few cases where other HDC employees left their employment on redundancy or with severance packages. The claimant did not seek to argue that the respondent, by denying her the enhanced redundancy payment, had exercised a discretion in a capricious or arbitrary manner. The only question was whether the HDC formula was an implied term of her contract by virtue of custom and practice.
115. It is inevitably necessary to reach a decision based on the particular facts of the case as presented by the parties. Indeed, the Court of Appeal in Park Cakes placed emphasis on the need to consider the relevant factors in light of all the circumstances.

116. The facts in evidence in the older authorities showed different approaches taken by the employers. In Quinn it was shown that enhanced redundancy terms had been applied on four occasions over a 7 year period, and each time this was subject to a management decision being made. In Duke the EAT referred to the question whether the employer's policy had been drawn to the attention of employees or followed without exception over a substantial period of time. Albion Automotive concerned a compelling set of facts whereby redundancy terms had been negotiated and agreed with the trade union, and had been applied on six occasions over a 4 year period. The numbers of employees made redundant (in the hundreds) was significant, as was the fact that the payments had been made automatically. The communications made by the employer had been consistent with the payments being an entitlement. For those reasons, the enhanced redundancy payments were held to be legally enforceable.
117. Turning to the facts in the present case, I find that the Retirement and Redundancy Policy was made under the 2006 Regulations and this gave HDC the power to enhance redundancy payments in one or both of two ways: by disapplying the statutory cap on a week's pay, and by considering making an award of "additional" compensation in its discretion. The exercise of the power under Regulation 5 was an undisputed feature of this case, as it was applied automatically, but the ability to enhance the multiplier on the weeks of service under Regulation 6 required careful analysis.
118. The Retirement and Redundancy Policy was the vehicle through which three other policy documents were created: the Redeployment and Redundancy policy, the Discretion Policy 2009 and Annex 5.
119. The Retirement and Redundancy Policy does not itself contain any specific terms relating to the issue. These are found in the Redeployment and Redundancy Policy, which is worded in terms that on their face could be construed as supportive of the claimant's argument. It says that a multiplier "will be applied to all payments, doubling the statutory formula in every case". Nevertheless, immediately below these words is the heading "Additional Discretionary Compensation" and a reference to Annex 5. This part of the policy therefore appears contradictory. If the statutory cap on the number of years' service "will not be applied", subject to an upper limit of "104 weeks augmentation", then the question arises as to why any compensation should be described as "additional" or "discretionary" at all. Those words would be meaningless if what precedes them was intended to be a binding contractual commitment.
120. The Discretion Policy 2009 sits alongside the Redeployment and Redundancy Policy, both within the umbrella of the Retirement and Redundancy Policy. It makes clear that it is to be read with Annex 5. In her evidence the claimant agreed that the Discretion Policy 2009 and Annex 5 set out the respondent's policy on the exercise of discretions. She did, however, dispute a point of detail in respect of the information in the right hand column of the table in Annex 5, saying that this was not relevant because it deals with pensions. Ms Wren disagreed with that interpretation and said that this entry showed that the council had two options: to

pay a cash lump sum or to make a payment converted into the pension. I agree with that view.

121. The terms of the Discretion Policy 2009 are at odds with the notion of a contractual entitlement, not least because it states expressly that the policies do not confer contractual rights. The introductory notes make clear that the policy is dealing with “employer discretions” and that “employers have to decide how they will operate those discretions”. Although the context also covers the LGPS pension scheme, it includes “discretionary payments on redundancy/efficiency departures” which are then covered in more detail in Annex 5. The document describes itself as representing “clear guidance on the exercise of any particular discretion”. Guidance is not consistent with the need for certainty that a contractual term requires in order to be enforceable.
122. Like the Discretion Policy 2009, Annex 5 expressly states that it does not confer contractual rights and that it amounts to guidance. The table in Annex 5 says that “HDC uses actual salary in the calculation of redundancy payment as opposed to the statutory maximum”. This falls under the heading “Power to increase statutory redundancy payments”. A separate heading follows: “Discretionary compensation for redundancy”. This is consistent with a different approach being taken under Regulation 6. Whereas the power to pay actual salary under Regulation 5 was applied automatically, including in the claimant’s case, the approach under Regulation 6 is different. This is evident from the terms under this second heading, which say that the employer “may” pay compensation not exceeding 104 weeks’ pay. It goes on to say that the council has determined it “will” make compensatory awards (or award augmentation of pensionable service), but that statement is qualified by the express words that this will be “subject to agreement on each case”. Decisions would be made by senior management or members as appropriate.
123. The later Discretion Policy 2019 uses the same language of guidance and the exercise of discretions. Again, it states expressly that it does not confer contractual rights. The note below the Chief Executive’s signature refers to the application of these discretions as being “in accordance with the Officers Delegation Scheme with advice from the relevant Director – and Chief Executive – who is accountable for the proper and consistent application of this policy on behalf of HDC”. This suggests that any discretion will be subject to a decision-making process, and furthermore that steps will be taken to ensure consistency. There would be no need to consider consistency, if the discretions were automatically applied.
124. It is in the Discretion Policy 2019 that the express requirement for there to be a sound business case is introduced. This document was written with the intention of making the existing position clearer. As before, the policy states that “HDC will base redundancy payments on actual weeks’ pay”, whereas the policy under Regulation 6 is put in terms that “HDC will reserve the right to apply this award where there is a sound business case for doing so”. The different approach under the two regulations is therefore maintained.
125. The final policy document is the Restructuring and Redundancy Policy dated November 2022. It was in existence at the time of the transfer of the claimant’s

employment to the respondent. However, whereas Mr Bentley concluded that this most recent of the policies was the only one that applied at that time, the others having been superseded, this interpretation was legally incorrect. There was no evidence before him or this Tribunal to suggest that the earlier policies ceased to apply, and indeed the claimant did not seek to make that argument.

126. The Restructuring and Redundancy Policy was written by Ms Halls, who was in a good position to understand HDC's policy and intentions. Like the earlier documents, it uses the terminology of "additional" payments. Referring to the 2006 Regulations, it notes that the council "has the authority" to make additional severance payments and this includes "the ability" to pay an enhanced severance payment. There is no suggestion that this ability or authority amounts to an obligation to pay. The table in this document shows the HDC "discretionary formula" alongside the statutory one. It does not communicate any intention to apply the former in every case.
127. The same document contains a note relating to Chief Officers remaining in service with HTD up to its abolition. In that context it says that the council will "consider compensation" under Regulation 6. The need for consideration is at odds with the suggestion that a legal obligation existed. The note reflects the circumstances in which authorisation was sought to approve severance packages paid through settlement agreements. The evidence produced to the Tribunal about these terms was incomplete, but it did indicate (through Councillor Robson's report) that the Chief Executive and Chief Officers would not press for payments under the HDC enhanced formula. Nevertheless, had payments been made to them on that basis, it would not be difficult to see the sound business case underpinning them.
128. The fact that the Restructuring and Redundancy Policy was authored by Ms Halls has to be taken into account when evaluating the views she expressed in her email exchanges with Ms Wren. Ms Wren's interpretation is that there was a discrepancy between the Redeployment and Redundancy Policy and the Discretion Policy 2019, which is why further clarification was needed. I agree that there is an appearance of a contradiction between the Redeployment and Redundancy Policy and all the other policy documents. The former is the only document which comes close to suggesting that the discretion will be applied in every case. Every other policy document contains clear terms which support the opposite interpretation.
129. One of the difficulties in this case, which made the Tribunal's task considerably more difficult, was the degree of repetition and overlap between the policy documents, with inconsistent drafting and a lack of clarity about how they related one to another. Navigating those policy documents was made no easier when the contemporaneous records such as minutes and emails (and sometimes the evidence of the witnesses at this hearing), used the blanket term "redundancy policy" without distinction.
130. Having examined the express terms of the various policies in some detail, I also considered the other evidence about contemporaneous events and the limited evidence about the handling of other redundancy situations at HDC.

131. The exchanges of emails between Ms Wren and Ms Halls in the period leading up to the TUPE transfer showed two interpretations of the policy. The law requires an objective analysis of the employer's conduct and whether it conveyed to employees an intention to be legally bound by a policy statement. It was therefore necessary to examine the conduct and statements of the parties by reference to HDC rather than the respondent. The the former was the authority responsible for the introduction of the policies and the respondent simply inherited that position. I therefore considered whether Ms Wren's stance in the email exchanges, and generally, might have been influenced (in good faith) by how she felt the policies ought to be interpreted. She was clearly surprised at the generosity of the HDC enhanced formula.
132. That said, my conclusion is that Ms Wren did correctly describe the discretionary nature of the policy. Even Ms Halls in her own words, said in her initial email that "redundancy arrangements are a discretion". She talked in terms of HDC having "authority to make additional severance payments". In other words, it had the power to make additional payments but there was no suggestion in the language she used of any obligation to do so. Ms Halls expressed the view that "in 99.99% of circumstances we would follow the [HDC formula]", then said they "could" make an additional payment up to 104 weeks. While that is a strong indication that Ms Halls, as Head of HR, had a high expectation of the discretion being exercised, this is not expressed in terms of an legal obligation. If the authority had the power not to make such a payment, albeit in a tiny minority of cases, then that is at odds with the idea of a contractually binding obligation.
133. A further reference in the emails relates to Ms Wren being in discussion with Unison. She records their view that former HDC employees could seek to make an argument for an enhanced redundancy payment. This is consistent with the union taking the view that the policy survived the TUPE transfer in such a way that employees could invoke the right to have the discretion considered. The evidence about the union's viewpoint was unchallenged and I note that no union official gave evidence to this hearing about past custom and practice. I find that this interpretation also aligns with the Chief Executive's letter of 30 September 2022 where he referred to pay policies being protected. That letter can easily be read as meaning that former HDC employees would still have access to the policies and thereby would still have access to the right to be considered for a discretionary payment. The Chief Executive's words in that letter cannot in my view be elevated to the level of showing an intention to create a legal obligation.
134. Other evidence relied on by the claimant was unpersuasive. For example, when making comments to the local press about the Chief Executive's severance package, Councillor Robson may well have understood that there was at least a high expectation of the HDC formula being applied, but that understanding was necessarily legally incorrect and not capable of evidencing a binding legal obligation. Councillor Robson's report to Cabinet in November 2022 is a more reliable source for understanding HDC's position. It shows two matters of significance: the fact that the Chief Executive and Chief Officers were not pressing for enhanced payments; and that even if they had done so, the circumstances would clearly warrant a sound business reason for exercising the discretion.

135. The contribution of the independent legal advisor to this report is also relevant. It uses language indicating that any compensation is something to be “considered”, in circumstances where the employment of an officer is to be terminated by reason of the interests of efficiency, and based on the formula for redundancy. Referring to Regulation 6 compensation, it says that an employee “could” be entitled to three weeks’ pay for each full year of service.
136. As for other redundancies, I do not doubt that the claimant genuinely understood from her few dealings with potential redundancies that there was an expectation that all staff would receive enhanced redundancy payments. The sample spreadsheet supports that argument. However, the claimant was never in the position of implementing a redundancy and was only aware of one person being made redundant by HDC in her time there. It is impossible to say whether the council would have adopted the HDC formula shown on the spreadsheet, or whether it would have limited the payments to the statutory amount, or whether it would have uplifted the calculation of a week's pay in accordance with regulation 5 but not applied any enhancement under regulation 6. What we do know is that these potential redundancies did not lead to any such conclusion.
137. In those circumstances it cannot be said that any custom or practice was created. The claimant bears the burden of proof and her position is not supported by the evidence. No other witnesses gave evidence to support the claimant's contention, such as a union officer, Ms Halls or any other former manager from HDC.
138. My conclusion is that the right that existed was the right to have the discretion exercised, and not a right to have it exercised automatically in an employee's favour or as a matter of contractual entitlement on the occasion of every redundancy. The claimant's high level of expectation of the discretion being exercised is not enough to imply a term into her contract.
139. Having carried out a careful analysis of the policy documents and taking into account the surrounding circumstances, my conclusion can be summarised as follows. HDC adopted a policy under the 2006 Regulations and published it in accordance with Regulation 7. That was the Retirement and Redundancy Policy which included also the Redeployment and Redundancy Policy and Annex 5. The policy applied to all members of staff. Every employee at HDC therefore had the benefit of the policy being considered in each case, and a right to have a discretion exercised. The uplift to a week's pay under Regulation 5 is consistently expressed as applying to all employees without exception, and the evidence shows it was in fact applied automatically. The position is different under Regulation 6, which deals explicitly with “additional discretionary compensation”. That compensation “may” be paid subject to agreement in each case, and subject to a sound business case.
140. Applying the relevant factors from the authorities quoted above, it is clear that the Retirement and Redundancy Policy with its related policies was made available to all employees through the formal route of presenting it to full Council and publishing it on the council's website. As for the terms of those documents, they are worded at times ambiguously but overall in language which expressly conveys the exercise of a discretion, not an entitlement. The evidence showed some

awareness of an expectation, but there was no evidence that the employer created a 'widespread knowledge and understanding' on the part of employees that they were legally entitled to the enhanced benefits (per Park Cakes).

141. Even if there were such an expectation, and enhanced payments were made on the few occasions when termination payments were made, this would not be enough to overcome the express language of “additional discretionary compensation” and the statements that the policies conferred no contractual rights. It cannot be said on the evidence in this case that the HDC formula was applied without exception for a substantial period. Only one redundancy took place in the 7 years before the TUPE transfer. The Chief Officers’ positions cannot be compared, for the reasons stated above. Even if they were taken into account, the evidence shows clearly that the award of enhanced termination payments was subject to a formal decision-making process and not treated as an automatic entitlement. A business case was made and was accepted.
142. Finally there is the question of equivocality. Applying this part of the Park Cakes guidance, it is clear in this case that the claimant has not met the burden of establishing that a practice became contractual, for all the reasons set out above. She has not been able to discharge that burden in circumstances where the employer's practice, viewed objectively, is equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation.
143. Accordingly, the claim fails.

SE Langridge
Employment Judge Langridge

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 9 May 2025**

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

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Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any

oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>