Appeal No. UKEAT/0083/12/ZT

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 28 June 2012
Judgment handed down on 17 January 2013

Before

HIS HONOUR JUDGE DAVID RICHARDSON

DR K MOHANTY JP

MR T STANWORTH

MR K ALLEN AND OTHERS APPELLANTS

TRW SYSTEMS LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2013

APPEARANCES

For the Appellants	MR MICHAEL FORD (of Counsel) Instructed by: Thompsons Solicitors The St Nicholas Building St Nicholas Street Newcastle-upon-Tyne Northumberland NE1 1TH
For the Respondent	MR ANDREW BURNS (of Counsel) Instructed by: Pinsent Masons LLP 3 Colmore Circus Birmingham B4 6BH

SUMMARY

CONTRACT OF EMPLOYMENT – Incorporation into contract

Redundancy policy containing provision for enhanced redundancy payments – formally agreed with works Advisory Council – promise added to Employee Handbook to implement redundancy policy in the event of redundancies – subsequent promises to do so in correspondence.

Held: Tribunal erred in law in failing to consider whether the express promise in the Employee Handbook was contractual in nature; and failed to address the express promise in the Employee Handbook and subsequent promises in determining whether the enhanced redundancy payments had been incorporated in the contract having regard to the criteria set out in **Albion Automotive Limited v Walker** [2002] EWCA Civ 94.

HIS HONOUR JUDGE DAVID RICHARDSON

1. Some years ago it was common for a large employer to have a redundancy policy which made provision for employees to receive enhanced payments over and above statutory requirements. In changed conditions employers have been less willing to countenance such payments; and there has been a steady flow of litigation brought by employees seeking to enforce the entitlement to an enhanced payment as a contractual term. This is another case concerning such a policy.

2. By a judgment dated 26 October 2011 Employment Judge Garside, sitting alone in the Employment Tribunal at Newcastle upon Tyne, found against Mr Allen and others ("the Claimants") in a claim against TRW Systems Limited ("the Respondent") seeking to establish that enhanced redundancy terms in a redundancy policy were contractual. Against that judgment they appeal.

3. The principal issue on the appeal is whether the enhanced terms in the policy were contractual at all. The Employment Judge, applying criteria set out in **Albion Automotive Limited v Walker** [2002] EWCA Civ 94, held that they were not contractual. The Claimants challenge this conclusion.

4. There is a subsidiary issue as to the meaning of the policy. Did it (as the Claimants contend) provide for four elements? Or did it (as the Respondent contends) provide for only three? The Employment Judge held that it provided for three elements.

The redundancy policy

5. The policy is dated 22 January 1999, although it appears to have been signed some months later. An introductory section sets out the aims of the policy, which include the fair handling of redundancies and the minimising of hardship to employees concerned. It contains a section dealing with procedure, which sets out provisions relating to consultation, measures to avoid or minimise redundancy and selection criteria.

6. The policy concludes with a section entitled "Severance Payments". This we will set out in full.

> **"Severance Payments**
>
> **To qualify for redundancy payments an employee must have been employed by the company for not less than 2 years continuous service and work over 16 hours per week. (NB service before the age of 18 does not count).**
>
> **For each complete year of service, up to a maximum of 20, employees are entitled to:**
>
> **a) For each year of service at age 18 or over but under 22 – half a week's pay**
>
> **b) For each year of service at age 22 but under 41 – one week's pay**
>
> **c) For each year of service at age 41 but under 65 (60 for women) – one and a half week's pay.**
>
> **1. Statutory Redundancy**
>
> **As per redundancy policy.**
>
> **2. Pay in lieu of notice (4 weeks)**
>
> **The amount of one weeks pay will be an average of the preceding 12 weeks and will include overtime and shift premium.**
>
> **3. Special payment**
>
> **a) £200 per year of service.**
>
> **b) Lump sum payment £1300**
>
> **(Less than 10 years service)**
>
> **c) Lump sum payment £1500**
>
> **(More than 10 years service)**
>
> **Where an employee is within 12 months of state pensionable age, the statutory redundancy entitlement is reduced by one-twelfth for each complete month after the 64th birthday (or 59th for women)."**

The background to the policy

7. The Respondent is an international company supplying systems, modules and components to the automotive industry. The Claimants worked at its Stephenson plant in County Durham which produced engine valves. In 1999 this plant had an Advisory Council on which management and employees were represented. At that time there was no recognised trade union. There were no collective agreements as such.

8. The Tribunal made findings as to the circumstances in which the policy was agreed. There was another plant at Wednesbury at which unions were recognised. A redundancy policy had been agreed with the unions at Wednesbury; and the employees at Stephenson pressed for a policy of their own.

9. Mr Randle, then the HR manager at the Stephenson plant, was instrumental in obtaining the Wednesbury policy and adapting it. The policy which he produced was closely modelled on the Wednesbury version. With the policy from Wednesbury he obtained a form used at that plant for producing a quotation in the event of redundancy. The quotation form allowed for three calculations: statutory redundancy (for which the week's pay was the then statutory capped amount); pay in lieu of notice (not capped, but calculated by using one of two averages); and a special payment.

10. The redundancy policy which Mr Randle produced was presented to the Advisory Council. It was signed on behalf of management and the Advisory Council. It bears the date 22 January 1999, but this appears to have been backdated: the Employment Judge found that it was actually signed in June 1999.

The Statement of Main Terms and Conditions and the Employee Handbook

11. The Claimants were provided with a document entitled "Statement of Main Terms and Conditions of Employment". A sample, dated May 2007, was before the Tribunal.

12. The Statement recorded that it "sets out certain details of the terms and conditions of employment as they apply at 18 May 2007 as required by section 1 of the Employment Rights Act 1996." It is not necessary for the purposes of this judgment to set the Statement out in full. It is sufficient to say that it was quite detailed, covering not only issues which it was required to cover by section 1 of the 1996 Act, but also other matters such as data processing, confidentiality and intellectual property. At the end, above the signature of members of management, appeared the words:

> **"We confirm that the written statement set out above accurately represents the terms of the contract of employment".**

13. From time to time the Statement made reference to the Respondent's Employee Handbook (for example in respect of holidays and holiday pay); but there was no general statement that terms and conditions were to be found in the Employee Handbook.

14. Sample pages from the Employee Handbook were also before the Tribunal. The edition was the 2009 edition.

15. The Employee Handbook itself had provisions relating to a wide variety of matters. Some overlapped with the Statement. Some were rules and procedures referred to in the Statement. Some were policies of a general nature, such as a "mission statement" and a "quality statement". There are some areas where the Handbook appears to have set out

entitlements above and beyond those in the Statement: we shall return to this point in a moment.

16. On the question of redundancy the Employee Handbook provided:

> **"REDUNDANCY POLICY**
>
> **It is the policy of EC Stephenson, by careful forward planning, to ensure security of employment for its employees, as far as possible. However it is recognised that there may be changes in competitive conditions, organisational requirements and technological developments that may affect staffing needs.**
>
> **In the event of redundancies the Redundancy Policy will be implemented. A copy can be obtained from the H.R. Department."**

17. We have said that there are some points at which the Employee Handbook appears to have set out entitlements above and beyond those in the Statement. We do not have the full Handbook in our papers. The following pages were, however, included by way of illustration.

18. Page 11 of the Employee Handbook contained reference to a Health Scheme under which employees are said to be "safe in the knowledge that any cost implications of treatment may be met or at least contributed to". It was said that some benefits were available at "no cost to EC Stephenson employees or their children under 18, in full time education and living with the EC Stephenson employee". It was said that "Employees can elect to pay additional contributions for themselves or a partner".

19. Page 11 of the Employee Handbook also contained provisions for holiday which appear to go beyond those in the Statement. The Statement dealt with the first year of employment. The Handbook contained more generous holiday provision including in particular additional days of holiday for employees with longer service. It is unclear whether these were amendments to the provision which existed in 2007 and if so whether the amendment was notified to employees in any other way than by means of the Handbook.

20. Page 18 of the Employee Handbook set out in detail provisions for a "Perfect Attendance Bonus" expressed in terms of entitlement. A notional pool of money, calculated on the basis of £60 per employee, was distributable at the end of the year between those employees who had "perfect attendance" in a way carefully defined by the Handbook.

21. Page 21 of the Employee Handbook made provision for training time to be paid at single time and for trainers to receive the appropriate overtime premium.

22. Page 22 set out a detailed scheme for the re-imbursement of course fees for further education.

23. On the face of it, therefore, the Employee Handbook contained a wide variety of provisions, including those which (1) re-iterated what was in the Statement; (2) supplemented the Statement by setting out rules and procedures which it required; (3) set out additional entitlements; and (4) set out general rules and policies not of a contractual nature. We do not think it is at all unusual to find this variety of provision in an Employee Handbook. We will return to its significance later in this judgment.

The Respondent's promises

24. By 2008 there was pressure at the Stephenson plant for union recognition. In order to resist union recognition Mr Randle wrote an open letter dated 31 October 2008 to all the employees:

> **"I can now give a guarantee, endorsed by Joachim Fricke, Director of Operations, Europe and Barbra Henke, Director of Human Resources, Global that the existing redundancy policy will remain in its entirety until the end of the next pay deal in December 2010."**

25. At the same time he wrote a further letter to all employees, under the heading "wage negotiations 2009/2010", which contained the following:

> **"Management <u>intend</u> to negotiate on the following points:-**
>
> **Annual pay increase**
>
> **Company Sick Pay**
>
> **An agreement regarding short time working**
>
> **Advisory Council items for negotiation.**
>
> **What we will not be re-negotiating is the existing redundancy policy which will stay as it is until the end of the two-year pay deal in 2010."**

26. On 11 March 2009 Mr Randle wrote again:

> **"To help stop rumours that TRW intend to close Stephenson and this is why they want to renegotiate the redundancy policy so that they can close the factory "on the cheap".**
>
> **I would like to reiterate the redundancy policy negotiations will not take place until January 2011 by which time we will have started to climb out of the recession and won't need to use the policy."**

27. The Respondent decided to close the Stephenson plant in 2010. By this time the GMB Union had been recognised. Initially the redundancy policy, with three elements, was to be used. However a decision was made at the highest level that no enhanced payments at all would be made. So the policy was not honoured at all.

The implementation of the Policy

28. As we have said, when Mr Randle set up the policy, he obtained from the Wednesbury plant a pro-forma which showed that it was applied using three elements.

29. At Stephenson, however, the policy came to be applied in a different way. Four elements were paid. It was evidently thought that the section entitled "For each complete year of service" conferred an entitlement of its own. The statutory element was capped to a significant

extent because the "week's pay" is laid down by statute; but this cap was not applied to the additional element which was paid at Stephenson. The additional element was therefore very valuable.

30. The first person to be paid in this way was Mr Grozier, in March 2001. Then six volunteers were paid this way in 2008 (one of the volunteers, Mrs Collinson, was the person who calculated Mr Grozier's payment, and she asked to be paid in the same way). Then, in February 2009, there were 17 compulsory redundancies: all were paid in the same way.

31. The Respondent's case at the Tribunal hearing was that these payments originated in a mistaken interpretation of the policy. Mr Randle gave evidence to this effect. He said that later redundancies, in 2008 and 2009, were paid in the same way to ensure that redundancies went ahead and to avoid industrial problems.

32. In March 2009 Mr Randle was told by Mr Plumley, the HR Director for England, that the redundancy payments had been miscalculated. It was agreed between them that all future payments would be made in accordance with the three elements in the policy.

33. There were two voluntary redundancy exercises in 2009. In the first volunteers were paid amounts which were not calculated in accordance with the policy. In the second volunteers were paid amounts which were calculated in accordance with the three elements in the policy.

The Tribunal's reasons

34. The case for the Claimants was put in two ways before the Tribunal. Firstly it was argued that the severance payments section of the redundancy policy was an express term of the contract of each employee, being "apt for incorporation". Secondly it was argued that it was

incorporated by implication, as in **Albion Automotive Limited v Walker** [2002] EWCA Civ 946.

35. The Employment Judge dealt with the first argument in paragraphs 48-49 of his reasons. He said:

> **"48. The redundancy policy for the Stephenson plant came into being because there was some concern that, as the Stephenson plant was not unionised, difficulties could be caused if there was a redundancy situation. The redundancy policy prepared by Mr Randle was a copy, with slight adjustments as to the amounts of payment, from the Wednesbury plant, a policy that had been negotiated between the respondent and the unions which were active in that plant. The policy was put before the Advisory Council and approved and signatures were appended to the policy which for some reason was dated 22 January 1999 and not as a term of the contract of employment of any of the employees. This document was written as a policy and not as a term of the contract of employment of any of the employees. There is no suggestion in the document that it was in any way to be incorporated into the contracts of employment.**
>
> **49. There is a copy of the main terms and conditions of employment in the bundle at pages 279-285 for a Ms Bernard which she signed on 21 May 2007. The terms and conditions of employment state:-**
>
> > **"You are asked to sign the enclosed copy to confirm that you agree that it accurately reflects the terms of your contract of employment"**
>
> **The terms and conditions then go on to say that there are no collective agreements applicable to the employment. The terms and conditions do not refer to the redundancy policy. The respondent does have an employee handbook which does refer to the redundancy policy at page 305. It does not set out what the policy is but employees can, if they want to see it, obtain a copy from the HR Department. I can find no express term between individual employees and the employer that the redundancy policy is incorporated into their contracts of employment."**

36. He dealt with the second argument in paragraphs 50-51.

> **"50. I have to consider whether the policy was implied as a term of the contract of employment of the individual employees. It is helpful to go through the factors to be taken into account as set out in *Harlow* and *Albion* (paragraph 34). The policy was drawn to the attention of the Advisory Council but it was not circulated to the employees although it was available on request from the HR Department as set out in the employee handbook. The redundancy policy was not followed in 2001, 2008 and February 2009 or those that followed in March 2009 but it was, however, followed in April 2009. At most it can be said that the policy was followed on four occasions in a period of ten years. It is not entirely clear why Mr Grozier was paid a four stage element on his redundancy. However he was the only redundancy and the payment to him was not very substantial. Ms Collinson volunteered for redundancy and it appears that she made this conditional upon the redundancy policy being applied to her as it had been to Mr Grozier. It was applied to the other volunteers. Mr Randle explains in his evidence, which has not been challenged, that the application of the redundancy policy was to encourage employees to take voluntary redundancy, which were on a small scale. It is clear that the claimants were not paid automatically under the redundancy policy. Mr Randle said that he had to fight for payments to be made and that senior management had to approve the payments. On one occasion specific money was made available for a redundancy process.**
>
> **51. I cannot find any evidence of any inference that the employers intended to be contractually bound by the redundancy policy. It was made plain to the employees through the workforce meetings on 19 January and 3 March 2009 that there was no contractual obligation on the**

> **part of the respondent. The redundancy policy was adopted by agreement. The employees could not have had a reasonable expectation that payment would be made. There is throughout the bundle assurances by Mr Randle that the policy was to continue which suggests that employees did not expect that the policy would be applied if there were any redundancies. The employees needed reassuring that the policy was still in place. Obviously the terms of the policy were in a written agreement as evidence in the bundle of documents. However the terms of the redundancy policy were not consistently applied. I conclude that there was no implied term in the contracts of employment of the individual employees that the redundancy policy would be applied on every occasion, and in particular on the closure of the respondent's Stephenson plant."**

37. In view of these conclusions it was academic for the Employment Judge to decide whether the policy required payment of four or three elements. He concluded:

> **"A clear reading of the policy, although badly drafted, shows that there was three stage payment intended by that policy and not a further payment of a calculation of pay based on the statutory redundancy pay but not subject to the statutory cap on wages. I therefore find that it was the three stage payment that was applicable."**

Submissions

38. On behalf of the Claimants Mr Michael Ford made the following principal submissions.

39. Firstly, he submitted that the Tribunal erred in law in concluding that the terms as to severance payments were not express terms of the contract. He argued that the Tribunal ignored the Handbook and the Policy itself as a potential source of contractual obligation. He referred to and relied on **Carmichael v National Power** [1999] ICR 1226 per Lord Irvine at 1230H-1231B. He argued that certain provisions of the Handbook must have been intended to have contractual effect. The Tribunal failed to address the contractual status of the Handbook adequately. If it had done so, it should have found the severance provisions to have been contractual, especially since they were phrased as entitlements and – being part of the remuneration package of the employees – were "particularly apt for incorporation" (**Keeley v Fosroc International** [2006] IRLR 961 at paragraphs 37-38). He relied on **Keeley** as demonstrating that if the provisions on severance payment were apt for incorporation it was no obstacle that they appeared within a policy.

40. Secondly, he submitted that the Tribunal erred in law in concluding that there was no implied term of the contract by which employees were entitled to severance payments under the Policy. He criticised the way in which the Tribunal approached the criteria set out by the Court of Appeal in **Albion**: (1) The Tribunal made no reference to clear evidence that the Policy was drawn to the attention of all employees, not only in the Handbook but also by the letters dated 31 October 2008 and 11 March 2009. (2) The Tribunal's conclusion that the Policy was "not followed in 2001, 2008 and February 2009" was inconsistent with its own findings. (3) The Tribunal's finding that "claimants were not paid automatically" was either incorrect or unexplained. (4) The Tribunal ignored plain evidence that the Respondent intended to be contractually bound, culminating in Mr Randle's letters to all employees. (5) It was irrational to find that the employees had no reasonable expectation that enhanced payments would be made when this was expressly stated in the Policy and confirmed in correspondence. He further submitted that the Tribunal appeared to look for evidence of a subjective nature, whereas the question whether there was an intention to be contractually bound was to be objectively ascertained from what the parties said and did.

41. As to the meaning of the Policy, Mr Ford submitted that the Tribunal misconstrued its provisions as requiring the payment of only three elements. He submitted that it provided for the payment of four elements and had been understood in this way at Stephenson and also (on at least one occasion) at Wednesbury. In this latter respect he sought to rely on redundancy quotations from Wednesbury in 2006 which (while they contained three elements) were more generous than allowed for by the Wednesbury pro-forma in 1999.

42. On behalf of the Respondent Mr Andrew Burns submitted that the Tribunal correctly concluded that the Policy was not expressly incorporated. He emphasised that the Statement of

Main Terms and Conditions of Employment did not incorporate the Policy either directly or by reference. Nor did it incorporate the Handbook as such: where the Handbook was applicable, the Statement said so. In this respect the case was to be distinguished from (for example) **Harlow v Artemis International** [2008] IRLR 629. Nor could it be said that agreement by the Advisory Council meant that the Policy was incorporated: the Advisory Council did not have collective bargaining rights and the Statement said that there were no applicable collective bargaining agreements.

43. Mr Burns submitted that the Tribunal, in deciding whether the Policy was incorporated by implication, stated and applied correct legal principles derived from **Albion** and **Harlow**. The weight to be given to the various factors set out in **Albion** was a matter for the Tribunal, not giving rise to any question of law in itself.

44. As to specific points made by Mr Ford, Mr Burns submitted the following. (1) The Tribunal made sufficient findings concerning the extent to which the Policy was drawn to the attention of employees. It found that the policy was "quite widely known". There was no error of law in the Tribunal's reasoning. (2) The Tribunal was not, as Mr Ford suggested, muddled in finding that the Policy was not followed. The Tribunal was correct in this finding. (3) There was ample evidence upon which the Tribunal could conclude that payments were not made automatically. (4) The Tribunal was entitled to find "no evidence of any inference" that the employers intended to be contractually bound (paragraph 51). (5) The Tribunal was entitled to conclude that employees had no reasonable expectation that payment would be made. This is why the Respondent needed to re-assure the employees with the "guarantee" on 31 October 2008. But this was a temporary assurance, running contrary to a permanent right. If a workforce had a settled expectation that a redundancy payment was contractual and binding, its

representatives would hardly require an assurance that the benefit would be maintained for a temporary period.

45. On the question whether the Policy provided for three or four elements, Mr Burns submitted that the Policy expressly provided for a three stage payment. If there had been any doubt about the matter, the Wednesbury pro forma in 1999, which provided part of the factual matrix against which the Policy should be construed, strongly supported the Tribunal's conclusion. Subsequent documents from Wednesbury in 2006 were irrelevant to the meaning of the Policy.

Three elements or four elements?

46. On this part of the case we consider that the conclusion of the Employment Judge was plainly correct. The Policy provided for three elements: a statutory redundancy payment; pay in lieu of notice to be calculated on an average of the preceding 12 weeks, to include overtime and shift premium; and a special payment based on length of service.

47. While we agree that the Policy is not well drafted, it is to our mind plain that it was drafted to contain three elements. We cannot read the opening two paragraphs of the section entitled "Severance Payments" as in any way giving rise to a further element of payment. A separate, uncapped, redundancy payment would be an element of great significance to both employer and employee. It is impossible to read the opening paragraphs of the section as making provision for such a payment in such an indistinct manner. They are, we think, to be read as no more than a pre-amble setting out provisions of general application to the statutory redundancy scheme.

48. In our judgment this conclusion is inevitable on a true reading of the words of the Policy itself. It may be the case, as Mr Burns submitted to us, that the pro-forma sent from Wednesbury in 1999 formed part of the factual matrix within which the Policy was agreed: if so, it strongly supports what we regard as the ordinary meaning of the Policy. But we do not think recourse to the pro-forma is required in order to reach this conclusion.

49. The Tribunal found that the fourth element – the uncapped redundancy payment – was paid to an employee in March 2001 and then, the precedent having been set, to other employees in 2008 and 2009, before Mr Plumley told Mr Randle it had been miscalculated. We shall return to this matter later when we consider the question whether the severance payments within the Policy were contractual. But - whatever its relevance to that question - the payment of the fourth element on those occasions cannot in our judgment affect or alter the true meaning of the Policy which had been agreed in 1999 and expressly referred to in the Employee Handbook.

The question of incorporation

50. We turn then to the question whether the severance payments contained in the Policy had contractual status. We find this question much more difficult.

51. It was in our experience not uncommon for redundancy policies to include both statements as to the general approach to be adopted by the employer in the event of potential redundancies and (within the same document) quite specific provision as to enhanced payments which would be made to employees in the event of their redundancy.

52. This, we think, is the source of many of the difficulties which arise concerning these policies. Such policies as a whole will not have been appropriate for incorporation into a

contract of employment. The enhanced payments were not required by section 1 of the **Employment Rights Act 1996** to be in an employee's written statement of terms and conditions. Yet within the policies are stated entitlements to enhanced payments of real value to employees, likely to be well-known to them and of real practical importance, especially to long-serving employees.

53. This feature of redundancy policies gives difficulty for all concerned when economic circumstances become difficult. The employee, faced with rumours of redundancies and perhaps (as here) with an employer who has said that he will seek to "renegotiate" the redundancy policy, will seek re-assurance as to its application: and it will then be said (as Mr Burns has submitted in this case) that by seeking such re-assurance he has shown that he did not understand the policy to be contractual. The employer, with legal considerations at this stage to the fore, will say that the payments are not contractual. We think that statements made by employer and employee in their own interests during this endgame are unlikely to be helpful to a Tribunal which has to decide whether the policy had any contractual effect: for, if it had, it will have acquired this status long before the final time of dispute.

54. We think it is instructive to consider, by way of background, a Court of Appeal case in which the Employee Handbook was expressly acknowledged in the Statement of Main Terms and Conditions as a potential source of contractual obligation.

55. In **Keeley v Fosroc International** [2006] IRLR 961 the Court of Appeal was concerned with a redundancy policy which was found within the "Employee Benefits and Rights" section of an Employee Handbook. The provision for enhanced redundancy payments was a good deal less specific than that which was found in this (and many other) such policies. It stated simply that:

> **"'Those employees with two or more years' continuous service are entitled to receive an enhanced redundancy payment from the company, which is paid tax free to a limit of £30,000'. Details will be discussed during both collective and individual consultation' (my emphasis).**

56. There was, in fact, a formula for calculating such payments: it was not set out in the Handbook, but it was known to the parties and common ground for the purposes of the litigation.

57. Each employee had a statement of main terms and conditions provided pursuant to section 1 of the **Employment Rights Act 1996**. This statement made no reference to the redundancy policy; it stated, however, that it was a statement of main terms and conditions, and that other terms and conditions would be found in "company information folders".

58. Reversing the Judge, the Court of Appeal held that the enhanced redundancy provision had contractual effect. The Employee Handbook was identified as a source of contractual obligation by the statement of main terms and conditions; the specific provision was "apt for incorporation" as a term of the contract. Auld LJ said:

> **"33. Equally, here, the fact that the staff handbook was presented as a collection of 'policies' does not preclude their having contractual effect if, by their nature and language they are apt to be contractual terms, as clearly many were in the 'Employee benefits and rights' part of the handbook, incorporating in that way by reference what was not expressly referred to or detailed in the statement of employment terms.**
>
> **34. Highly relevant, in any consideration, contextual or otherwise, of an 'incorporated' provision in an employment contract, is the importance of the provision to the over-all bargain, here, the employee's remuneration package – what he undertook to work for. A provision of that sort, even if couched in terms of information or explanation, or expressed in discretionary terms, may be still be apt for construction as a term of his contract (providing it is not in conflict with other contractual provisions); see eg *Horkulak*; and cf. *Briscoe v Lubrizol* [2002] IRLR 607, per Potter LJ at paragraph 14, as he then was, and with whom on this point Ward LJ and Bodey J agreed. Provision for redundancy, notwithstanding statutory entitlement, is now a widely accepted feature of an employee's remuneration package and as such, is particularly apt for incorporation by reference, as the judge recognised in the following passage in paragraph 45 of his judgment:**
>
> > **'The payment of enhanced redundancy payments was a well-known fact of employment life in the group and, given the frequency with which redundancy exercises were conducted, clearly an important factor in particular to higher-paid and longer-serving employees.'**

> **35. Equally, if not more important, is the wording of a provision under question in an incorporated document containing contractual terms. If put in clear terms of entitlement, it may have a life of its own, not to be snubbed out by context immediate or distant in the document of which it forms part. Where the wording of the provision, read on its own, is clearly of a contractual nature and not contradicted by any other provision in the documentary material constituting the contract, context is not all."**

59. In **Keeley** the statement of main terms and conditions expressly referred to the company's information folders, which included the Handbook and therefore the policy. In this case there is no such reference to the Handbook. We therefore turn to the central question on which the Tribunal decided the case – whether the policy was incorporated as a term of the contract.

60. Where an employer and an employee agree upon a document which they intend to be the exclusive source of the terms of their contract, the court or tribunal must look exclusively to that document for its terms, the construction of which will be a matter of law: see **Carmichael v National Power** [1999] ICR 1226 at 1230H-1231B, 1233-1234.

61. There are cases, usually involving senior employees, where such a document exists. Such cases are, however, the exception rather than the rule. The statutory requirement imposed upon an employer by section 1 of the **Employment Rights Act 1996** is to provide an employee with a statement of main terms and conditions: see, in particular, section 1(4) for the matters which the statement must cover. Such a statement is not required to cover all matters of contractual entitlement; and it is not uncommon to find that other matters of contractual entitlement are dealt with by different documents, such as an Employee Handbook, or by custom and practice, or (particularly in small businesses) orally.

62. How is it to be decided whether enhanced severance terms have been incorporated in one of these ways? There is some assistance in the cases, but it must be said that it is not particularly easy to apply.

63. Before turning to cases more specifically in point, it is necessary to mention **Duke v Reliance Systems Ltd** [1982] IRLR 347, EAT, where the employer was seeking to imply a contractual normal retiring age of 60. This case, as we shall see, was one where a policy was adopted unilaterally by management. It has very little directly to do with the problem in hand, but it came to be discussed, and in part to be the foundation of reasoning in, those cases. Browne-Wilkinson J said (page 349):

> **"[T]here was no evidence that the employers' policy of retirement for women at the age of 60 had been communicated to such employees in 1978 nor was there any evidence of any universal practice to that effect. A policy adopted by management unilaterally cannot become a term of the employees' contracts on the grounds that it is an established custom and practice unless it is at least shown that the policy has been drawn to the attention of the employees or has been followed without exception for a substantial period."**

64. In **Quinn v Calder Industrial Materials** [1996] IRLR 126 the Appeal Tribunal was concerned with a claim by an employee that an enhanced redundancy scheme, enshrined in a policy of the employer, not contained in or referred to in any Employment Handbook, was a term of his contract.

65. Lord Coulsfield, giving the judgment of the Appeal Tribunal, observed that the law recognised more than one type of implied term. In a case such as **Quinn**, where the employee sought to establish that a policy had become a term of the contract by custom and practice (paragraph 6): –

> **"The question whether there is an implied term in the present case is really a different way of putting the question of what terms the parties have actually agreed. In order to answer that question, it is necessary to consider the whole circumstances of the formation of the contract**

and the parties' actings before, and, even, after, the contract, to gather what terms they had actually agreed."

66. Lord Coulsfield referred to **Duke**, noted the words "at least" in the judgment of Browne-Wilkinson J, and continued:

> **"In a case such as the present, the factors to which Browne-Wilkinson J referred are likely to be among the most important circumstances to be taken into account, but they have to be taken into account along with all the other circumstances of the case. Thus, for example, in our view, the question is not whether the period for which a policy has been followed is 'substantial' in some abstract sense, but whether, in relation to the other circumstances, it is sufficient to support the inference that that policy has achieved the status of a contractual term. Again, with regard to communication, the question seems to us to be not so much whether the policy has been made or become known directly to the employees or through intermediaries, but whether the circumstances in which it was made or has become known support the inference that the employers intended to become contractually bound by it."**

67. In **Albion Automotive Limited v Walker** [2002] EWCA Civ 94 the question was again whether a policy offering enhanced redundancy terms was contractual. On this occasion the policy had been the subject of detailed negotiation, but it was never referred to in any statement of terms and conditions or in collective agreements. The Tribunal found the policy to be contractual. The employer's appeal was dismissed by the EAT and the Court of Appeal.

68. In the Court of Appeal Peter Gibson LJ accepted a submission from counsel to the effect that the following factors were likely to be relevant in that case (see paras 15 and 18):

> **"(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."**

69. Finally, we should mention **Harlow v Artemis Corporation** [2008] IRLR 629. In that case McCombe J, at first instance in the High Court, followed and applied the criteria in **Albion**. In that case, however, as in **Keeley**, an Employee Handbook had been identified by the contract as a source of contractual obligation; and it was found that the Handbook, in its online form, contained the relevant redundancy policy.

70. Standing back for a moment from these authorities, it is important (we think) to keep in mind that the fundamental question is the one which Lord Coulsfield identified in **Quinn** – namely, whether the circumstances in which the enhanced redundancy package had been made known or had become known supported the inference that the employers intended to become contractually bound by it. It is well established that this question is to be determined not by an examination of the employer's private intentions, but by an objective examination of the circumstances.

71. In **Albion** the Court of Appeal did not seek to lay down an exhaustive list of considerations relevant to that question, still less to attribute weight to individual considerations. It seems to us that one consideration, not in the **Albion** list, which Employment Tribunals should keep firmly in mind is the consideration to which the Court of Appeal referred in **Keeley** – namely that provision for redundancy became, during the last generation, a widely accepted feature of an employee's remuneration package. 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.

72. Against this background we turn to consider the criticisms which Mr Ford has made of the Tribunal's reasoning. We keep firmly in mind the limited remit of the Appeal Tribunal. There is an appeal only on a question of law. If the Tribunal has directed itself properly in law, then the weight which it attaches to particular factors is within its remit, and does not give rise to any question of law.

73. We have seen that the Respondent, having reached an express written agreement with the Advisory Council concerning the policy, then incorporated in the Employee Handbook an express promise to implement it in the event of redundancies. The policy itself is prescriptive as to the amounts to be paid and appears to allow no room for discretion. In our judgment there is force in Mr Ford's submission that the Tribunal did not consider whether the Employee Handbook was in this respect a source of contractual obligation.

74. We cannot see, in the relevant paragraphs of the Tribunal's reasoning, any indication that it considered whether the Employee Handbook might contain contractual promises. There is a bare reference to the Handbook in paragraph 49 where the Tribunal says that it "does refer to the policy"; but the Tribunal does not set out the promise made to employees to implement the policy in the event of redundancies.

75. We have set out earlier in this judgment some respects in which it would seem likely that the Handbook contained contractual promises. As we have already observed, the provision of enhanced severance payments was not a matter required by the 1996 Act to be contained in the statement of "main" conditions: it is precisely the kind of matter which might be provided for elsewhere. As we have also already observed, because redundancy policies contain that which is apt for incorporation along with that which is not apt for incorporation, it is inherently

unlikely that they will be found in a section 1 statement. It is not surprising if such a policy is found in the Employee Handbook, as it was in **Keeley**.

76. In our judgment the Tribunal ought to have considered whether the promise to implement the policy in the event of redundancies was contractual in nature. The Tribunal seems rather to have restricted its consideration to the section 1 statement without considering whether the promise in the Employee Handbook might be contractual. In our judgment this was too narrow an approach – an error of law. The Employee Handbook was capable of being a source of contractual obligation; and the Tribunal ought to have considered it.

77. We think this unduly narrow approach has carried over into the Tribunal's consideration of the **Albion** factors. We note the Tribunal's conclusion that there was no evidence of any inference that the employers intended to be contractually bound by the redundancy policy. But this depends whether the Employee Handbook, containing its express promise to implement the policy, was capable of being a source of contractual obligation.

78. We note further the Tribunal's bald conclusion (in paragraph 51) that "the employees could not have had a reasonable expectation that payment would be made". We would respectfully ask: why not? The matter, having been agreed with the Advisory Council, had then been made the subject of an express promise in the Employee Handbook. How can an employer, having acted in this way, sensibly deny that employees could have a reasonable expectation that payment would be made in accordance with the promise? Again, we note that in paragraphs 50 and 51 the Tribunal does not refer to the express promise in the Handbook to implement the policy.

79. On the question whether the employees had a reasonable expectation that payment would be made, we cannot help noticing that the Tribunal has placed no weight upon promises, which we have set out above, confirming that the policy would "remain in its entirety" and "stay as it is" until renegotiated in 2010. As regards the particular **Albion** factor concerned, these promises in our judgment serve to confirm that employees did indeed have a reasonable expectation that payment would be made unless and until the policy was renegotiated. We cannot see any other way of reading them. They expressly confirmed the conclusion which any reasonable employee would have from reading the Employee Handbook and the redundancy policy.

80. There is one other aspect of the reasoning of the Tribunal upon which we wish to comment specifically, although it would not in itself have caused us to allow the appeal. It is the statement that the policy was "not followed in 2001, 2008 and February 2009 ...." In one sense this is correct: we agree with the Tribunal that the policy was not *correctly* followed, because it provided for three elements and the Respondent paid four. However, the **Albion** factors are not so much concerned with whether the policy was correctly followed, as with the question whether the Respondent was intending to follow it. As we understand the Respondent's case, put through Mr Randle, the Respondent was indeed intending to follow the policy, but was mistaken in its application until put right by a more senior member of management: see paragraphs 11 and 15 of the reasons. We do not understand it to have been the Respondent's case that it ever resiled from or abandoned the policy. If so then the Respondent, although not correctly applying the policy on these occasions, was intending to do so; and this would be the point which mattered from the perspective of the **Albion** factors.

81. For these reasons we have reached the conclusion that the Tribunal erred in law in its consideration of the question whether the Respondent was contractually obliged to pay the

enhanced severance terms set out in the redundancy policy. The Appeal Tribunal, however, has a limited remit. We have no power to substitute our own conclusion unless, on the facts found by the Tribunal and a true appreciation of the law, it is plain beyond argument what is the correct answer to the question in dispute. This is not such a case: the question is one of mixed fact and law which must be determined by a Tribunal. We think it should be remitted for reconsideration by a freshly constituted Tribunal.

82. The Judge regrets the time he has taken to prepare this judgment, and has written to the parties accordingly.