Neutral Citation Number: [2013] EWCA Civ 1435

Case No: A2/2013/0015

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE LANGSTAFF
UKEAT/0252/12/LA

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2013

Before :

LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE TOMLINSON
and
LORD JUSTICE UNDERHILL

- -

Between :

CSC COMPUTER SCIENCES LIMITED	**Appellant**
- and -	
McALINDEN AND OTHERS	**Respondents**

- -
- -

Simon Gorton QC (instructed by **Clyde & Co**) for the **Appellant**
Oliver Segal QC and Nicola Newbegin (instructed by **Thompsons Solicitors**) for the **Respondents**

Hearing date: 24 July 2013

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Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. This is an appeal from a decision of the Employment Appeal Tribunal (Langstaff P presiding) upholding the decision of an Employment Tribunal sitting at Manchester (Employment Judge Robertson sitting alone) which held that the Appellant had made unlawful deductions from the wages of the Claimants contrary to Part II of the Employment Rights Act 1996.

2. In the ET and the EAT the Claimants were represented by Ms Nicola Newbegin of counsel and the Appellant ("CSC") by Mr Simon Gorton QC. Before us Mr Gorton again appears for the Appellant and Mr Oliver Segal QC, leading Ms Newbegin, for the Respondents.

THE FACTS IN OUTLINE AND THE NATURE OF THE CLAIM

3. There are 23 Claimants. They were until 1 April 2000 employed by a company called IT Services Ltd ("ITS"). On that date their employment was transferred to CSC as part of a group of about 200 under the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE"). CSC was a large business with an established workforce of its own.

4. The Claimants' contracts of employment with ITS provided for annual salary reviews. The relevant clause (36.9) reads as follows:

> "*Salary progression/review*
>
> Company rates of pay will be reviewed annual by the Executive of the company in consultation with representatives of the staff (the JCC). New pay rates will normally come into effect from 1 April each year. Annual salary increases will be in the form of an award comprising a global component applicable to all employees and a selective merit award reflecting the individual jobholder's performance and skills."

5. It was, as the Employment Judge found, CSC's understanding at the time of the transfer that ITS's practice had for a considerable period been to award annual pay increases in which the "global component" took the form of an increase in line at least with the increase in RPI (calculated as an average of the increase in the first three months of the year), subject to satisfactory performance; and that that practice had acquired contractual force. I will refer to such increases as "RPI increases". In making the finding that that was CSC's understanding the Judge referred in particular to three documents, which I can summarise as follows:

   (1) An e-mail dated 21 September 2005 from a Ms Anderson, described as an HR adviser, to an ex-ITS employee, about a potential move to a "CSC contract". The e-mail notifies the employee that by signing the new contract "you would no longer receive a guaranteed RPI pay rise annually as per your current ITS contract". Mr Segal told us that all of the ex-ITS employees were in fact, at one point or another, offered the chance to go onto CSC terms and that

several were sent an e-mail in these terms. That sounds not unlikely, and Mr Gorton did not contradict him. But there is no finding to this effect by the ET, and we must proceed on the basis that there is no evidence of any other such document – though that does not preclude inferences being drawn as to how the RPI increases may have been described in other communications.

(2) An e-mail dated 29 June 2006 from Ms Anderson to an unnamed colleague referring to "the RPI global element of the pay award for people on ITS terms and conditions".

(3) A briefing document issued by CSC to managers in the Northern Region giving them guidance for the purpose of pay review discussions in mid-2008. This sets out various "questions you may be asked". One was "Does CSC apply a 'cost of living increase'?", to which the answer was (in short) no; but there was a follow-up question "Are there any exceptions to this ?". The answer given is:

> "The only exception to this is the ex-ITS group who are not on CSC terms and conditions and for whom a guaranteed minimum increase is awarded (subject to individual performance)."

Although that was an internal document, it is good evidence of CSC's contemporary understanding of the position; and of course it also reflects what managers would tell employees, at least if the question were raised.

6. On the basis of that understanding, CSC paid RPI increases (subject to some immaterial exceptions) to its "ex-ITS" employees for each year from 2001 to 2007: it did not do the same for its other employees.

7. In the 2008 pay round CSC agreed with Prospect, the trade union which it recognised for collective bargaining purposes, an increase for most of the ex-ITS employees of only 3%, which was acknowledged by both sides to be less than the increase in RPI (about 4%); and the increases paid were in line with that agreement. The confirmatory letter from CSC to Prospect said:

> "We further recognised that future pay rounds needed to more closely align to normal CSC pay arrangements and we committed to discuss further in anticipation of the 2009 pay round."

8. In 2009 RPI was in fact negative and no pay increase occurred.

9. In 2010 CSC paid most of the ex-ITS employees an increase of 3%, as against an increase in RPI of 3.9%. Again, it understood that course to have been agreed with Prospect. Unfortunately both CSC and Prospect had overlooked the fact that Prospect was not recognised in respect of the ex-ITS employees; and it is now accepted that any agreement reached between the two of them in 2008 or 2010 about those employees was of no effect.

10. Although the Claimants had not protested at receiving a below-RPI increase in 2008, when the same thing occurred in 2010 they raised a formal grievance and in due course commenced the present proceedings. Precisely how they put their claim was at first unclear but it was eventually crystallised as a claim in the alternative, either (a) that their contracts of employment with ITS, which were binding on CSC by virtue of TUPE, expressly provided for an annual increase in salary corresponding to any increase in RPI; or (b) that such an entitlement, as the Employment Judge recorded it, "is to be implied into their contracts based on the custom and practice and/or the conduct of the parties". To anticipate, the Judge found for the Claimants on alternative (b). He rejected the case based on an express term and that case has not been pursued before us.

THE LAW

11. The correct approach in cases where employees seek to rely on terms to be implied on the basis of "custom and practice and/or the conduct of the parties" was very recently reviewed by this Court in *Park Cakes Ltd v Shumba* [2013] EWCA Civ 974, [2013] IRLR 800 – see in particular paras. 26-36 (pp. 805-8); and although the term asserted in that case concerned enhanced redundancy benefits the same principles would apply in the present case. Since that decision was handed down after the argument before us we gave the parties the opportunity to submit further written submissions by reference to it. I see no point in reproducing *in extenso* here what was said in *Park Cakes*. But I would draw attention to the fact that the Court, following the lead given by Leveson LJ in *Garratt v Mirror Group Newspapers Ltd* [2011] EWCA Civ 425, [2011] ICR 880, focused less on the language of "custom and practice" and more on the essential question of what the employees will reasonably have understood from the employer's conduct and words, applying ordinary contractual principles.

THE REASONING OF THE ET AND THE EAT

12. The claims were heard by the Employment Judge over three days in August and December 2011. His Judgment and written Reasons, which are full and well-structured, were sent to the parties on 3 February 2012. They can be summarised as follows:

    (1) Paras. 1-70 contain an introduction to the issue and the Judge's findings of primary fact. I will return later to such of those findings as are material for the purpose of the issues which we have to decide. Para. 71 refers to counsel's written submissions but does not set them out.

    (2) Para. 72 states the issue which the Judge has to decide as follows:

> "The succinct issue is whether the Claimants were contractually entitled by custom and practice or by conduct to the RPI increase, that is a guaranteed minimum pay increase from 1 April each year of the average increases in RPI over the first three months of the year."

    (3) At paras. 73-79 the Judge considers the relevance of the express contractual term as to annual salary reviews which I have set out at para. 4 above. He rejects a submission on behalf of the Claimants that that term created a

positive right to an annual pay increase, and also a submission on behalf of CSC that the implication of a term by reference to custom and practice, or by conduct, is inconsistent with the express terms of the contract. Neither point is pursued before us.

(4) At paras. 80-83 he summarises the relevant law as follows:

> "80. In *Solectron Scotland Limited v Roper [2004] IRLR 4* the Employment Appeal Tribunal summarised the basis for implying a term into a contract of employment by custom, practice or conduct. A custom or established practice applied with sufficient regularity may eventually become the source of an implied contractual term. This occurs when the courts are able to infer that the regular application of the practice shows that the parties must be taken to have accepted that the practice has crystallised into contractual rights.
>
> 81. The parties must be shown to be applying the term because there is a sense of a legal obligation to do so. It is not enough that the party applies it as a matter of policy rather than out of a sense of obligation. The practice must be reasonable, notorious and certain.
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> 82. In *Garrett v MGN* [2011] IRLR 91 the Court of Appeal, following its earlier decision in *Albion Automotive v Walker* [2002] EWCA Civ 946, identified the relevant matters to be considered in deciding whether a term has gained contractual status by custom, practice or conduct as these:
>
> (a) the length of time, frequency and extent to which the practice has been followed in every case as a matter of practice. This will include whether the policy was followed without exception for a substantial period of time, how often it was followed, whether payments were made automatically and whether the policy was followed consistently;
>
> (b) the understanding and knowledge of employer and employee. This will include whether the policy was drawn to the attention of employees, whether the manner of communication supports the inference that the employer intended to be contractually bound and whether employees had a reasonable expectation the policy would be followed;

> (c) the written terms of the contract. This will include whether the policy was adopted by agreement and confined [*sic*] into writing.
>
> 83. I have sought to apply these principles to these cases and I have reached the following conclusions. No single factor has been decisive and I have arrived at my decision from the evidence as a whole."

Although the Employment Judge did not have the benefit of the judgment in *Park Cakes Ltd v Shumba*, his self-direction is in fact very closely in line with it, and neither party suggested that it was wrong.

(5) At paras. 84-98 the Judge reviews the evidence about the pay increases accorded to the ex-ITS employees between 2001 and 2007, confirming that – subject, as I have said, to minor exceptions which he held to be immaterial – they did indeed reflect the increases in RPI. At para. 91 he states his conclusion that "the respondent's management believed that the ex-ITS employees were contractually entitled to a guaranteed minimum RPI annual pay increase".

(6) He describes that conclusion, at para. 92, as "a significant factor in my own overall decision". He gives his reasons for that conclusion at paras. 93-97. Since the conclusion itself is not in dispute I need not set out those reasons in any detail; but they include statements made in various contemporary documents (including those to which I have referred at para. 5) and the negotiations with Prospect in 2008, which were plainly on the basis that the employees in question enjoyed a right which could only be withdrawn by agreement. He continues:

> "97. I find not only that the respondent believed the ex-ITS employees were entitled to the RPI increase but from 2001 to 2007 they consistently acted on the belief by awarding pay increases accordingly. They ceased to do so only when in error they believed they had negotiated it away with the Prospect trade union in 2008.
>
> 98. I have no doubt that the respondent's management believed that the right to the RPI increase had transferred with the ex-ITS employees in April 2000. I have referred to the clear evidence that the respondent's management dealt with the pay reviews for the ex-ITS employees separately. I have heard no evidence that the respondent itself initiated separate pay reviews for ex-ITS staff and indeed all the evidence suggests they would not have done so."

(7) At paras. 99-100 the Judge discusses the question whether the belief on the part of CSC's management that while they were employed by ITS the

Claimants had enjoyed a contractual right to annual pay increases in line with RPI was in fact correct. He says:

> "99. I do not know on what basis they believed this and I would not for myself have been prepared to find the right existed from evidence I have heard about the policy and practice about pay increases pre-transfer. However, there are several matters which do suggest the practice may have existed:
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> (a) Mr McAlinden's evidence that it had been paid since he joined ITS in 1995;
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> (b) the employee grievance letters I described at paragraph 22 above which referred to the practice;
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> (c) Mr Lawson's pay proposal document in February 1999 which twice referred to RPI in a pay context covering the previous (1998) and current (1999) years;
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> (d) the respondent's reply to the JCC in October 1999 which did not challenge the JCC's assertion of a cost of living increase pay policy and clearly acknowledged that the respondent had a different policy (although there was no express reference to RPI).
>
> 100. Whilst I would not have been prepared to find a policy amounting to an implied contract term existed pre-transfer on this material, I believe that the fact that post-transfer the respondent's management believed it existed, and consistently followed a pay policy which was not only different from the policy it applied to its other employees, but was manifestly disadvantageous to it (it resulted in pay awards in excess of budget in several years) supports a conclusion that the policy was well-established at transfer to the extent that the respondent believed that it was obliged to follow it."

(8) His dispositive reasoning appears at paras. 101-107, which I should set out in full:

> "101. I find, therefore, that first the respondent consistently followed the policy of awarding ex-ITS employees at least the RPI increase for a substantial period of time from 2001 to 2007. It ceased the practice in 2008 only because it

mistakenly believed it had negotiated different terms with the relevant trade union.

102. Second, I find that the respondent acted in the belief that it was legally obliged under the contracts of employment of the ex-ITS employees to award at least the RPI increase. This was not a matter of mere policy; it reflected what the respondent believed was a legal obligation.

103. Third, I find that the policy was communicated to employees and understood by them. I have referred to Ms Anderson's emails in 2005 and 2006 and the Pay Review Management Briefing document. Mr McAllinden's evidence was clear that he believed from long usage that the RPI increase was awarded every year and this is supported by the grievance letters in the bundle.

104. I find nothing in the written contract of employment which is inconsistent with the existence of the right. Clause 36.9 is silent as to how the global component will be calculated; there is nothing in it which precludes the existence of the implied term.

105. I accept that the policy was subject to satisfactory performance. I find, however, that it was extremely rare for an increase not to be awarded on such basis and as I have said, in any event it is not the respondent's case that it withheld any RPI increases for the claimants for performance reasons.

106. I regard it as immaterial whether the respondent's management were correct in believing the policy was a contractual right. On the evidence before me, I simply do not know whether they were right or not. However, they followed it consistently for a substantial period in the belief it was a legal entitlement. In my judgment, they followed it in a way which leads me to conclude that the payment of the RPI increase as a minimum each year had crystallised into a contractual right whether or not in the beginning the respondent's belief was wrongly held.

107. In all the circumstances, therefore, I have concluded that the claimants were entitled to the RPI increase from 1 April 2010 as a matter of contract. The respondent made unauthorised

> deductions from the claimants' wages by failing to pay the increase from 1 April 2010. The claims will now be listed for a remedy hearing and to decide whether the claimants should have leave to amend their claims to complain that the respondent also made unauthorised deductions by failing to award the RPI increase from 1 April 2008. I have made Case Management Orders for this hearing above."

13. I will not attempt to summarise the reasoning of the EAT. We are of course primarily concerned with whether there was any error in the judgment of the ET, and in any event much of Langstaff J's judgment was concerned with points that are not taken before us. However, I should set out one passage which is of particular interest because it explicitly gives the views of the lay members (the Judge in the ET having sat alone). At paras. 35-36 Langstaff J said this:

> "35. [The position argued for by CSC] seems to us, and again I am grateful to the lay members of this Tribunal, to defy industrial reality. If looked at objectively, as the origins of contract have to be in traditional contract law, one would see the employer behaving as if there were a contractual term, and one would see the employee behaving as if there were that contractual term. There would objectively appear to be a meeting of minds to show that both parties believed there was a contractual term. The employer in this case would be asserting, as it did, that there was such a contractual term in its communications to the employees. Its behaviour in 2008 in seeking to buy out or negotiate away the term would have no other explanation. The use of the word "guarantee" would be critical. The fact that the employees declined to be bought out shows that they clearly understood both that they thought they had a right but also that they understood that the employer thought they had a right. Although the Tribunal itself did not rely upon the point, there seemed to the lay members of this Tribunal no other explanation for the refusal of the ITS ex-employees to be bought out than that they considered that their employer thought that they had such a right and had effectively communicated that belief to them.
>
> 36. Objectively viewed, therefore, there would here be the strongest of cases for showing that there was a term to be inferred from the behaviour of the parties. ... ."

(The reference at para. 35 to a "guarantee" is clearly to the language of the documents which I have quoted at para. 5 (1) and (3) above.)

THE APPEAL

14. The pleaded Grounds of Appeal are quite discursive, but Mr Gorton in his oral submissions helpfully focused on two central points. Other points which were raised

in the Grounds or in his skeleton argument he either abandoned or acknowledged to be subsidiary to the two principal points.

15. Mr Gorton's first point was that the Employment Judge had impermissibly based his conclusion on what he found to be CSC's subjective belief between 2001 and 2007 that it was contractually obliged to pay RPI increases and not on any finding as to what was communicated, in words or by conduct, to the Claimants.

16. I do not accept that submission. The Judge had in his self-direction on the law expressly acknowledged the importance of what was communicated to the employees – see para. 82 (b) set out at para. 11 (4) above – and at para. 103 of his Reasons (para. 11 (8) above) he found explicitly that "the policy [sc. of paying at least RPI increases] was communicated to employees and understood by them". Mr Gorton submitted that that was only a finding that what was communicated and understood was that there was a "policy" of paying RPI increases and not a finding that it was communicated and understood that that policy reflected a perceived legal obligation. On a literal reading of para. 103 that is correct; but I do not think that a literal reading is appropriate. It is important to appreciate that this is not a case of the kind (in my experience more usual) where the employer confers the benefit in question in the belief that he is doing so without obligation but the employees assert that he has nevertheless conveyed the contrary impression. In such a case a finding that the employer had communicated a "policy" of conferring the benefit would indeed probably mean that what was communicated fell short of an acknowledgment of legal obligation. But here CSC's case has to be that, while itself believing that it was under a legal obligation to pay the increases, it said or did nothing that should have conveyed that impression to the employees. That is rather more of a tall order for an employer; and the Judge may be forgiven for not being wholly precise in his wording. I believe that what he meant in para. 103 was that CSC had communicated not only a policy of paying RPI increases but its belief, as found in the previous paragraph, that it was obliged to do so. That is in my view confirmed by the documents to which he refers in para. 103 – being those summarised at para. 5 above. The significance of all three is that they acknowledge a legal obligation; one is addressed to an employee, and another prescribes what should be said to employees if they ask.

17. Mr Gorton submitted that if para. 103 is indeed to be read in that way it is inadequately reasoned and/or that there was insufficient evidential support for a finding that CSC's conduct could have led ex-ITS employees to understand that RPI increases were being paid as of right. I do not accept this. As I have already observed, this is a case where CSC itself believed that it was under a legal obligation in this regard; and ex-ITS employees were differently treated from their colleagues for that reason. It would hardly be very surprising if it had conveyed that impression to the employees. But the Judge had more to go on than that general consideration. As (again) I have already said, the documents to which he referred clearly showed CSC both telling an individual employee that he had a contractual right to RPI increases and authorising managers to give that message more generally. The grievance statements to which he referred in para. 103 also clearly conveyed (though without much specificity) that the ex-ITS employees had been given the impression that they were contractually entitled to RPI increases. Taking it as a whole, there was in my view ample evidential basis for the Judge's finding; and it is clear on what basis he reached that finding.

18. I turn to Mr Gorton's second point. He fastened on the passage in the Judge's Reasons where he considers whether CSC was in fact correct in its belief that the ITS employees enjoyed a contractual right, as at the moment of transfer, to an RPI increase: see para. 99 of the Reasons, quoted at 11 (7) above. He submitted that that passage constitutes a finding that they did not in fact enjoy such a right and thus that CSC's belief that they did was mistaken; and he submitted that conduct based on a mistaken belief could not give rise to contractual obligations. In this connection he relied on the decision of the House of Lords in *Harvela Investments Ltd v Royal Trust of Canada (C.I.) Ltd* [1986] AC 207.

19. I should start by noting that the point does not appear to have been put this way in the ET. Accordingly the Judge was not required to, and did not, make an explicit finding as to whether CSC's belief that the ex-ITS employees had enjoyed, pre-transfer, a right to RPI increases was mistaken. His conclusion that the Claimants had not proved that they enjoyed such a right is not, on a strict analysis, sufficient: while the burden of proving the existence of the right pre-transfer was on the Claimants, the burden of proving any mistake – that is, the non-existence of the right – would be on CSC. The Judge had acknowledged in para. 99 the existence of evidence pointing to at least an accepted "practice" of paying RPI increases pre-transfer; and the openings of both paras. 99 and 100 are carefully worded. Nevertheless I am prepared to accept for the purposes of argument that in the circumstances of this case what the Judge says in those paragraphs can be treated as an implicit finding that CSC's belief was indeed mistaken.

20. Even on that basis, I cannot accept Mr Gorton's submission. We are concerned here with the effect of communications by an employer to (a class of) his employees, partly in words and partly by conduct. As a matter of principle, what matters is the effect of those communications, viewed objectively: the employer's subjective understanding is irrelevant. If, as the Judge found, CSC's communications conveyed the impression to the Claimants that RPI increases were a contractual right, the fact that it may have been acting on a mistaken belief is thus irrelevant. It is of course trite law that, other things being equal, unilateral mistake cannot invalidate a contract.

21. The decision in *Harvela* on which Mr Gorton relied is concerned with a wholly different situation. The facts can be sufficiently summarised as follows. The vendors of a parcel of shares invited offers from two potential purchasers and bound themselves to accept the higher bid. One party ("A") submitted a bid in a "referential" form which was eventually held not to comply with the terms of the offer. The vendors believed that they were bound to accept that offer and sent a telex saying so. A contended that even if its original bid was invalid as an acceptance of the original invitation it could and should be treated as a fresh offer, which the vendor had accepted by its telex. The House of Lords rejected that argument. A's bid was not a fresh contractual offer, nor was the vendors' telex an acceptance of such an offer. In the context of the prior dealings the bid could only be understood as a purported acceptance of the offer to sell constituted by the prior invitation, and the telex as an acknowledgment (as it turned out, a mistaken acknowledgment) of a legal obligation created by that prior offer and acceptance. Both Lord Diplock and Lord Templeman, who delivered the only two substantial speeches, did indeed refer to the fact that both A and the vendors mistakenly believed that A's bid had created a binding contract (see at pp. 226 D-E and 235 F-G), but it was no part of their

reasoning that that mistake invalidated what would otherwise have been a binding contract: their reasoning was, rather, as I have said, that in the context created by the parties' (mistaken) belief A's bid was not intended – nor, critically, could it have been understood to be intended – as a fresh contractual offer.

CONCLUSION

22. I therefore cannot accept either of Mr Gorton's challenges to the reasoning of the Employment Judge and I would dismiss the appeal. The Claimants in their Respondents' Notice sought to argue that the Judge should in any event have found that ITS's policy had crystallised into a contractual term prior to the transfer to CSC; but that is now academic and I need not consider it.

Lord Justice Tomlinson:

23. I agree.

Lord Chief Justice :

24. I agree. I wish to add one observation. It seems to me that references to "custom and practice" are rarely likely to be relevant in these disputes. The phrase has a well understood meaning which, as applied in some of the earlier judgments, is likely to give rise to the lack of focus to which Leveson LJ drew attention in *Garratt v Mirror Group Newspapers Ltd*.