EMPLOYMENT TRIBUNALS

Claimant: Mrs K Crielly

Respondent: Great Places Housing Association

Heard at: Manchester **On:** 22 July 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr N Grundy, Counsel

JUDGMENT

The complaint of breach of contract in relation to redundancy pay fails and is dismissed.

REASONS

Introduction

1. By a claim form presented on 7 January 2019 Mrs Crielly complained that there had been a breach of her contract when she received a redundancy payment as a consequence of being made redundant in December 2018.

2. She argued that incorporated into her contract of employment was a redundancy policy which provided for payments made on voluntary redundancy to be enhanced compared to those paid upon compulsory redundancy.

3. By its response form of 14 February 2019 the respondent defended the claim on the basis that the policy in question had never formed part of the contract of employment.

Issues

4. The issues remained as identified in the Case Management Order of Regional Employment Judge Parkin issued following a telephone hearing on 14 March 2019.

5. The fundamental question was whether the redundancy policy was contractual or not. If so, there was an issue about whether that term of the contract had been varied in the claimant's case. Because of my conclusion that the policy had never been contractual that second issue did not arise.

Evidence

6. The parties had agreed a bundle of documents running to approximately 180 pages, and any reference to page numbers in these Reasons is a reference to that bundle.

7. The claimant gave evidence pursuant to a written witness statement but was the only witness on her side. The respondent called only Sarah Costigan, the Head of Human Resources ("HR").

Relevant Findings of Fact

8. The primary facts in this case were not in dispute and can be summarised as follows.

Background

9. The respondent is a Housing Association engaged in the provision of accommodation and associated services across the North West and Yorkshire. The claimant was employed in March 2007 and by the time of the events in this case was working as a Start Solutions Officer.

Contract of Employment

10. Following a review of terms and conditions in 2015 the claimant signed a contract of employment on 10 July 2015 (pages 31-36). It began with this preamble:

> **"This document together with any document referred to in the Employee Handbook that is expressed to be contractual form your contract of employment."**

11. The contract did not make any reference to entitlement in the event of redundancy, but in other places it made express reference to policies in the Employee Handbook. The contract also said that it and any documents referred to in it set out set out the whole agreement between the parties. Variations would only be effective if in writing and signed on behalf of the respondent. Any changes to terms and conditions would be notified in writing within one month of them taking effect (page 35).

Redundancy Policy

12. The Employee Handbook at the time contained a redundancy policy which was issued in November 2013. It appeared at pages 43-49. In the event of compulsory redundancy, payments were more generous than the statutory scheme.

Payments would be made to employees who had worked for less than two years, and the statutory cap on a week's pay was disapplied.

13. It also made provision for voluntary redundancies. The policy emphasised (page 44) that applications for voluntary redundancy would be considered on an individual basis given the need to maintain a balanced, skilled and experienced workforce. It was plain that there was no automatic right to go on voluntary redundancy. However, the policy went on as follows (page 47):

> **"If you apply for voluntary redundancy and your application is accepted in addition to the compulsory redundancy pay you will also receive the following payments…"**

14. The policy went on to provide for payments which were effectively twice that payable upon compulsory redundancy.

15. I will call the amount payable on compulsory redundancy the "compulsory payment" and the amount identified by the policy as applicable upon voluntary redundancy as the "enhanced payment".

Redundancies 2011-2017

16. Between 2011 and 2015 approximately ten employees left by reason of redundancy. According to the respondent's records (pages 175-177) they all received only compulsory redundancy payments even where they went on a voluntary basis. This was because the respondent did not regard the policy as contractually binding.

17. In June 2017 there was a substantial restructuring exercise, and more than 30 employees were made redundant on either a voluntary or compulsory basis in the rest of that year and early 2018. The records showed that each of them received only compulsory redundancy payments.

Redundancy Consultation February – August 2018

18. In February 2018 a restructuring was announced which affected the part of the business in which the claimant worked. She and her colleagues attended a briefing presentation at the end of February 2018. There was a presentation which made clear (page 73) that for voluntary redundancy there would be "no incentive or difference in redundancy pay". The same message was contained in a booklet issued to staff at that meeting (pages 91-92) and in a list of "frequently asked questions" (page 103).

19. The redundancy policy from November 2013 was also part of the documentation available and it was apparent to the claimant and her colleagues that there appeared to be a conflict between that policy and what was being said in this restructuring.

20. On 5 March 2018 the claimant sent an email asking how to apply for voluntary redundancy. She made no mention of her expectations regarding payment. The email did not appear in the bundle. In response she was told that her email would be treated as an application for voluntary redundancy.

21. Collective consultation meetings took place on 12 March (pages 121-125) and 4 April 2018 (pages 138-141). At the first meeting it was agreed that the position in relation to enhanced redundancy payments would be reviewed (page 123), but at the second meeting it was confirmed that no enhanced payments would be made (page 140).

22. The matter had also been discussed at an individual consultation meeting with the claimant (pages 133-134). She and her colleagues were maintaining that they were entitled to the enhanced payment if they went by way of voluntary redundancy.

23. On 13 April 2018 (page 141A) the Director of Housing, Alison Dean, sent an email to staff confirming the company view that the policy was non contractual and that enhanced payments would not be made. The email recognised, however, that the policy was not helpful and needed to be updated.

24. The claimant attended her second individual consultation meeting on 16 April (pages 142-149). She reiterated her view that she would be contractually entitled to enhanced terms.

25. On 30 May 2018 (page 150) the claimant was informed that her application for voluntary redundancy had been accepted. There were to be further discussions about her leaving date.

August – September 2018

26. In pursuit of her claim that there was a contractual entitlement to enhanced payments, the claimant emailed members of the respondent's Board on 17 August 2018 (pages 150A-150B). She was eventually to receive a reply from the Chief Executive Officer on 10 September 2018, two days before she understood the Board were due to have discussed it. His letter (pages 151A-151B) said that he had delegated authority to respond to the claimant and he confirmed that the enhanced payment would not be made.

27. In the meantime the claimant had attended a meeting on 4 September to discuss her voluntary redundancy. The meeting had been adjourned because she refused to accept that she would only be going on compulsory terms. The claimant went off sick after this meeting with work related stress and did not return to work prior to the ending of her employment.

28. The position was confirmed in an email the following day from Ms Hopkinson (page 151) which said that the claimant was effectively withdrawing her application for voluntary redundancy because she would not accept the compulsory terms. A compulsory redundancy meeting would therefore be arranged.

29. That compulsory redundancy meeting took place on 26 September 2018. The notes appeared at pages 152-157. The claimant signed the notes at the end of the meeting, although she explained that she was told that if she did not do so she would not receive her 12 weeks of notice.

30. The signed notes confirmed that she would leave employment on 13 December 2018.

Grievance

31. The claimant lodged a grievance in late October 2018, raising two points. The first was her alleged contractual entitlement to enhanced terms. The second was that she had been bullied into signing the compulsory redundancy meeting note. She mentioned that she was aware of people who had been allowed to leave on a voluntary basis even though they did not agree that they should only be receiving compulsory payments. She was not saying that those individuals had received the enhanced payment.

32. Following a grievance fact find meeting on 14 November 2018 (pages 163-169), the outcome to the claimant's grievance was issued four days after her employment ended. It was a letter from the Director of Business Intelligence, Craig Daniel. He concluded that there was no legal entitlement to the enhanced payment. However, he apologised that the claimant felt bullied and coerced into signing a compulsory redundancy agreement, and he said that a note would be put on her file to the effect that she always wished to continue down the voluntary route. The grievance was otherwise rejected.

33. Although the emails were not produced to my hearing, I accepted the claimant's evidence that there was a further exchange of emails after this in which Mr Daniel confirmed that the claimant would be treated as having left on a voluntary redundancy basis.

Relevant Legal Principles

34. This section of the Reasons contains a summary of the law which I applied to make my decision.

35. There are various types of contractual term and three were relevant here.

36. The first is express terms which have been discussed and agreed between the parties, either orally or in writing.

37. The second is terms that are not discussed but which are implied into the contract. Terms can be implied by reason of custom and practice, or because they are too obvious to need mentioning. They can also be implied by law or if necessary to give “business efficacy” to the agreement.

38. Thirdly, a contract can incorporate terms which are found in other documents.

39. An example of a case where terms in an Employee Handbook were incorporated into the contract is **Keeley v Fosroc International Ltd [2006] IRLR 961**. The written statement of terms issued to the employee in that case expressly incorporated the Staff Handbook. The issue was whether the provisions of the Staff Handbook relating to enhanced redundancy payments were apt to be incorporated into the contract. The Court of Appeal found that a term expressly incorporating such provisions does not necessarily mean that all the provisions in the document become terms of the contract. The test for whether it is apt for them to do so was explained. The Court of Appeal decided that the claimant was entitled to an enhanced redundancy payment in that case.

40. I was also referred to **Harlow v Artemis International Corporation Ltd [2008] IRLR 629**. The case turned in part on whether documents found on the intranet fell within the provision in the contract which incorporated the Staff Handbook. There was also an issue about whether the contents of those documents were apt for incorporation. In that case too the claimant was successful.

41. As for cases in relation to terms which become contractual by implication, in **Albion Automotive Limited v Walker & others [2002] EWCA Civ 946** the Court of Appeal considered a case in which enhanced redundancy payments had been made for an extensive period of time over six redundancy exercises and affecting some 750 employees. The Court upheld the decision of the Employment Tribunal that the entitlements had become incorporated into the contract by reason of that custom and practice.

42. More recently the Court of Appeal gave guidance on the incorporation of terms through custom and practice in **Park Cakes Ltd v Shumba and others [2013] IRLR 800**.

Submissions

43. At the conclusion of the evidence I heard submissions from both sides.

44. Helpfully Mr Grundy had prepared a written skeleton argument which ran to six pages. He argued that the contract did not expressly incorporate the redundancy policy because that policy did not itself say that it was contractual. Further, the policy could not be implied as a contractual term because there was no history of custom and practice. He also submitted that there had been no agreement to pay those enhanced terms when the application for voluntary redundancy was accepted at the end of May 2018, because by that point it was clear (from the email from Alison Dean in April) that the respondent was not going to be offering voluntary redundancy on those terms.

45. Mrs Crielly submitted that the wording of the policy itself was enough to make it part of her contract. It gave no hint that the enhanced payments were discretionary but said that they “will” be paid once an application for voluntary redundancy was accepted. The policy was part of the documentation issued to her and her colleagues at the consultation meeting and it should not be overridden by what were only consultation briefing documents. The policy had been in place for five years by the time of her redundancy.

Discussion and Conclusions

<u>Express/Incorporated term</u>

46. I was satisfied that the policy did not form an express or incorporated term of the contract. The contract itself made clear that its terms were restricted to what was in the document itself, together with those documents in the Employee Handbook that were themselves expressed to be contractual. The disciplinary policy did not express itself to be contractual. It was therefore not expressly incorporated into the contract.

47. The fact that none of the other documents in the Employee Handbook were expressed to be contractual did not help the claimant. It is not unusual for employers to keep policies non-contractual in order to maximise flexibility.

48. Further, the fact that some of the provisions in the Employee Handbook were expressly incorporated by the contract itself (for example, the provisions as to sick pay – page 32) also did not help the claimant as there was no comparable provision (or, indeed, any provision) for redundancy payments in the contract.

Implied Term

49. I then considered whether the term might have become implied through custom and practice. Mrs Crielly accepted that she had no evidence of any previous occasion upon which the respondent had paid enhanced terms in a way consistent with it being legally required to pay them. She was not in a position to challenge the evidence of Mrs Costigan, based on the records at pages 175-177, that no employee had received the enhanced payments since 2011, even though a significant number had gone by way of voluntary redundancy. The custom and practice supported the respondent's assertion that this policy was not binding.

Policy Wording

50. I also considered Mrs Crielly's argument that the terms of the policy itself were such that it had contractual force. I could understand why she would take this view. The voluntary redundancy section of the policy read in isolation created an obligation for the respondent to pay the enhanced terms once it accepted an application for voluntary redundancy.

51. However, the policy itself could not in isolation become contractual simply because some of its terms were cast in language consistent with entitlement rather than discretion. For reasons explained above I was satisfied that the whole policy was not part of the contract of employment and its wording could not alter that.

Collateral Contract

52. That left a fourth and related point for Mrs Crielly, which was that by its acceptance of her application for voluntary redundancy the respondent had entered into a new and separate contract with her which entitled her to enhanced payments. I rejected that for two main reasons.

53. Firstly, in her application for voluntary redundancy Mrs Crielly had not expressly said that it was conditional upon her receiving the enhanced payments.

54. Secondly, by the time the respondent accepted that offer by confirming voluntary redundancy it was clear (from Ms Dean's email) that the respondent was only doing so on the basis that she would receive compulsory terms. As a matter of contractual interpretation that meant that there was no legal contract formed at that stage because there was no agreement on a key component: the amount that would be paid.

55. I agreed with Mrs Crielly that her apparent acceptance of the compulsory redundancy by her signature on the notes from the formal meeting on 26 September

2018 should not be taken as her consent to receive only the compulsory redundancy terms. She had not waived any rights. However, neither did Mr Daniel's acknowledgment after employment ended that the claimant should be treated as though she had gone on voluntary terms. He never intended her to have the enhanced payment.

Conclusion

56. Accordingly, for those reasons I concluded that there was no legal entitlement to the enhanced payments set out in the redundancy policy. Despite the clear wording of that policy itself, it formed no part of the contract of employment of Mrs Crielly based on the written terms of her contract, and nor had any contractual entitlement to those payments arisen through custom and practice.

57. The complaint of breach of contract therefore failed and was dismissed.

Case Number 2405716/2019

58. It became apparent at the end of this hearing that the claimant had a second claim under case number 2405716/2019 which had arisen because she had been identified as a second claimant on a claim brought by her former colleague, Miss T Kaye.

59. That case number is simply a duplicate of the present claim and it was agreed that it should be dismissed as well.

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Employment Judge Franey

23 July 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 July 2019

FOR THE TRIBUNAL OFFICE