EMPLOYMENT TRIBUNALS

Claimant: **Ms Tracey Wahlberg and Others**

Respondent: **Virgin Media Ltd**

Heard at: **by Video Link** **On: 25th November 2020**

Before: **Employment Judge R F Powell**

Representation:

Claimant: **Mrs Caroline Probert and Mrs Karen Amour**

Respondent: **Mr J Laddie, one of her Majesty's Counsel**

Judgment

The judgment of the Employment Tribunal is:

The claimants' contracts of employment with Cable & Wireless Communications Plc did not contain an entitlement to enhanced redundancy benefits.

REASONS

The Issues

1. This open preliminary hearing was ordered by Employment Judge Jenkins to determine two questions of fact and law. The questions were as follows:

   a. "Did the claimants enjoy enhanced redundancy terms with their employer, Cable & Wireless Communications plc?"

   b. If so, what were those terms?"

The evidence

2. Directions were issued by the tribunal for the exchange of documents and a direction was given to the parties to arrange for their witnesses to attend at this hearing.

3. I received two bundles of documents the first, which ran to 728 pages and the second which ran to 397 pages. Due to initial technical difficulties the available hearing time was reduced and I was unable to deliberate or give judgment on the day.

4. I heard evidence from Miss Carol Jackson, a case manager within the employee relations Department of the respondent, who was cross examined by Ms Probert. The claimants had not called any one as a witness. Although no witnesses were formally called to give evidence on behalf of the claimants, I was prepared to consider the statements of Mrs Probert and, on occasion Mrs Amour, as evidence when they made statements of fact in the course of questioning Mrs Jackson, discussion with me or in submissions.

5. I also received a skeleton argument from Mr Laddie on behalf of the respondent and copies of referenced case law.

6. I confirmed with Mrs Probert and Mrs Amour that they were authorised to speak on behalf of all of the claimants in this case. They confirmed that was so.

The character of the dispute

7. All 26 claimants were formally employed by Cable and Wireless Communications. They commenced their employment on various dates between 1999 and 2001. They each had continuous employment which, through a number a number of business transitions[1], culminated in them being employed by Virgin Media, the respondent in these proceedings. Their employment was terminated by reason of redundancy and redundancy payments were made. The claimant's contest the calculation of those payments.

8. The claimants presented a unified claim which asserted the following:

9. During their period of employment with Cable & Wireless, the claimants had the benefit of a contractual method for the calculation of redundancy pay which expressly provided the following scheme of payments in the event of redundancy:

- Up to 20 years' service: four weeks' pay per year of service.
- 20 to 30 years' service: 4.5 weeks' pay per year of service.
- more than 30 years' service: 5.5 weeks' pay per year of service capped at a maximum of 30 years.

The scheme used a gross week's pay as the multiplicand.

[1] Whether any of those transitions fell within the ambit of the Transfer of Undertakings (Protection of Employment) Regulations is a contentious matter between the parties and is not a matter for determination at this hearing.

10. The claimants aver that, at the point of their recruitment by cable and Wireless, each was asked to sign and return the contract of employment and other paperwork, which included a document entitled "Welcome to C & W Handbook". The claimants assert the redundancy scheme was set out in that document. They then assert that the terms, noted above, formed part of their contract of employment with Cable & Wireless and that the said term remained part of their contract of employment at the date of their dismissal, by reason of redundancy, by the respondent.

11. The respondent denies that the claimants had a contractual entitlement to enhanced redundancy pay and deny that, if I find such a contractual term existed, it was as generous as the claimants' pleaded case.

Findings of Fact

12. The respondent was not party to the contractual relationships between Cable & Wireless ("C & W") and the claimants; those relationships were formed some 20 years prior to the presentation of this claim. The respondent's potential liability stems from a series of business transitions which altered the identity of the employer, the last of which, for these claimants, was the respondent.

13. It is common ground between the parties that neither the claimants (through their efforts to search their own documents, contact with former colleagues, or the Cable & Wireless archives at Truro) nor the respondent, in its searches through retained documents, have found a copy of a C&W handbook, a C&W redundancy policy or a contractual statement concerning redundancy which can be associated with the times at which these claimants entered into contracts of employment with C & W.

14. Later redundancy polices, with subsequent employers (such as NTL), have been found but these express less generous terms than those asserted by the claimants and are documents upon which they rely.

15. Miss Jackson's evidence described the efforts which she had made to search through relevant documentation in order to try and find the redundancy policy or terms that matched the description in the claimant's pleading. She indicated that her searches had not identified any C&W redundancy policy even though she had, as set out in paragraph 6.c, of her statement, obtained some 58 files of C&W staff who had been employed at the relevant time.

16. She also stated that she had not been directly involved in any redundancy procedures relating to relevant staff although she had been involved in regular grievance issues, none of which, in her experience, had raised any concern about the application of a redundancy policy which contained the terms which claimants plead in this case.

17. Ms Jackson was cross examined. The character of the cross-examination was to test the thoroughness of her investigations and to define the limits of her knowledge. Mrs Probert's cross examination laid the foundation for the claimants' submission that, despite the respondent's best efforts, Ms Jackson's evidence could not demonstrate that the pleaded enhanced redundancy policy had not existed. Nor could the respondent's evidence gainsay the claimants' assertion that the policy was contractual in nature.

18. I have considered examples of the offers of employment made to the claimants in the autumn of 1999 and the subsequent contractual documentation, so far as it is now available.

19. There are four common elements:

a. A letter making an offer of employment.

b. A letter in response to the acceptance of an offer of employment.

c. The contract of employment.

d. The absence of a "C&W Workbook" or a "C&W Handbook".

20. When a potential employee was sent a C&W conditional offer of employment letter other documents were enclosed. These were two copies of a contract of employment and a series of policy documents relating to discipline, grievances, equal opportunities, health and safety, harassment and ethics.

21. If the potential employee accepted the offer then C&W acknowledged that acceptance in a letter which [151-3] included two signed [2] copies of the contract of employment (one copy to be returned to the employer after the claimant had signed it). The other document was referenced under the title "Induction" and was:

    "To assist you gaining knowledge about the company, enclosed is a "Welcome to Cable and Wireless" workbook. Please complete prior to commencement and bring it with you on your first day of employment".

22. By July 2000 the content of the letter set out under the title "Induction" had altered a little:

    " On your first day your line manager will arrange a local introduction to provide you with details about your job and an overview of local facilities and company policies and procedures. To assist you in your first few weeks of employment, we have an induction workbook available electronically on our intranet, planet. Your manager will provide you with details of how to access this information and during your first weeks ensure you have sufficient time to complete the workbook".

23. I also note from page 46 of the bundle that the intended content of the induction for new staff focused on the mechanics of their responsibilities; billing enquiries, TV on demand faults are two examples of the subjects upon which training was to be given.

24. Neither version of the correspondence to which I have referred states that the workbook should be signed and the context and title of the document does not suggest that it contained any contractual terms.

[2] Signed on behalf of the employer.

The written contract

25. The express terms of the claimants' contracts are evidenced by the documents at pages 7 to 10 of the bundle. In part E it sets out general conditions which appear to be applicable to all employees. They set out the usual statutory particulars; continuity of employment, job title, place of work, hours of work.

26. There is reference to a disciplinary and a grievance procedure, an equal opportunities and harassment policy. There is no suggestion that these policies were contractual.

27. It is common ground between the parties that there is no reference in the contract to a redundancy policy nor reference to the termination of employment by reason of redundancy.

28. The contract contains a brief General Statement

    "These are the terms of your employment including the particulars of employment required by the Employment Rights Act 1996"

29. In section 17 of the contract the following is stated:

    "This agreement supersedes any previous correspondence and any prior agreements between yourself and the group company and forms the sole basis of contractual relations between yourself and the company except rights and obligations implied by law".

    Under the title employment benefits, it was stated:

    "Information is enclosed on the range of employment benefits available in Cable & Wireless Communications. Details of the flexible benefits scheme will be forwarded to you in due course. Enrolment details will be provided on commencement of employment".

30. The above documentation made reference to "flexible benefits" and in the course of Mrs Probert's submissions she referred to death in-service and dependents benefits. She did this to identify where the redundancy policy, that she saw in 1999, was found within the respondent's document.

31. In the additional bundle which contained, on the respondent's case, all of the available policies which could be associated with C & W. There was a document titled Flexible Benefits it is found at page 41 of the PDF format of the bundle. It states:

    " Welcome to Cable & Wireless Communications. As a new employee you will need to consider your flexible benefit choices as soon as you join because you will only have a few weeks to establish your options. Any options you select will normally remain in place until the end of the calendar year. The flexible benefits program, or Flex for short, covers six benefits; pension, life cover, healthcare, dental insurance, childcare vouchers and annual leave. You will be sent your own personal Flex enrolment form by the employee admin unit within two or three weeks of joining you will have four weeks to return it to your manager with your selections."

32. I note that the benefit of the life cover policy provided for an insurance payment between two and four times the employee's pensionable salary. That is consistent with Mrs Probert's recollection of the value of that benefit and suggests that it is more likely than not that this is a copy of the document that she saw upon her employment. I note that an employee had to sign a document to signify that s/he wished to take up the offer of any, or all, of the flexible benefits.

33. The Flexible Benefits document was provided to C&W employees on thier commencement and they had to confirm any choice they made in respect of the offered benefits by their signature. They also had to pass that document to C&W for those choices to be processed. This process is notably similar to the claimant's pleaded case:

    "At the point of being recruited by Cable & Wireless, the Claimants were each asked to sign and return the contract of employment and other paperwork, which included a document entitled "Welcome to C&W Handbook".

34. I note page 569 of the bundle when analysing the quality of the respondent's searches the documents, that it was stated on behalf of the claimants:

    "there is no copy or mention of the Cable & Wireless benefits of employment booklet with signed documents…."

35. This description is inconsistent with the pleaded "handbook" but very close to the C&W "Flexible Benefits" document discussed above.

36. It is difficult, employing my industrial experience gained over the last 27 years, to understand why an employee would hand back to the employer a handbook; a document which typically contains policies and information for the employee to refer to during their employment.

37. It is equally difficult to understand why the respondent would set out in a "workbook" (the character of which I have addressed above) the terms of a redundancy policy.

38. On consideration of all the available evidence, giving account for the passage of time affecting the claimant's recollection, I find it is more likely than not that the document which the claimants signed after they commenced employment was the Flexible Benefits document.

39. In my judgment that document made no reference to redundancy payments.

    <u>A C&W redundancy policy and its terms</u>

40. I will address how the claimants' case was put in the written evidence contained within the bundle.

41. As I have noted, paragraph 7 of the pleaded claim states that the relevant redundancy terms were within a document entitled "Welcome to C & W handbook". In correspondence dated 15th October 2018, Miss Wahlberg, writing on behalf of the claimants, stated:

"I can confirm that as employees we had to sign and return all paperwork including a "welcome to C&W work book", which included details of the enhanced company redundancy policy, (there is a letter confirming the request to return all paperwork to C & W.). Subsequently we do not have a copy of the redundancy terms to provide you - we would expect as best practice that copy to be retained on our personal records. All of the collective C&W group can confirm that the policy was four weeks salary paid per year of service." [170]

42. On 30 October 2018, 15 days after the above statement, Miss Wahlburg wrote to the respondent again [574]. On that date she stated that:

"Due to the fact that Virgin Media were unable to provide any evidence of the legacy Cable & Wireless redundancy policy and they refused to believe that this had existed we resorted to using the Internet to try and obtain a copy of the Cable and Wireless policy online".

The email then goes on to cite a link to the Privy Council Judgment in Mr Conrad Tonge & Others v Cable & Wireless West Indies Ltd. It goes on:

" highlighted with the within that is the exact redundancy payment schedule that we as Cable & Wireless employees were issued within the period from July 1998 through to July 2000. Evidence showing that the policy payment schedule as stated by the members of this group did exist with the company Cable and Wireless Communications plc which operated as Cable & Wireless Communications with operations in the Caribbean including the West Indies and Central America. All 26 will testify that we as a group had held many discussions in our period of employment surrounding the enhanced terms of our redundancy, about which colleagues who were not Cable & Wireless employees would find frustrating and can bring those ex NTL: employees to testify this."

43. The Industrial Court's decision imposed a formula for calculating redundancy pay which was considerably more generous than the one which the claimants had asserted 15 days earlier. It is the formula determined by the Antigua and Barbuda Industrial Court which the claimants plead.

44. I note that the judgement of the Privy Council in the above case was reviewing the lawfulness of a judgment of the Antigua and Barbuda Industrial Court wherein a division of the respondent, having failed to agree through collective bargaining a method for calculating redundancy payments, unilaterally imposed a formula. That action led to proceedings in which the Industrial Court made its own assessment of what would be a reasonable redundancy pay calculation method. It was the Industrial Court which formulated the formula to which Ms Wahlberg referred. The detail set out in her email appears to misunderstand the judgement; believing that the court had described the contractual agreement between Cable & Wireless and its Caribbean employees.

45. Whilst the discrepancy between the email of 15 October and 30 October does not, in my judgement, reflect upon the honesty and integrity of Mrs Probert or Mrs Amour at all, it does lead me to have some concern about the degree to which I can be confident that the group, who on 15 October are said to have been unanimous in their recollection of the policy in question awarded them "four weeks" could be considered reliable when, 15 days later , they

assert a more complex, and beneficial redundancy payment scheme; one which it is said was subject to many discussions throughout their common period of employment.

46. Mrs Probert and Mrs Amour confirmed that their recollection of the policy was the "four weeks" term. But for their evidence, it is likely that I would have found the claimant's case so contradictory that I could not have confidence in either of the written assertions noted above. As I have said, I consider both women to be honest and so rather than discount both assertions I prefer their assertion of a "four weeks" term – it is consistent with the correspondence of the 15th October noted above.

47. I then considered the degree to which the claimants' "four weeks" assertion is reliable given that, on the evidence before me, none one of the claimants has had sight of the asserted redundancy policy, or its terms, since 1999/2000.

48. At page 308 the bundle is a document titled "Managers Leaving Employment" I was briefly of the view that this was a document which referred solely to the rights and entitlements of managers. However, on careful reading, it is also clearly guidance to managers in relation to accepting the resignation of an employee and how they should inform Cable & Wireless' employee administration unit.

49. The document also contains guidance relating to the management of redundancy part of which reads as a statement of an employee's entitlement and the respondent's duties, in a" redundancy situation". The material element reads as follows:

    "you will be eligible for a redundancy payment from the company for loss of employment. This will be inclusive of any amount payable statutory redundancy pay. Payments depend on length of service and will be two weeks pensionable pay for each year of continuous employment subject to a minimum of four weeks pensionable pay."

50. I also note, at page 84 of the policy bundle, that in a section relating to paternity leave, and the risk of redundancy, the respondent's policy states:

    "please refer to the company redundancy policy, which can be obtained from your operational HR consultant."

51. So far as I am able to tell, from the following comment on page 82: "the SMP lower rate is set from time to time by the government. As from 4 April 2000 the lower SMP rate will be £60.20.", this document predates April 2000 and is evidence of the existence of a Cable and Wireless redundancy policy around that time.

52. Although I do not doubt the candour of Miss Jackson, nor the effort of the respondent to seek out documents which were created some 20 years ago by another business, I am satisfied, on the civil standard of proof, that the two documents referenced above, in the context of a collection of detailed policies on many aspects of employment, proves that, at the time of the commencement of the claimants' employment in late 1999-2000, Cable & Wireless had a redundancy policy.

53. I am equally satisfied that it is more likely than not that the relevant term of the redundancy policy is reflected in the summary quoted above; an entitlement to two weeks pay per year of service.

Discussion and Conclusions

"Did the claimants enjoy enhanced redundancy terms with their employer, Cable & Wireless Communications plc?"

54. The Claimants' pleaded case asserts that the redundancy policy was an express term of their contract. They do not assert the policy became a contractual term through a variation of their contracts nor do they argue that the policy is a term which should be implied. In essence, their claim is that an enhanced redundancy payment scheme was incorporated into their contract of employment from the outset of their working relationship with the respondent.

55. Their claim is neatly expressed in paragraph 7 of the Particulars of claim:

"At the point of being recruited by Cable & Wireless, the Claimants were each asked to sign and return the contract of employment and other paperwork, which included a document entitled "Welcome to C&W Handbook". This is where the contractual redundancy scheme was set out, in the terms set out in paragraph 5 above."

56. I have understood the above to state that the contract of employment incorporated one element of the "Welcome to C&W Handbook". Incorporation of terms, perhaps through an agreement derived from collective bargaining or specific aspects of an employer's handbook are a common experience in the employment sphere as noted in Harveys at Division 2, E, 42.

57. I have found that, at the relevant time, Cable and Wireless had a redundancy pay policy which provided for a multiplicand in excess of that provided by the statutory redundancy regime.

58. I have made no findings about any aspect of the policy save the multiplicand. Nor could I do so as there is no evidence available to me upon which I could make findings on a number of important points: were there any qualification criteria for entitlement to the enhanced payment, were there any exclusionary criteria, was the policy discretionary or whether there was any cap on the enhanced award? I do not know whether that policy applied to all employees or a certain group of employees.

59. The key question for me to determine is whether, on the balance of probabilities, the claimants had a contractual right to such a redundancy payment calculated in accordance with that policy. I was referred to one authority; Park Cakes Ltd v Shumba & others [2013] EWCA Civ 974, Court of Appeal. Mr Laddie drew my attention to paragraph 36 which reads as follows:

"36. In considering what, objectively, employees should reasonably have understood about whether a particular benefit is conferred as of right, it is, as I have said, necessary to take account of all the circumstances known, or which should reasonably have been known, to them. I do not propose to attempt a comprehensive list of the circumstances which may be relevant, but in a case concerning enhanced redundancy benefits they will typically include the following:

(a) *On how many occasions, and over how long a period, the benefits in question have been paid*. Obviously, but subject to the other considerations identified below, the more often enhanced benefits have been paid, and

the longer the period over which they have been paid, the more likely it is that employees will reasonably understand them to be being paid as of right.

(b) *Whether the benefits are always the same*. If, while an employer may invariably make enhanced redundancy payments, he nevertheless varies the amounts or the terms of payment, that is inconsistent with an acknowledgment of legal obligation; if there is a legal right it must in principle be certain. Of course, a late departure from a practice which has already become contractual cannot affect legal rights (see Solectron); but any inconsistency during the period relied on as establishing the custom is likely to be fatal. It is, however, possible that in a particular case the evidence may show that the employer has bound himself to a minimum level of benefit even though he has from time to time paid more on a discretionary basis.

(c) *The extent to which the enhanced benefits are publicised generally*. Where the availability of enhanced redundancy benefits is published to the workforce generally, that will tend to convey that they are paid as a matter of obligation, though I am not to be taken as saying that it is conclusive, and much will depend on the circumstances and on how the employer expresses himself. It should also be borne in mind that "publication" may take many forms. In some circumstances, publication to a trade union, or perhaps to a large group of employees, may constitute publication to the workforce as a whole. Employment tribunals should be able to judge whether, as a matter of industrial reality, the employer has conducted himself so as to create, in Leveson LJ's words, "widespread knowledge and understanding" on the part of employees that they are legally entitled to the enhanced benefits.

(d) *How the terms are described*. If an employer clearly and consistently describes his enhanced redundancy terms in language that makes clear that they are offered as a matter of discretion – e.g. by describing them as *ex gratia* – it is hard to see how the employees or their representatives could reasonably understand them to be contractual, however regularly they may be paid. A statement that the payments are made as a matter of "policy" may, though again much depends on the context, point in the same direction. Conversely, the language of "entitlement" points to legal obligation.

(e) *What is said in the express contract*. As a matter of ordinary contractual principles, no term should be implied, whether by custom or otherwise, which is inconsistent with the express terms of the contract, at least unless an intention to vary can be understood.

(f) *Equivocalness*. The burden of establishing that a practice has become contractual is on the employee, and he will not be able to discharge it if the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation. This is the point made by Elias J at para. 22 of his judgment in Solectron."

60. Most of the guidance set out in the Park Cakes authority is not directly material to the issue before me but Mr Laddie relies on sub paragraphs (d) and(e) as a convenient reminder of ordinary first principles of interpretation of a contract.

61. Mr Laddie lays emphasis on two elements of the express wording of the contract of employment which he advised me to conclude amounts to an express statement that this document sets out the entirety of the contractual terms between the parties.

62. He identified the preamble which contained "these are the terms…" of the employment contract; an expression, which he submitted evidenced an express intention between the parties that it was the only document setting out the contractual terms between the parties.

63. He secondly places weight upon section 17 of the contract which set out definitions and interpretations of the contract and which included the statement:

"This agreement supersedes any previous correspondence and any prior agreements between yourself and the group company and forms the sole basis of contractual relations between yourself and the company except rights and obligations implied by law".

64. Mr Laddie accepted that the phrase implied by law entails statutory rights. In my judgement, in the absence of a contractual clause, the statutory regime for redundancy payments under the Employment Rights Act 1996 would be incorporated Into this contract.

65. I was also taken to pages 11 and 12 the bundle which is an example of a letter to one of the claimants of November 1999 wherein it stated that her contract of employment with NTL:

    "Provides details of the main terms and conditions of your employment please read carefully, and routine of your own information"

    Mr Laddie identifies this passage to contrast it with what he argues is the unambiguous and encircling terminology of the Cable & Wireless contract.

66. I also note that the C&W contract makes express reference to holiday and sickness absence (terms which one would expect to be contractual in nature) pay but not redundancy. I note that the contract's reference to a disciplinary policy and grievance policy are expressed in terms which either make clear that such policies are not terms of the contract or imply as much.

67. The language of the contract does not refer to, still less express any intent to incorporate, any aspect of an employee handbook or any policy within it.

68. I accept as a matter of principle that the language of the policy may be so unambiguous that the only proper interpretation of its terms will lead a tribunal or court to conclude that its true character is that of a contractual obligation[3]. I also accept that case law shows that redundancy policies have been found to be contractual despite assertions are they were discretionary in nature[4].

69. In this case I have not seen a copy of the redundancy policy; only a synopsis in a management guidance document and, as set out in my findings of fact there is no evidence before me to enable me to conclude, on the balance of probabilities, that the language of the policy would be "apt" to be contractual terms[5].

70. The claimants accept that the policy is not referred to in their contracts. I have no documentary or witness evidence which assists me to find a factual foundation sufficient to qualify the express wording of clause 17 of the contract, or identify a reliable basis for an assertion of a collateral contract.

71. In those circumstances, reminding myself of the civil burden of proof that rest upon the claimant I have concluded that:

72. The terms of the written contract of employment set out the whole of the claimants' contractual terms.

[3] Park Cakes Ltd v Shumba & Others [2013] EWCA 974 at paragraph 36 (d).
[4] Keeley v Fosroc International Ltd [2006] IRLR 961 at paragraph 18.
[5] Alexander & others v Standard Telephones and Cables Limited (No.2) IRLR 286.

73. That the redundancy policy was not incorporated into the claimants' contract of employment.

74. That the character of the Cable & Wireless redundancy policy has not been proven to be contractual in nature.

75. In light of the above judgment, it is not necessary to determine the second question, but I do so for completeness. To determine this issue, I must decide between the recollection of the claimants (as expressed in their correspondence referenced above and by Mrs Probert and Mrs Amour) and the available, broadly contemporary, documentary evidence. In reaching my conclusion I bear in mind that the burden of proof rests upon the party asserting the claim; the claimants.

76. I consider Mrs Probert and Mrs Amour to be honest witnesses, doing their best to recall terms of an agreement which they have not seen for twenty years and about which, in some part, their recollection is based on their discussions with colleagues. I have already expressed some doubt about the earlier written representations on behalf of the claimants.

77. Taking into account the C&W manager's guidance and the internal briefing note of late 2002[6], which expressly referred to C&W paying two weeks as its multiplicand for redundancy payments[7], It is more likely than not that the C&W policy stated that employees whose dismissal was by reason of redundancy, could, or would, receive a redundancy payment based on a multiplicand of two week's pensionable pay for each year of employment, including the statutory redundancy payment.

78. If I had found that the above agreement was a contractual entitlement, I would have concluded the terms of that entitlement were as set out in paragraph 78.

Employment Judge R F Powell

Dated: 20th December 2020

REASONS SENT TO THE PARTIES ON 21 December 2020

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNA

[6] I take this date from 387 which refers to a possible future event in "early 2003".
[7] Page 387 of the bundle. I cannot determine whether this statement was based on sight of the C&W policy after the staff joined NTL or from "market intelligence". It is however consistent with the C&W documentation.