Neutral Citation Number: [2022] EWCA Civ 1027

Case No: CA-2021-000743

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HIS HONOUR JUDGE AUERBACH
EA-2019-001237-AT

EA Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2022

Before :

THE PRESIDENT OF THE FAMILY DIVISION (SIR ANDREW McFARLANE)
LORD JUSTICE BEAN
and
LADY JUSTICE ELISABETH LAING

- -

Between :

AMDOCS SYSTEMS GROUP LTD	Appellant
- and -	
JOEL LANGTON	Respondent

- -
- -

Jonathan Cohen QC (instructed by **CMS-CMNO LLP**) for the **Appellant**
Douglas Leach (instructed by **Baker Law LLP**) for the **Respondent (Claimant)**

Hearing date: 28 June 2022

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Approved Judgment

Lord Justice Bean:

1. In 2003 the Claimant Joel Langton began working for a company then called Cramer Systems Limited ("Cramer") as a Test Engineer. In 2009, by which time the company name had changed to Amdocs Systems Limited ("Amdocs") following its acquisition by the Appellant, he went on sick leave and remains so to this day. The issue between the parties is whether at the time he issued employment tribunal proceedings in 2018 he was entitled to the benefit of an "escalator clause" providing for annual increases of 5% in payments under a salary protection plan.

2. Mr Langton was offered the post in a letter dated 25th July 2003. The relevant passages from the offer letter are as follows:

> "Following your recent interview, I am delighted to offer you the position of Test Engineer with Cramer Systems Limited.
>
> Your employment will commence on [start date to be confirmed]
> ...
>
> Your remuneration package will be as follows:
>
> An annual salary of £25,000;
>
> A pension contribution of 6% of your annual salary if you wish to join the contributory scheme;
>
> Private healthcare for you and your immediate family;
>
> Life insurance to 4 times basic annual salary;
>
> An income protection plan;
>
> ……
>
> Income Protection and Sickness Payments
>
> Cramer will pay staff on sick leave their full salary (less any statutory sick pay) for the first 13 weeks that they are ill. Thereafter, an income protection plan has been established that will pay employees 75% of their annual salary, less basic rate state long term incapacity benefit, up to their 60th birthday.
>
> Please see the attached "Summary of Benefits" for further information about the above benefits."

3. Attached to the offer letter was the document entitled "Summary of Benefits". It included the following wording concerning an income protection scheme established by Cramer for the benefit of their employees:

> "INCOME PROTECTION SCHEME & GROUP LIFE ASSURANCE SCHEME

In order to protect you and your family from the potential loss of income resulting from long term sickness or disability, the company have established an Income Protection Scheme with Sun Life Financial of Canada.

In the event of your premature death, the company have established a Group Life Assurance Scheme with Royal Sun Alliance.

When am I included?

You are included in both Schemes if you are a permanent employee from the day you commence employment with Cramer Systems. You will cease to be included in the Schemes at age 60, or on ceasing to satisfy the eligibility conditions.

What benefits are provided?

Under the Group Income Protection Scheme, the payment of benefit commences after the first 13 weeks of incapacity. You will be asked to provide medical certification for the insurance company in respect of any Incapacity lasting longer than this period.

After benefits have been paid continuously for 52 weeks the benefit will increase by 5% every year, until you return to work. In this way, your benefits will have a degree of protection from inflation.

Under the Group Life Assurance Scheme, a payment would be made to your Estate, or a nominated individual, following your death.

How much is the benefit?

For the Group Income Protection Scheme, the maximum initial benefit is 75% of your salary less a deduction in respect of the State benefit for a single person.

For the Group Life Assurance Scheme, the benefit is four times your annual basic salary.

Do I have to pay towards the benefit?

No. Cramer pays the whole cost, which does not count as part of your income for tax purposes.

What happens if I leave the company?

Should you leave employment with Cramer Systems your cover in both Schemes automatically ceases on the date that you leave.

> NOTES The operation of both Schemes is governed by the terms of the Group policies, and nothing in this summary will override the terms of that document."

4. In addition to the offer letter and the summary of benefits, the Claimant was provided with a written "contract of service", also dated 25th July 2003, which included the following clauses:

> "6. The Employee is entitled to the following benefits to the extent and in the circumstances set out in the Manual and outlined in the employee's letter of offer:
>
> i. Salary Protection Plan
>
> ii. Pension Fund Participation
>
> iii. Life Assurance
>
> iv. Equity Participation
>
> v. Private healthcare
>
> 7. Provisions relating to absence through illness shall be those set out in the Manual.
>
> …
>
> 11. Where the rights and liabilities of the parties are set out in the Manual they shall be varied whenever and in the manner set out in any amendments made to the Manual by the Company. Such amendments will be communicated to each employee individually.
>
> 22. Save as may have been specifically agreed and provided herein or in any other agreement between the parties the Company and Employee hereby adopt and incorporate into this Agreement the general terms and provisions (including any provisions of amendment or variation) of the Manual herein referred to."

5. The Claimant accepted the offer of employment. The contract of service was signed on behalf of Cramer on 25th July 2003 and by him two days later. He began work on 1st September 2003.

6. On 2nd August 2004 Cramer wrote to the Claimant to confirm a change to his salary. The letter informing the Claimant of that change also stated: "Other terms and conditions are set out in your original Contract of Employment, a copy of which is in your possession."

7. On a date unknown in 2004, Cramer circulated to employees, including the Claimant, a document entitled "Rewards Benefits & Environment". The document contained the

following information about the income protection scheme that applied to permanent employees:

> "In case you were wondering ... some questions and answers Income Protection & Life Assurance
>
> When am I included?
>
> You are included in both Schemes if you are a permanent employee from the day you commence employment with Cramer. You will cease to be included in the Schemes at age 60, or on ceasing to satisfy the eligibility conditions.
>
> What benefits are provided?
>
> Under the Group Income Protection Scheme, the payment of benefit commences after the first 13 weeks of incapacity. You will be asked to provide medical certification for the insurance company in respect of any incapacity lasting longer than this period. After benefits have been paid continuously for 52 weeks the benefit will increase by 5% every year, until you return to work. In this way, your benefits will have a degree of protection from inflation.
>
> How much is the benefit?
>
> For the Group Income Protection Scheme, the maximum initial benefit is 75% of your salary less a deduction in respect of the State benefit for a single person.
>
> Do I have to pay towards the benefit?
>
> No. Cramer pays the whole cost, which does not count as part of your income for tax purposes.
>
> What happens if I leave the company?
>
> Should you leave employment with Cramer Systems your cover in both Schemes automatically ceases on the date that you leave.

8. On 12th September 2005 the Claimant was promoted to the position of Test Analyst. The letter informing him of the promotion also stated: "Other terms and conditions are set out in your original Contract of Employment, a copy of which is in your possession."

9. On 23rd May 2006 the Claimant was promoted to the position of Test Analyst. The letter informing him of the promotion also stated: "Other terms and conditions are set out in your original Contract of Employment, a copy of which is in your possession."

10. On the 15th September 2006 Cramer wrote to the Claimant to notify him of some changes to the terms and conditions of his employment. Those changes did not

expressly affect the income protection scheme. Save for the changes referred to in the letter, it was stated that "all other Terms and Conditions of Employment remain the same".

11. In or about September 2007, employees of Cramer attended a presentation by an HR manager, Andrea Swinn. The Claimant, in his oral evidence to the employment tribunal, had no recollection of the presentation but he accepted that he had probably been present at the presentation. The purpose of the presentation was to explain how "harmonisation" was going to be achieved as employees of Cramer were transferred into the Amdocs organisation. Ms Swinn used slides at the presentation; these referred to "benefit harmonisation" and an "improved benefit package for all employees". Under the heading "Effect on Cramer UK Employees" the following wording appeared on one of the slides:

Current Benefit Package	Proposed Benefit Package
…	…
Income protection insurance	
13 weeks 75% base salary (capped £90,000)	13 weeks 75% base salary (capped £90,000)
…	….

12. On 10th September 2007, a letter was sent to the Claimant on Cramer stationery which stated as follows:

> "Amendments to your Terms and Conditions of Employment
>
> Further to our recent discussions, I write to confirm the amendments to your contract of employment with Cramer Systems Limited ("the Company") which will apply with effect from 1 October 2007 (the "Commencement Date").
>
> From the Commencement Date, the relevant provisions in your contract of employment will be amended to read as follows:
>
> …
>
> Other Employment Benefits
>
> Optical & Dental Insurance

> Subject to satisfying any eligibility criteria imposed by the Company's insurers, you will be entitled to participate in the Company's optical & dental insurance scheme.
>
> The Company may from time to time change the benefit provider and vary or amend the extent of the cover or the basis on which it is provided. This benefit will cease on termination of employment.
>
> …
>
> All of the other terms and conditions of your employment are unchanged.

13. In or about October 2007 the Claimant received a pack of documents from the company, including one entitled "Income Protection Scheme & Group Life Assurance Scheme". This stated:

> "In order to protect you and your family from the potential loss of income resulting from long term sickness or disability, the company have established an Income Protection Scheme with Unum.
>
> In the event of your premature death, the company have established a Group Life Assurance Scheme with Canada Life.
>
> When am I included?
>
> You are included in both Schemes if you are a permanent employee from the day you commence employment with Cramer Systems. You will cease to be included in the Schemes at age 65, or on ceasing to satisfy the eligibility conditions.
>
> What benefits are provided?
>
> Under the Group Income Protection Scheme, the payment of benefit commences after the first 13 weeks of incapacity. You will be asked to provide medical certification for the insurance company in respect of any incapacity lasting longer than this period.
>
> After benefits have been paid continuously for 52 weeks the benefit will increase by 5% every year, until you return to work. In this way, your benefits will have a degree of protection from inflation.
>
> Under the Group Life Assurance Scheme, a payment would be made to your Estate, or a nominated individual, following your death.
>
> How much is the benefit?

> For the Group Income Protection Scheme, the maximum initial benefit is 75% of your salary less a deduction in respect of the State benefit for a single person. This benefit is paid as income and taxed accordingly.
>
> For the Group Life Assurance Scheme, the benefit is four times your annual basic salary.
>
> Do I have to pay towards the benefit?
>
> No. Cramer pays the whole cost, which does not count as part of your income for tax purposes.
>
> What happens if I leave the company?
>
> Should you leave employment with Cramer Systems your cover in both Schemes automatically ceases on the date that you leave.
>
> NOTES
>
> The operation of both Schemes is governed by the terms of the Group policies, and nothing in this summary will override the terms of that document."

14. On 17th October 2007, the Claimant signed a form to confirm that he wished to participate in the benefit schemes referred to in the pack of documents, including the income protection scheme.

15. On 23rd November 2007, Cramer wrote to the Claimant to inform him that it was anticipated that Cramer Systems Limited would change its name to Amdocs Systems Limited on 1st December 2007.

16. On the 1st October 2008, Amdocs Systems Limited wrote to the Claimant in the following terms:

> "Alterations to Terms and Conditions of Employment
>
> Further to recent discussions, I write to confirm the following amendment to your contract of employment with Amdocs Systems Limited
>
> New Job Title: QE Manager
>
> New Job Family: Dev Tech
>
> New Stream: Quality Assurance
>
> Effective Date: 1st October 2008
>
> All other Terms and Conditions of your employment contract remain unchanged."

17. In the autumn of 2008 the Claimant became unwell. In March 2009 he was diagnosed by his GP with suspected Encephalomyelitis/Chronic Fatigue Syndrome. The diagnosis was confirmed by a specialist at the end of June 2009. He began long term sick leave on 30th June 2009. That sick leave has continued, without interruption, to the present day.

18. On 28th July 2009, Amdocs wrote to the Claimant enclosing some forms for him to complete in respect of a claim under the income protection scheme. The Claimant duly completed the forms and returned them to Amdocs.

19. On 5th November 2009, Amdocs wrote to the Claimant in the following terms:

> "Further to your conversation with your HR Consultant, I write to confirm that in accordance with your Terms and Conditions of Employment dated 25th July 2003 a decision has been made to withdraw company sick pay from you effective 1st November 2009. This will not affect your entitlement to Statutory Sick Pay (SSP) which can only be paid upon provision of doctor's certificates for the period in question.
>
> You have made a claim under the income protection insurance as per our scheme rules. Under this scheme, the maximum benefit is: 75% of your insured earnings less the state long term incapacity benefit. This claim is subject to approval of the insurer, which is UNUM.
>
> Until your claim with Unum has been approved, or if it is not successful, you will receive any SSP to which you are entitled (and have provided sick notes for). If your doctor signs you fit to return to work on a partial basis (less than your contracted 37.5 hours per week), the Company will top your salary up to your standard hourly rate for any hours you do work, subject to your manager's approval prior to your work and receiving timesheets signed by you and your manager. This will be done a month in arrears until you return to work full time. As soon as you return to 37.5 hours per week (100% recovery), then your salary will be processed as we did before your sick leave."

20. The Claimant's claim under the income protection scheme was successful. He started receiving benefits under the scheme with effect from the 1st November 2009. However, the payments made to him under the income protection scheme with effect from the 1st November 2009 were not increased by 5% every year.

21. On the 8th May 2015, Amdocs wrote to the Claimant to notify him that his contract of employment was to be transferred from Amdocs Systems Limited to the Appellant company Amdocs Systems Group Limited.

22. Towards the end of 2015, the Claimant received a letter from Standard Life regarding a new pension plan that had been created for him. The employment tribunal found that it was as a result of that letter that the Claimant investigated the payments that he had

been receiving under the income protection scheme and he discovered that the payments had not been increased by 5% every year.

23. On 5th October 2016 the Claimant's solicitors sent a letter before action requesting, inter alia, an explanation as to why the payments made to the Claimant under the income protection scheme had not been increased by 5% every year.

24. The date on which the Claimant was told that the escalation rate had been removed from the income protection scheme was 1st November 2016, when the following email was sent by Radhika Katarya on behalf of Amdocs to the Claimant's solicitors:

> "I checked again and I have been advised that [Mr Langton] went on LTD from Nov 2009. Please note that this was after the policy removed the escalation in October 2008. I am afraid due to this [Mr Langton] doesn't have escalation in his benefits payout."

25. A claim for unlawful deduction of wages was issued in the employment tribunal on 9 March 2018. The Tribunal's jurisdiction was limited to the period of two years ending with the presentation of the claim: see section 23(4A) of the Employment Rights Act 1996. The Claimant argued that he was entitled to the 5% annual escalation on the basis of the three documents sent to him on 25 July 2003. Amdocs accepted that the income protection insurance policy in force for the period from the date of commencement of the Claimant's employment to 30th September 2008 had specified that benefits payable under the income protection scheme would be increased by 5% every year after the benefits had been paid continuously for 52 weeks. The company's case was that the Claimant had no such entitlement because it had been lawfully removed in 2008, before the Claimant applied for benefits under the income protection scheme.

26. In support of its position, Amdocs relied on the following:

i) clauses 6, 7 and 11 of the Claimant's contract of employment dated the 25th July 2003;

ii) an Employee Handbook dated April 2005, which contained the following provisions:-

> 1.1 Contract of Employment
>
> Your Offer Letter and Terms and Conditions of Employment form the basis of your contract with Cramer Systems Group Limited, Cramer Systems Europe Limited or Cramer Systems Limited ("the Company").
>
> You will be informed of any changes in your Terms and Conditions of Employment in writing.
>
> …
>
> 5.3 Income Protection Insurance
>
> Subject to satisfying any eligibility criteria imposed by the Company's insurers, the Employee shall be entitled to participate

> at the Company's expense in an income protection scheme, providing up to 75% of salary less an amount equal to basic rate state invalidity benefit, underwritten by such reputable insurers as the Company shall decide from time to time. *The Company may from time to time change the benefit provider and vary or amend the extent of the cover or the basis on which it is provided.* This benefit will cease on termination of employment. [emphasis added]

iii) the terms of a Group Income Protection Insurance Policy issued by Unum, which contains the following provisions:

	GENERAL TERMS
effective date	1 October 2008
…	
Policyholder	Amdocs Systems Europe Limited
Commencement date	1 June 2003
Policy accounting date	1 October
Policy review date	1 October 2010
	SCHEDULE
Effective date	1 October 2008
Terminal age	65th birthday
Basic benefit	75% of a member's insured earnings then less the notional LtSIB
Escalation rate	No escalation rate has been selected for the benefits

The employment tribunal's findings of fact

27. The case was heard by Employment Judge D. Harris, sitting alone, at Bristol on 15 July 2019. His reserved judgment was promulgated on 13 August 2019. He was unable to make any findings of fact in respect of the document referred to as the "Manual" in the Claimant's contract of employment dated the 25th July 2003, since neither party could produce a copy. Whether it contained a similar provision to the "time-to-time" clause set out in paragraph 5.3 of the 2005 Employee Handbook was unknown.

28. In respect of the 2005 Employee Handbook, the ET found that that must have replaced the earlier Manual, it being illogical to suppose that the earlier Manual continued to co-exist with the 2005 Employee Handbook. There was, however, no evidence to indicate that the Claimant was informed about the existence of the new Employee Handbook in 2005.

29. The ET accepted the Claimant's evidence that he had read the offer letter dated the 25th July 2003, the summary of benefits that had been attached to the offer letter and the contract of service dated 25th July 2003. The Tribunal also accepted the Claimant's evidence that he had not read the Manual referred to in his contract of employment or the 2005 Employee Handbook.

30. The Tribunal found that it was likely that the 2005 Employee Handbook and the earlier Manual referred to in the Claimant's contract of employment had been accessible to Cramer employees, including the Claimant, via Cramer's intranet. The Tribunal accepted, however, that the company intranet had not been easy to use and that the Claimant had never searched for the Manual or the 2005 Handbook on it. The Tribunal was of the view that there was no basis for criticism of the Claimant for not discovering the 2005 Employee Handbook on the intranet. If, as the Tribunal found, he had not been told about the Handbook, then it was unrealistic to expect him to conduct periodic searches of the intranet to see if Cramer Systems Limited had published a new Handbook without telling him.

31. The Tribunal accepted the Claimant's evidence that he had not been made aware of the removal of the escalation rate from the income protection scheme before engaging in correspondence with the Respondent about the income protection scheme in 2016.

32. The Tribunal found that the offer letter, the summary of benefits and the contract of service conferred a contractual entitlement upon the Claimant to the escalation rate that he contends he is entitled to.

33. In the judgment of the Tribunal, it was the clear contractual intention of the parties to bestow upon the Claimant, as a permanent employee, the benefit of the income protection scheme described in the offer letter and the summary of benefits , which included the 5% escalation rate provided for in the summary of benefits.

34. EJ Harris noted that the summary of benefits made express reference to an insurer, in the context of the income protection scheme provided to permanent employees, but held that this "fell far short" of being sufficient to show that the Claimant's contractual entitlement was to the Respondent obtaining cover under an insurance policy for an income protection scheme and passing over to him any benefits payable under it.

35. He found that it was also correct that the summary of benefits stated that "the operation of both Schemes is governed by the terms of the Group policies, and nothing in this summary will override the terms of that document'; but that "document", assuming it was an insurance policy with Sun Life Financial of Canada, was never provided to the Claimant and was never, of itself, of any contractual force as between the Claimant and Amdocs.

36. EJ Harris rejected Amdocs' submission that the summary of benefits had no contractual force. He held that the summary of benefits was clear and certain as to the benefits payable under the income protection scheme. The fact that it was called a "summary" did not prevent the document from having contractual status.

37. In the judgment of the ET, "there was nothing in the offer letter, the summary of benefits or the contract of service to alert the Claimant that his entitlement to benefits under the Respondent's income protection scheme may change from time to time". Had that been the intention of the company at that time, then wording could have been used to make that clear in the offer letter or the summary of benefits or the contract of service. No such wording was used.

38. EJ Harris was not prepared to assume that the Manual referred to in the contract of service contained a time-to-time clause as set out in paragraph 5.3 of the later 2005 Employee Handbook. The Tribunal was also not prepared to find an implied time-to-time clause (of the kind set out in paragraph 5.3 of the later Employee Handbook) in the Claimant's contract of employment in the absence of evidence as to the contents of the Manual. In the judgment of the Tribunal, such an implied term was not necessary under either the officious bystander or the business efficacy tests.

39. In any event, however, EJ Harris found at paragraph [91] of this decision that the effect of clause 22 of the contract of service was such as to remove the contractual effect of anything that the 2003 Manual said, if it said anything, about the amount of income protection to which the Claimant was entitled under the income protection scheme. In other words, in the judgment of the Tribunal the Manual was subject to the agreement between the parties, as set out in the summary of benefits, that the Claimant was entitled to an increase of 5% every year upon the payments made to him under the income protection scheme, up until the age of 60, after those payments had been made continuously for 52 weeks.

40. Amdocs did not succeed in its argument that the Claimant was only ever contractually entitled to receive the percentage of salary for which the company was indemnified under the income protection scheme. The finding of the Tribunal was that the Claimant was contractually entitled to receive a 5% increase every year on the benefits paid to him under the income protection scheme after such benefits had been paid continuously for 52 weeks.

41. The ET rejected a further argument on behalf of Amdocs to the effect that such entitlement as there was to the escalator had been withdrawn by the company's letter of 1 November 2016 informing the Claimant that it was no longer in effect. This aspect of the decision was originally the subject of a ground of appeal to the EAT, but that ground was withdrawn upon Mr Leach pointing out on behalf of the Claimant that if the ET had been wrong to find that the Summary of Benefits was the source of entitlement to the escalator, his client's claim could not succeed.

42. The ET accordingly granted a declaration that there had been an unlawful deduction from the Claimant's wages arising from the Respondent's failure to increase the payments to him under the income protection scheme by 5% every year after the first 52 weeks; though, as already noted, their jurisdiction was limited to making an award for the two years immediately before the presentation of the claim.

43. By a subsequent decision made on 17 March 2020 the ET ordered the company to pay 100% of the Claimant's costs associated with the liability decision.

The letter of 29 October 2019

44. After promulgation of the ET's liability decision on 13 August 2019, Amdocs gave notice of appeal to the Employment Appeal Tribunal. On 29 October 2019 they wrote to Mr Langton to notify him that if and to the extent that he did have any entitlement to an annual escalation of his income protection benefits, the company was exercising its discretion to terminate that entitlement from the date of the letter. We were told that the removal of benefits effected by this letter has been the subject of a second claim by Mr Langton to the ET. It does not affect the appeal before us.

The appeal to the EAT

45. The appeal to the EAT was rejected on the initial sift but subsequently allowed by HHJ Auerbach to proceed to a full hearing. That hearing was also before Judge Auerbach. The outcome was that the company's appeal against the liability decision of the ET was dismissed. Judge Auerbach did, however, decide that the ET had erred in ordering Amdocs to pay 100% of Mr Langton's costs, and remitted the assessment of the proportion of costs that would be payable to a different judge in the ET.

46. In his judgment Judge Auerbach reviewed the authorities on the interpretation of contracts of employment and went on to refer to a number of cases about permanent health insurance, including *Villella v MFI Furniture Centres Ltd* [1999] IRLR 469, QBD, *Briscoe v Lubrizol Ltd* [2002] EWCA Civ 508; [2002] IRLR 607, *Jowitt v Pioneer Technology (UK) Ltd* [2003] ICR 1120, CA; and *Awan v ICTS UK Ltd* [2019] IRLR 212, EAT. He summarised the effect of those cases as follows:-

> "67. Standing back, I make the following observations about these authorities. First, it is clear that *Briscoe* turned on its own facts. It did not articulate any guiding principle different from those emerging from the other authorities. Secondly, in all three of the other cases, the employee was provided with documentation which told them, in terms, that the benefit existed, and set out, unambiguously, essential provisions as to the level of benefit and the circumstances in which it would be provided, which objectively conveyed a contractual commitment.
>
> 68. Thirdly, a consistent theme is that, if there is any ambiguity or uncertainty as to whether the employer's obligation to provide benefits is to be limited by reference to the specific terms of the employer's insurance cover, any such ambiguity will be resolved against the employer and in favour of the employee. That is not,

> I observe, a departure from orthodox contractual principles, but an application of the ancient common law rule, that any ambiguity as to whether a provision applies is to be construed against the party who seeks to rely upon it.
>
> 69. Next, a reference to the fact that the employer has arranged insurance in respect of the benefit, was not, in these cases, alone sufficient to make good the contention that the employer's commitment was limited by reference to the terms of that policy. To be effective, the limitation of the employer's exposure must be unambiguously and expressly communicated to the employee, so that there can be no doubt about it. That might be done by spelling out unambiguously, in a document provided to the employee, or drawn to their attention, what the particular limitations are, by stating in terms that the employer's obligation will be limited to the amount of payments made by the insurer, or something unambiguous of that sort."

47. Judge Auerbach then turned to the principal ground of appeal, which concerned the status of the three documents provided to the Claimant in 2003. He said:-

> "71. The contract of service, which was also self-described as "an Agreement" between the two parties, was signed and dated by the claimant and for and on behalf of Cramer. Its contents were plainly contractually binding. However, in relation to IPP the effect of clause 6 was, in my judgment, to incorporate as contractually binding terms, the provisions of the letter of offer and the Summary of Benefits. That came about in the following way.
>
> 72. The reference to "Salary Protection Plan" was plainly to what the offer letter called "An income protection plan". The preamble to clause 6 referred the reader to the letter of offer and to the Manual for further particulars. It did not refer only to the Manual. The letter of offer was only an outline, but it was a potential source of terms, as far as it went, and the objective sense was that its contents would be in keeping with whatever was set out in the Manual.
>
> 73. In this case, the letter of offer set out headline terms with clarity. When the benefit would kick in: after 13 weeks when full sick pay expired; how much it would be: 75% of salary less incapacity benefit; how long it could last: up to age 60. It then referred to the attached Summary of Benefits. The description of that as being "for further information" did not signify that its terms were not contractual. Nor did the use of "Summary" in the title of the document itself. What mattered was not the title but the contents: the ground that they covered and the language in which they were expressed.

> 74. The language of the Summary of Benefits was, itself, in my judgment, the language of entitlement. It repeated, unambiguously, the headline terms that had appeared in the offer letter. It also set out, precisely, the terms of the escalator: when it would kick in, the annual increase amount, and how long it would continue to apply. It also addressed with clarity other important matters, such as whether the employee has to make any contribution payment (no) and tax treatment. Its question and answer format was also expressive of it being addressed directly to the employee, and providing information that they would be able to rely upon.
>
> 75. What of the fact that the preamble to clause 6 of the contract of service also referred to "the circumstances set out in the Manual"? As to that, the contract did not define "the Manual"; and the Tribunal found that the claimant was not given it. But what he was given, with the offer letter, was the Summary of Benefits. The former could objectively be fairly described as outlining the benefit, and the latter as setting out the extent and circumstances of the entitlement. The objective reader would infer that, if the Summary of Benefits was not in fact an extract from the Manual, then the Manual itself could not be expected to say anything materially different.
>
> 76. Pausing there, I conclude that the Tribunal correctly found that the content of the Summary of Benefits had contractual effect. Ground 1(a) of the appeal fails.

48. A further ground of appeal to the EAT was that the ET had erred in finding that Clause 22 of the Claimant's contract of service had the effect of disapplying the provisions of the Employee Handbook or Manual in favour of the Summary of Benefits. As to this, Judge Auerbach said:-

> "77. … The correct analysis is this. Clause 22 of the contract potentially had the effect of incorporating by reference into the contract, provisions of the Manual in relation to matters about which neither this contract, nor any other agreement between the parties, made provision. IPP was a matter in relation to which the contract did make provision: it did so in clause 6. That being so, clause 22 had no application in relation to that topic.
>
> 78. The Tribunal plainly had a copy of the contract of service before it. But it did not set out the words of clause 22 in its decision, and its analysis of its effect at [91] is not quite right. It is not that clause 22 removed the effect of whatever the Manual said. Rather, clause 22 only had effect to incorporate a provision of the Manual, in respect of a matter in respect of which the contract made no provision. But that would not have precluded the contract elsewhere making some provision incorporating a provision of the Manual. Clause 6 did itself refer to the Manual. But the Tribunal had no direct evidence of what the Manual as

> at 2003 might have contained, and could make no finding about it.
>
> 79. However, to repeat, clause 6 did not refer only to the Manual; and, for the reasons I have set out, its effect was that the contents of the offer letter and the Summary of Benefits on the subject of lPP were contractual. In that sense, the Tribunal's overall conclusion at [91], that the contractual nature of the Summary of Benefits was not affected by clause 22, was correct. Further, as I have indicated, the only objective inference that the reader of the contract of service, the offer letter and the Summary of Benefits could draw about the Manual would be that it would not say anything materially different about IPP from what the Summary said.
>
> 80. Accordingly, although the Tribunal's analysis in [91] is not quite right, it was neither a necessary part of its reasoning, nor did it affect the soundness of the conclusion that it came to as the contractual status of the Summary of Benefits. In so far as the point of ground 1 (b) is that the Tribunal wrongly considered that clause 22 reinforced its analysis, I agree. But if the point of ground 1 (b) is also that the Tribunal should have concluded that clause 22 supported the respondent's case that the Summary was not contractual, I disagree. Either way, this ground does not assist the respondent, because it does not show that the Tribunal was wrong to conclude that the Summary was contractual."

49. A further ground of appeal to the EAT was that, even if the Summary of Benefits did have contractual effect, the ET should have found that the words "the operation of both schemes is governed by the terms of the Group Policies and nothing in this summary will override the terms of that document" had the effect of limiting the employer's obligations to the level of the Claimant's entitlement under the relevant insurance policy in force at any particular time. Judge Auerbach rejected that ground, holding that in line with the approach in the authorities such as *Villella* and *Awan*, if reliance was to be placed on a term in an insurance policy as qualifying what the contractual documents have elsewhere expressly stated, further steps would need to have been taken to bring those particular terms to the Claimant's attention and since the ET had found that no such steps had been taken, this ground could not succeed.

The appeal to this court

50. The employer's sole ground of appeal to this court against the liability decision, for which I granted permission on 26 November 2021, was:-

> "The Claimant's case was wholly dependent upon a "summary of benefits" having contractual effect. The EAT was wrong to dismiss the Respondent's appeal against the ET's finding that it did have contractual effect. The tribunals should both have found that the sole source of the Claimant's contractual right to the relevant benefit was the Manual, i.e. the Respondent staff handbook. "

51. The skeleton argument makes three points in support of this ground. Firstly, it is argued that Clause 6 of the contract of service provides that "the employee is entitled to the following benefits [the first one listed being the Salary Protection Plan] to the extent and to the circumstances set out in the Manual and outlined in the employee's letter of offer". It is said that Clause 6 on its proper construction means the only entitlement is as set out in the Manual and that by contrast the use of the word "outlined" in the reference to the offer letter, and the use of the word "summary" in the Summary of Benefits both indicate that the Manual must be regarded as taking precedence. The second point is that the ET and EAT were wrong to find that the Summary of Benefits had contractual force since it would be unusual for an employee's entitlement to any benefit to be set out in two different documents. The third point is that it was wrong to find that the Claimant had any entitlement as against the employer as opposed to its insurer.

Discussion

52. Mr Cohen is right to say that most of the argument in this case is about questions of law. However, there are four findings of fact by the ET which cannot be challenged on appeal and form the backdrop against which the points of law have to be debated. These are:-

    a) (paragraphs 6-9) The Claimant was sent and read three documents dated 25 July 2003: the offer letter, the summary of benefits attached to it; and the contract of service;

    b) (paragraph 55) The Claimant was not given the 2003 Manual or Handbook at that time.

    c) (paragraph 56) The Claimant was neither given a copy of nor told about the 2005 Employee Handbook although it was placed on the company intranet.

    d) (paragraph 87) The insurance policies were never provided to him either.

53. It seems to me clear beyond argument that at the end of July 2003 the terms of the contract were contained in the three documents which Mr Langton had been sent. It is common for contracts of employment to be contained in more than one document. The offer letter promised him on its first page that his remuneration package would include an income protection plan. The next page returns to the same theme under the heading "income protection and sickness payments". That gives the figure of 75% of annual salary but adds "please see the attached summary of benefits for further information about the above benefits." The attached summary of benefits is entirely clear and includes the escalator.

54. It is interesting that in the 2005 Handbook the first paragraph says that "your offer letter and terms of conditions of employment form the basis of your contract"; it does not say that only the contract of employment has any effect. In the 2003 documents the offer letter plainly incorporates the attached Summary of Benefits. The terms set out in the Summary of Benefits (which were not, of course, confined to the income protection scheme) were, in the traditional phraseology of contract law, "apt for incorporation into the contract". The case would be more difficult if there was something in the contract

of employment which contradicted the summary of benefits: that would bring into play the case law about interpreting a contract two of whose express clauses appear to contradict each other. But this is not such a case.

55. Mr Cohen hinted at what seemed to me to be jury points about the supposed remarkable generosity of the 5% escalator. It was expressly described as giving some protection against inflation for the long-term sick employee. At times of very low inflation it is generous, less so when inflation is in double figures. In any event, generous or not, it was what the parties agreed: see the majority decision in *Arnold v Britton* [2015] UKSC 36 among many other examples.

56. I am even less impressed with the argument that the information about life insurance and the income protection plan did not confer a contractual entitlement as against the employer. I asked Mr Cohen QC whether, if the Claimant had died shortly after starting work in September 2003, Cramer would have been able to say that the life insurance protection was not part of the contract on which the Claimant's estate could sue. I did not understand the answer and I do not think there is a satisfactory answer, other than a firm "No". The employer's contractual obligation is to procure the payment of the benefits promised in the contract.

57. Nor do I think that the paragraph in the summary of benefits saying "the operation of both schemes is governed by the terms of the Group policies, and nothing in this summary will override the terms of that document" makes any difference. If there was something in the insurance documents as they stood in July 2003 which contradicted the express promise in the contractual documents this should have been brought expressly and unambiguously to the Claimant's attention. I agree with what Judge Auerbach said on this topic in paragraphs 67 to 69 of his judgment, cited above.

58. Clause 6 says that "the employee is entitled to the benefits to the extent and in the circumstances set out in the Manual and outlined in the employee's letter of offer: (1) Salary Protection Plan…" We do not have the Manual. I agree with Judge Auerbach that, in the absence of the Manual being produced, we should assume at least that its terms did *not* contradict the letter of offer and summary of benefits. Clause 6 does not therefore help the employers.

59. Clause 11 of the signed contract of service allows the employer to vary the contents of the Manual but concludes "such amendments will be communicated to each employee individually". Mr Cohen does not suggest that a unilateral variation *not* communicated to the Claimant could have any effect and I do not consider therefore that Clause 11 helps the employers as regards any period before 2016.

60. A more difficult issue is whether the employers could, provided that this was clearly communicated to the Claimant, remove the escalator unilaterally. There was a difference of view between the ET and EAT as to the meaning of Clause 22 of the contract of service, which says that "save as may have been specifically agreed and provided herein or in any other agreement between the parties the Company and Employee hereby adopt and incorporate into this agreement the general terms and provisions (including any provisions of amendment or variation of the Manual herein referred to)". EJ Harris held that this clause prevented any unilateral variation, and on that basis rejected Amdocs' argument that the email of 1 November 2016 had been effective to bring the entitlement to an end. One of Amdocs' grounds of appeal to the

EAT was that this was erroneous; but, as already noted, that ground of appeal was withdrawn in the light of Mr Leach's concession that he could only succeed on the basis of the Summary of Benefits being incorporated into the contract. The effectiveness of the email of 1 November 2016 was not, therefore a live issue before us.

61. It is unnecessary on this appeal to resolve the difference of opinion on this issue between the ET and EAT. I must not be taken as endorsing either view. Clause 22 may give rise to argument in Mr Langton's new ET claim about the effectiveness of the letter of variation sent in 2019: but, as already noted, it cannot affect the outcome of this case.

62. I would dismiss the appeal.

Lady Justice Elisabeth Laing

63. I agree.

The President of the Family Division

64. I also agree.