EMPLOYMENT TRIBUNALS

Claimant: **Mr Mark Judkins**

Respondent: **BCA VEHICLE SERVICES LTD**

Heard at: **Southampton** **On: 30th of August 1972**

Before: **Employment Judge Dawson**

Representation
Claimant: Miss Grennan, counsel
Respondent: Miss Swan, solicitor

JUDGMENT

1. The respondent is in breach of the claimant's contract of employment.

2. The respondent is ordered to pay to the claimant the sum of £25,000

REASONS

1. In this case Mr Judkins, the claimant, asserts breach of contract against the respondent arising out of a dismissal by redundancy which took effect on 9 November 2018. He does not assert that his selection for dismissal, or the process by which dismissal was effected, was unfair but asserts that he had a contractual entitlement to an enhanced redundancy payment upon his dismissal.

2. In order to show such a contractual entitlement he relies upon two collective agreements between former employers of his and his former trade union, which he says were incorporated into his contract of employment (at least as to the redundancy terms). The respondent denies that the claimant had any entitlement to an enhanced redundancy payment with former employers and asserts that, even if he did, by virtue of 2 variations of contract, on 16th of January 2018 and 7th of June 2018, that contractual entitlement was lost.

Issues

3. I was provided with an agreed statement of issues at the outset of the hearing by reference to which I will give my conclusions in due course.

Findings of fact

4. References, in these Reasons to page numbers are to the "B" section of the bundle of documents used at the hearing unless otherwise stated.

5. The claimant commenced employment with Renault UK Ltd on 3 July 1978 as a Flatter. The claimant told me in evidence, and I accept, that his work was as a car body repairer. His statement of terms of employment carried the statement "the following constitutes the basic terms of your employment… and is in accordance with, and subject to the provisions of the general rules of the Company as outlined in the Employee Handbook…" (Page 1).

6. The relevant company handbook provided that "this Handbook is designed as a general guide to new employees and provides supplementary information to that contained in your written statement of terms and conditions of employment. Together with that written statement, it forms your contract of employment. However, no handbook can be comprehensive… The Company reserves the right from time to time to extend, vary or modify the above conditions, and you will be informed of any changes or amendments to this Employee Handbook by direct notification, the Company noticeboards or where applicable by amendments to the Company/Union agreements. It will then be deemed that all employees have understood the alteration" (emphasis added).

7. I note that the reference to amendments by the Company/Union agreements is a reference to "the above conditions". The conditions referred to are the written conditions of employment that, with the handbook, form the contract of employment. I find, therefore, that it was intended that the terms and conditions set out in the Company/Union agreements were intended to have legally binding effect in respect of an individual employees terms and conditions, at least where apt for them to do so.

8. On 24th of January 1983 a collective agreement, called a Procedural Agreement was entered into between Renault UK Limited and the Transport & General Workers Union (TGWU). The claimant was a member of that union at the time:

    a. By clause 1.1, it stated that the agreement recognised the TGWU as the appropriate and sole union to represent and negotiate on behalf of the manual employees of Renault located as listed in Appendix B. There is no dispute that at that time the claimant was a manual worker in a relevant location.

    b. By clause 1.3 it is stated that the agreement is entered into a voluntary basis and whilst not legally binding will be observed by both parties without reservations.

    c. By clause 2.5 it is provided that Management will provide the steward with reasonable facilities for carrying out his or her duties.

d. By clause 2.6 it is provided that "for this purpose, he/she will be provided with a list of manual employees covered by agreement, and will be given facilities to recruit newly engaged manual employees…"

e. By Appendix E , in paragraph E, an enhanced redundancy scheme was set out which stated "Individual payments are based on a maximum of 20 years service. In addition to the state scheme benefits employees will receive as applicable: –

i. one week for each complete year of service at age 18 or over but under 42…"

9. The claimant has been unable to provide any list of manual workers and has never seen one.

10. At a consultation meeting on 25 January 2018 the claimant's work history was discussed. The notes of the meeting state "started 1978 as an apprentice as a vehicle body refinisher, spent about 4 – 5 years in paint shop… Ended up spending about 5 years doing that came out of workshop into admin. Been in direct supply for the last 5 years." (Page 75).

11. The claimant was asked about his duties whilst working in admin and stated that he was doing company car contract work, preparing vehicles for staff who are entitled to cars and vehicles for press and media people. He stated that as well as doing that he would prepare paperwork, send out emails and book drivers with subsidiary companies. He would also bring vehicles round for inspection and inspect them to check they they were up to the required standard.

12. In 1989 the claimant's employment transferred to CAT GB Limited (p38). There is no dispute that the provisions of the relevant Transfer of Undertakings Regulations applied to that transfer. According to the claimant, his previous employer and new employer were sister companies within the Renault group.

13. I have been provided with the Employee Handbook which, I was told, applied to the claimant after his transfer of employment. In fact that handbook refers to CAT GB services Ltd as being the employer but it was not suggested that the handbook was not applicable to the claimant's employment.

14. The handbook, in its introduction, is in similar terms to the claimant's previous employee handbook. It states "this Handbook is designed as a general guide to your terms and conditions of employment. Your written statement contains those details of your employment particular to you… and details any respects in which your terms and conditions differ from the standard ones in this Handbook. Together with that written statement, this handbook forms your written statement of terms and conditions of employment… The Company reserves the right from time to time to extend, vary or modify the above conditions and you will be informed of any changes or amendments to this Employee Handbook by direct notification, the Company noticeboards or where applicable by amendments to the

Company/Union agreements. It will then be deemed that you have understood the alteration." (Page 16).

15. For the same reasons I have given above in relation to the Renault Handbook, I find that it was intended that Company/Union agreements were intended to have legally binding effect in respect of an individual employee's terms and conditions where apt for them to do so.

16. On 25th of September 1989 a collective agreement was negotiated between CAT GB Services Ltd and TGWU (the 2nd collective agreement). Again, it has not been put in issue that there is an apparent disparity between the limited company employing the claimant and the parties to that collective agreement and there is no doubt that the claimant was given a hard copy of the collective agreement by his union.

17. The collective agreement is strikingly similar in its terms to the agreement with Renault UK Ltd and in particular I refer to clauses 1.3, 2.5 and 2.6 and Appendix E. However there are some differences, firstly the 2nd collective agreement recognises the Union as the appropriate and sole union to represent and negotiate on behalf of the employees of the company at the locations listed in Appendix B and is not limited to manual workers. Southampton is listed as a location in Appendix B and it is not in dispute that the claimant was, therefore, covered by this collective agreement. Secondly, Appendix E, paragraph E, is in different terms. It states "in addition to the state scheme entitlement CAT GB Services Ltd will make additional ex gratia payments to redundant employees according to age and length of service…" It then sets out various age ranges including that for people in the age range 22 to 40 the CAT GB payment will be one weeks basic pay" (page 47, emphasis added).

18. Matters continued until 16 January 2018 when, apparently without warning, preamble or consultation, the claimant was sent a statement of terms and conditions under the Employment Rights Act 1996 (page 70). It commences by stating that the statement sets out "certain particulars of your terms and conditions of employment" and is, apparently, therefore not intended to be exhaustive. However it does go on to state "together, this statement and the Employee Handbook constitute your statutory Terms and Conditions under the Employment Rights Act 1996". It was not suggested that the terms of the Employee Handbook had changed. That statement of terms stated that the claimant's employer was CAT UK Services Ltd but the claimants evidence was that that was simply the new name for CAT GB Services Ltd.

19. It is apparent that this document was sent in the context of a forthcoming transfer of employment to the respondent which would be governed by the Transfer of Undertakings Regulations (see for instance the email of 11 January 2018 at page 67).

20. I find that there was no intention on the part of the employer to vary the claimant's terms and conditions at that stage. It simply intended to record the terms and conditions as they were in order to facilitate the transfer of undertaking. Had there been an intention to vary the terms and conditions, in my judgment, there would have been some consultation and the claimant would have been asked to sign the variation.

21. On 4 February 2018 the transfer of undertaking from CAT UK Services Ltd to the respondent took place. I have not been addressed on the precise mechanics of the transfer, nevertheless, it is not in dispute that regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) applied to the claimant.

22. In April 2018 the claimant was sent a statement of terms and conditions of his employment as a 5 February 2018 by the respondent. Again it was not suggested that there was any intention to change the claimant's existing terms and conditions however the statement contained the statement "there are no collective agreements that directly affect employment." (Page 89). The claimant signed that document on 7 June 2018.

23. On 31 July 2018 the claimant was placed at risk of redundancy and was subsequently selected for redundancy and dismissed.

The Law

24. In respect of collective agreements the respondent has referred me to section 179 of the Trade Union and Labour Relations (Consolidation) Act 1992. In that respect I have noted the commentary in Harvey on Industrial Relations and Employment Law which states "Although the collective agreement is not itself legally enforceable, it is trite law that an individual provision in it may be incorporated (either expressly or by implication) into an individual's contract of employment and thus become legally enforceable as a contractual term" (Q[413]).

25. I was also taken to *Marley v Ford Trust Group Ltd* [1986] IRLR 369 in which the Court of Appeal stated "But, since 1974, the courts on a number of occasions have had to consider whether, when there is an unenforceable collective agreement incorporated into a contract of personal service, the terms of it, or some of them, can be incorporated into that contract of personal service. We found it unnecessary to go into all the cases because, as recently as 1983, this Court considered the problem in Robertson v British Gas Corporation [1983] IRLR 302. This Court decided that such terms can be incorporated into contracts of personal service and, when they are so incorporated, they are enforceable"

26. In *Alexander v Standard Telephones & Cables Ltd* (No 2) [1991] IRLR 286, Hobhouse J said, at para 31: "The principles to be applied can therefore be summarised. The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct

construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn."

27. That decision was cited with approval in *Sparks v Department for Transport* [2016] ICR 695 (paragraph 13).

28. Regulation 4 of TUPE provides

> (1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
>
> (2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—
>
> (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
>
> (*b*) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
>
> …
>
> [(4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.
>
> (5) Paragraph (4) does not prevent a variation of the contract of employment if—
>
> (a) the sole or principal reason for the variation is an economic, technical, or organisational reason

entailing changes in the workforce, provided that the employer and employee agree that variation; or

(b) the terms of that contract permit the employer to make such a variation.

29. It was not suggested by the respondent that regulation 4 (5)(b) TUPE had any application in this case.

30. I was not taken by either party to authority on the question of when the reason for any purported variation is the transfer but have noted *Hare Wines v Kaur* [2019] IRLR 555 and in particular the way the matter was put by Underhill LJ in that case (albeit somewhat different on its facts) that "Once the Judge rejected Mr Windsor's evidence as to the reason for the dismissal the only possible inference from her other findings was that he believed (in practice, no doubt, having ascertained Mr Hare's views) that Ms Kaur's problems with Mr Chatha, which had been tolerable pre-transfer, would not be tolerable post-transfer. In my view that means that the transfer was not simply the occasion for her dismissal but was, if not the sole reason, at least the principal reason for it: it was the transfer that made the difference between the problems being treated as a cause for dismissal and not."

Conclusions

31. As indicated above, I give my conclusions by reference to the list of issues.

A Establishing the Contract Terms at the EDT

1 Claimant's employment with Renault

a) Was the Claimant contractually entitled to the benefit of the enhanced redundancy payment scheme set out in the 1st collective agreement

32. In my judgment the 1st collective agreement, generally, was intended to be incorporated into the claimant's contract of employment with the respondent to the extent that it was apt to do so. I make this conclusion that the reasons I have set out in paragraph 7 above, essentially concluding as an matter of fact that the collective agreement was incorporated into the contract of employment between the claimant and Renault UK Ltd by express reference and that was the intention of the parties.

33. I am fortified in that conclusion by the terms of Appendix E, paragraph E, which sets out specific, prescriptive rights for employees. Applying an objective test to the construction of that part of the collective agreement I consider that it was intended to confer additional contractual rights on employees.

34. In my judgment, not only is the collective agreement incorporated into the individual contract of employment by reference, but Appendix E, paragraph E, is apt for incorporation.

35. Clause 1.3 of the collective agreement does not respondent in my opinion. That is a statement that it will is not intended that the collective agreement between the trade union and the employer will have legal effect. However, as set out in *Marley* that does not prevent a contract which has been incorporated into an employee's contract of employment having legal effect.

36. I also do not consider that the respondent's arguments based upon paragraph 2.6 of the collective agreement is a good one. In my judgment the list of employees which was to be given to the trade union shop steward was for the purpose of the shop steward providing union services to appropriate employees. It was not intended that the list would define who was and who was not covered by the terms of the collective agreement. Paragraph 2.6 must be read in the light of paragraph 2.5 and in the light of the heading for that section "union representation". The definition of who is covered by the collective agreement is set out in paragraph 1.1 of the collective agreement. In any event, given that the list has been lost, if I were wrong in this respect, I would have to consider whether, on the balance of probabilities, it is likely that the claimant's name appeared on it. Given that he was a manual worker at the appropriate location, I consider it more likely than not that his name did appear on it..

37. Thus I answer this issue in the affirmative.

b) If so, was that contractual entitlement effectively removed or varied prior to the TUPE transfer of the claimant's employment to CAT in 1989?

38. The respondent's argument in this respect is that because the claimant ceased to be a manual worker and became an administrative worker the relevant collective agreement did not apply to him any longer.

39. The claimant disputes that he ceased to be a manual worker but, also, asserts that once the term became part of his contract of employment it would be necessary for there to be an express variation for it to cease to be part, even if he was no longer a manual worker.

40. The Oxford English dictionary defines manual as meaning "Of work, an action, a skill, etc.: of or relating to the hand or hands; done or performed with the hands; involving physical rather than mental exertion. Frequently in manual labour".

41. I consider that in normal usage, once the claimant started doing administrative work and the only work that could possibly be described as being "manual" was driving vehicles round in order to inspect them, it could no longer be properly said that he was a manual worker.

42. In my judgment construing the statement of terms and conditions, the company handbook and the collective agreement as a whole it was not intended that an employee who had been a manual worker but ceased to be would continue to receive the benefit of the collective agreement. For instance had a manual worker progressed to management, construing those documents objectively, it cannot have been the intention of the parties

that s/he would still have the benefit of the manual worker collective agreement.

43. Thus I have come to the conclusion that by the time the claimant's employment transferred to CAT he had lost the right to the enhanced redundancy payment scheme.

Claimant's employment with CAT:

a) did the Claimants contractual entitlement with Renault transfer to CAT pursuant to TUPE?

44. In so far as this issue relates to the entitlement to an enhanced redundancy payment, the answer is that it did not because, by the date of the transfer the contractual entitlement to an enhanced redundancy payment no longer existed. However, pursuant to the relevant TUPE legislation, the claimants actual contractual entitlements against Renault would transfer to CAT.

b) In any event, was the Claimant contractually entitled to the benefit of the enhanced redundancy payments scheme set out in the 2nd collective agreement

45. At the point of the transfer the claimant's contract of employment with Renault transferred to CAT. That contract referred to the Employee Handbook. That handbook, (whether the Renault handbook or the CAT handbook) allowed the terms and conditions to be varied by applicable Company/Union agreements.

46. For the reasons I have largely given in relation to the 1st collective agreement, I consider that the 2nd collective agreement was intended to form part of the claimant's terms and conditions to the extent that it was apt to do so. For the same reasons I have given above, I do not consider that the respondent's arguments in respect of paragraphs 1.3 and 2.6 of the collective agreement are correct.

47. The more difficult question is whether, in respect of the 2nd collective agreement, Appendix E, paragraph E, is apt for incorporation. The 2nd paragraph states "in addition to the state scheme entitlement CAT GB services Ltd will make additional ex gratia payments to redundant employees…". I have given anxious consideration to the question of whether the reference to ex gratia payments should be interpreted to mean that the intention to make the additional payments cannot have contractual effect between the employees and the employer. That would normally be the meaning of such a phrase. Construing the collective agreement as a whole, however, I have concluded that the reference to ex gratia is intended to mean that at the point when the parties entered into the collective agreement there was no statutory obligation on CAT to make payments which were in addition to the statutory scheme. In that sense the payments were ex gratia, however by virtue of the collective agreement CAT voluntarily undertook a legal obligation to make such additional payments. Paragraph E sets out a detailed method of calculation according to an employee's length of service. The section, taken as a whole, clearly is intended to induce in the reader a belief that if a certain number of years'

service are completed, additional payments will be made to redundant employees. Not without some hesitation, therefore, I have concluded that Appendix E, paragraph E is apt for incorporation into the employee's contract of employment.

48. Thus I answer this issue in the affirmative.

If the answer to a or b above is yes, was any such contractual entitlement effectively removed or varied prior to the TUPE transfer to BCA on 5 February 2018?

49. The only variation relied upon by the respondent is the statement of terms sent to the claimant on 16 January 2018.

50. I have made a finding above that was not intended by the parties that the statement of terms sent on 16 January 2018 was intended to remove any contractual entitlement to an enhanced redundancy payment.

51. In my judgment the statement of terms which was sent was no more than a statement of the employer's belief of what the terms were at that time. It is not been suggested that the claimant was asked to sign that statement to show his agreement to it.

52. Thus, as a matter of fact, I do not find there was any variation of the claimant's contractual entitlement.

53. If, however, I was wrong in that respect I would conclude that the reason for the variation was the forthcoming transfer to the respondent. Notwithstanding that the claimant had been employed by CAT since 1989 this was the 1st statement of terms and conditions issued to him by it, many years after the collective agreement had been entered into, in the context of discussions between the transferor and transferee of an undertaking and a matter of days before the transfer of undertaking took effect. I have been provided with no explanation as to why that document was sent when it was and can only conclude that the sole or principal reason for sending it was the transfer which took place on 4 February 2018. In those circumstances the variation was void.

54. Thus I answer this issue in the negative

3 Claimants employment with BCA

a) Did any such contractual entitlement of the claimant transfer to BCA pursuant to TUPE

55. Having regard to regulation 4(1) TUPE, such a contractual entitlement would have transferred to BCA.

b) If so, was that contractual entitlement effectively removed or varied prior to the Claimants redundancy which took effect on 9 November 2018?

56. The respondent relies upon the purported variation of contract of 7 June 2018.

57. Miss Grennan, for the claimant, submitted that again there was no intended variation and therefore the contractual entitlement was not removed.

58. It seems to be that submission is more difficult in circumstances where the document expressly states that there are no collective agreements referring to the employment and the claimant has signed that document. Whatever the subjective intentions of the parties, the contract must be construed objectively. If I were satisfied that both parties were mistaken when the contract was signed then it may be possible to allow for rectification of the contract. In this respect I note that in *Nosworthy v Instinctif Partners Ltd* (unreported) the EAT apparently rejected a submission by counsel that the employment tribunal had no jurisdiction to set aside or rewrite a transaction (albeit in the context of deciding whether a contractual provision could be set aside; paragraphs 37 & 51).

59. Given that the respondent's case was that it was completely unaware of the relevant collective agreement, the claimant can assert with some force that the intention of the parties cannot have been to deprive him of the benefits of the collective agreement and, therefore, the contract must be one which was mistaken in its terms. The claimant also told me that he only signed the agreement in the belief that he was entitled to the benefit of an enhanced redundancy scheme.

60. Thus my provisional inclination is to accept the argument of Miss Grennan that there was no intended variation and therefore I should treat the contract of 7 June 2018 as if it did not state that there were no collective agreements referring to the contract of employment. However, it is not necessary for me to resolve this point since, if the contract did amount to a variation, as is advanced by the respondent, again I am driven to the conclusion that the reason for the variation was the transfer of undertaking.

61. It has been open to the respondent to call evidence as to the reason for any variation in June 2019 but it has failed to do so. Only the respondent knows the reason it sent the new terms and conditions to the claimant, but having regard to the proximity of timing between the date of the transfer of undertaking and the variation and the lack of any explanation for the variation or any obvious reason for it, it seems to me that the reason, or it is the principal reason for the variation is the transfer. To apply the reasoning of Underhill LJ in *Hare Wines,* the inference I draw is that enhanced redundancy terms which were considered acceptable before the transfer were not considered acceptable after the transfer. It was the transfer that made the difference between the claimant being entitled to the enhanced terms and not being entitled to them. Thus the transfer was the sole or principal reason for the variation.

B Breach of Contract

1 Has the Respondent paid the Claimant's redundancy pay in accordance with the contractual terms?

62. It has not, it has only paid of the statutory redundancy pay.

C Damages

if the Respondent is in breach of contract, what is the measure of damages to which the claimant is entitled?

63. The issue between the parties in this respect is whether the enhanced payment should be in addition to the statutory redundancy payment or inclusive of it.

64. The wording of the relevant section is clear it states "in addition to the state scheme entitlement, CAT GB Services Ltd will make additional ex gratia payments to redundant employees…" (Page 47, emphasis added)

65. Below that it sets out a statement of what an employee will receive as a statutory payment and what as a CAT GB payment. For employees aged between 22 and 40 the collective agreement states that the statutory payment is one week's basic pay and states that the CAT GB Payment is one week's basic pay. If the enhanced redundancy payment was intended to include the statutory payment, employees aged between 22 and 40 would not get any payment in addition to the state scheme at all since the payments are the same. Thus, the scheme would not give rise to additional payments at all.

66. Construing the relevant section as a whole and having regard, in particular, to the words "in addition to the state scheme…" I find that the employee is entitled to both the statutory entitlement to redundancy and the CAT GB payment. The parties are agreed that is an amount in excess of £25,000 and, therefore, damages are capped at £25,000.

Employment Judge Dawson

Date: 2 September 2019

Judgment sent to parties: 16 September 2019

For the Tribunal Office

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