EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J. McColl	**v**	**HCT Group**

Heard at: London Central (by video) **On**: 17 September 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Mr. R. Ford (solicitor)

For the Respondent: Mr. A Webster (of Counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

The Respondent was in breach of contract by failing to pay to the Claimant his contractual redundancy settlement and is ordered to pay to the Claimant the net sum of £25,000, being damages for the breach of contract.

REASONS

Background and Issues

1. By a claim form dated 21 December 2020 the Claimant brought a claim for breach of contract in respect to his enhanced redundancy pay. He claims that the Respondent was in breach of contract by failing to pay him his contractual

enhanced redundancy payment of £68,481.57 and paying the statutory redundancy of £16,140 instead, representing the shortfall of £52,321.57.

2. The Respondent denies that the Claimant was entitled to an enhanced redundancy payment. The Respondent relies on a term in the Claimant's contract of employment, which states that enhanced redundancy payment will be subject to "funding availability". The Respondent contends that due to its poor financial position it did not have sufficient "funding availability" to pay the enhanced redundancy.

3. Essentially this case turns on the legal construction of the contract terms and in particular the true meaning that should be ascribed to the phrase "funding availability", and then considering whether the Respondent had or did not have "funding availability" to pay the Claimant his enhanced redundancy.

4. Mr Ford appeared for the Claimant and Mr Webster for the Respondent. I am grateful to both of them for their assistance to the tribunal. The Claimant gave sworn evidence and was cross-examined. Ms Lynn McClelland, the Chief Executive Officer of the Respondent, gave sworn evidence for the Respondent and was cross-examined.

5. I was referred to documents in a bundle of documents of 262 pages. After the lunch break the Respondent disclosed a further document (minutes of the Board meeting of 26 October 2020) with less redactions applied to it than a copy of that document in the hearing bundle. I accepted that additional document in evidence.

6. Mr Ford confirmed that the Claimant was no longer advancing his case on the alternative ground of an implied term arising from prior conduct (paragraph 18 in the Grounds of Claim).

7. Both Mr Ford and Mr Webster confirmed that the case was one of legal construction of an express contract term (clause 24.4) and neither party sought to argue that a term must be implied to qualify the express term.

8. Finally, although there was some discussion and submissions by Mr Ford on the question of whether the proviso "subject to funding availability" in clause 24.4 equally applied to clause 24.3 (notice entitlement), this was not an issue I

needed to decide for the purposes of this claim. Accordingly, I make no findings and conclusions on this question.

9. At the end of the hearing, I decided to reserve my judgment as I felt I needed more time to reflect on the issues in the case.

Findings of Fact

Claimant's employment contract

10. The Respondent is a large charitable social enterprise transport provider, which delivers community-based bus transportation services particularly to vulnerable communities throughout the UK. The ultimate governing body of the Respondent is the Board of Trustees.

11. The Claimant was employed by the Respondent between 13 November 2000 and 27 November 2020. He held various positions, the most recent one, from 2013 until his redundancy, was Performance Director. It is a senior position. The Claimant was a member of the Respondent's Leadership Team.

12. The Claimant's contract of employment contained the following terms:

REDUNDANCY

> *24.1 For the purpose of redundancy, length of service will be calculated from the first day of continuous employment with HCT; irrespective of "temporary" or "permanent" contract status.*
>
> *24.2 The redundancy settlement will be two weeks gross pay for each full year of service to the organisation.*
>
> *24.3 Redundancy notice shall be 1 month plus 1 week for every completed year of service, above 1 year.*
>
> *24.4 Redundancy payment will be subject to funding availability.*

13. It was accepted by the parties, and I agree, that the reference to "redundancy settlement" in clause 24.2 and "redundancy payment" in clause 24.4 means one and the same.

Respondent's Financial Position

14. In 2018/2019, the Respondent began to experience financial difficulties due to a series of unprofitable acquisitions. The Respondent also became the victim of a serious cyber-attack in May 2019 which resulted in financial data and other information being destroyed and which made it more difficult to measure the scale of financial trouble it was facing.

15. In January 2020, the Respondent appointed an insolvency advisor to provide ongoing advice to the Board of Trustees regarding its financial position. The Respondent also appointed a Change Turnaround Specialist to advise and support the Board of Directors on the Respondent's ongoing financial situation.

16. In March 2020, the Respondent's lenders, concerned with the financial state of the Respondent, commissioned an independent review of the Respondent's business to ascertain the value of the Respondent's assets and the possibility of the lenders recovering their investments if the Respondent entered administration or liquidation.

17. A new Chief Executive Officer (Ms. Lynn McClelland) was appointed in April 2020. Her immediate priority was to lead the Respondent through that period of financial troubles.

18. The COVID-19 pandemic caused a further negative impact on the Respondent's trading conditions and its financial standing. The impact was somewhat mitigated by the Respondent's benefiting from "no better – no worse" provisions in its contracts with bus operators.

19. It appears, and the Claimant has accepted that in his evidence, that in early/middle 2020 the Respondent's insolvency was a real possibility.

20. In part due to the loss of financial data caused by the cyberattack the Respondent was late with filing its accounts for the financial year 2018/19. The accounts were eventually filed in June 2020. The accounts show a trading loss of £1.6 million on a growing revenue of £76.72 million. The balance sheet as of 31 March 2019 shows cash at bank and in hand of £3.6m (vs. 298k in 2018), net current assets of £3.4m (vs. £2m in 2018) and total group funds of £3.9m (vs. £5.5m in 2018).

21. The accounts were prepared on a "going concern" basis. The Trustees' assessment of that was explained in the accounts as follows (**my emphasis**):

The Trustees have assessed whether the use of the going concern assumption is appropriate in preparing these accounts. The Trustees have made this assessment in respect of a period of one year from the date of approval of these accounts - although as a result of the considerable uncertainties arising in the wake of the COVID-19 pandemic the projections made prior to the pandemic are subject to ongoing and continual re-evaluation.

As set out in greater detail in the Trustees' report, the Group has experienced a significant deterioration in trading in the period since 1 April 2018 which has continued through the subsequent accounting period and up to the date of approval of these financial statements. This has resulted in further significant losses, reductions in cash balances and breaches of funders and other counterparties" financial covenants. The situation was further exacerbated by a cyber security attack in May 2019 which led to a lack of clarity regarding the extent of the deterioration and seriously delayed the preparation and audit of these financial statements.

The Group has prepared detailed recovery plans and is in discussion with funders and other counterparties with a view to obtaining sufficient finance to enable it to achieve a turnaround over the next two financial years. The turnaround plan includes restructuring which is expected to result in a significant reduction in headcount and cessation or disengagement from some lossmaking activities and group entities. The process of negotiation with funders and other counterparties is ongoing.

The successful delivery of the Group's recovery plan and return to sustainable trading is dependent upon reaching agreement with existing and potential funders and other counterparties. Negotiations with these funders and other counterparties are complicated by these continuing uncertainties, and successful outcome cannot be guaranteed.

The Trustees have considered the requirement that they should prepare the accounts on the going concern basis unless they intend to liquidate the charity or to cease trading, or have no realistic alternative but to do so. **The Trustees believe there are material uncertainties arising from the charity's financial position which may severely curtail its work and/or threaten its going concern status.**

However, while negotiations with funders and other counterparties continue and the Trustees believe that a positive outcome remains possible, it is appropriate to prepare the financial statements on a going concern basis.

22. The Respondent's auditors gave qualified opinion on the accounts, noting, *inter alia*, material uncertainty related to the Respondent's ability to continue as a going concern.

23. To preserve cash flow and keep trading the Respondent stopped making payments to HMRC in February 2020 and the vehicles leasing company in April 2020. This resulted in a significant increase in the Respondent's cash balance from £3.1m in March 2020 to £5.4m in September 2020. Regular payments to other suppliers continued.

24. In June 2020, the Respondent commenced negotiations with HMRC and the leasing company, which resulted in agreements to restructure the debt and resume payments; to HMRC in September 2020, resulting in a £4.6m debt for

the period, and to the leasing company in October 2020, resulting in a £2.7m debt for the period.

25. To service the agreed repayment plans the Respondent was required to manage its cash very carefully. In addition to normal working capital, the Respondent also needed to hold cash for insurance collateral and to meet its regulatory requirement known as "financial standing" (circa £2.6m) to avoid the risk of its operating licence being revoked. The Respondent also held in escrow £1.7m in respect to its secured loans.

26. In July 2020, Ms McClelland started an exercise to prepare a turnaround plan to see the Respondent's through the financial difficulties and turn it into a profitable undertaking.

27. On 17 August 2020, Ms McClelland presented her 3 years' business plan. The plan showed anticipated loss of 3.6M in 2020/21 financial year, 0.2m profit in 2021/22 and 1.2m profit in 2022/23. The plan envisaged making further redundancies in the business, including among the leadership team. The plan was approved by the Trustees' Board in September 2020 and shared with the leadership team, including the Claimant.

28. The Respondent's October 2020 consolidated income statement shows some progress against the plan. In particular, the forecasted loss of £3.7m was revised to £3.2m, and there was also £561k increase in forecasted revenue.

29. On 11 November 2020, there was a leadership team meeting, at which Ms McClelland gave the team a finance update on the position since September 2020. The update shows positive variance on all key indicators (income up by 3.2%, operating loss down by 46.4%, EBITDA up by 205.3%). The management accounts balance sheet as of September 2020 records cash at bank and in hand as £5.37m (this, however, was before the repayment plans with HMRC and the leasing company commenced) but a negative value of net assets of £4.7m.

30. During the leadership meeting, Ms McClelland remarked that the business was "*absolutely not running out of cash*". That remark was made in the context of a discussion regarding concerns expressed by some suppliers of the Respondent due to delays in the Respondent making payments to them.

February 2020 redundancies

31. In February 2020, as part of addressing its financial difficulties, the Respondent decided to reduce its workforce. Six of the employees proposed to be made redundant had the same enhanced redundancy terms as the Claimant.

32. On 25 February 2020, at the Trustees Board meeting, Ms. Yasmin Rafiq, interim HR Advisor, outlined options related to these employees and associated costs. The options provided to the Trustees were:

"1. Hold firm and only pay statutory redundancy based on Clause 28.4 which states 'payment subject to funding availability'.
2. Pay the enhanced redundancy terms amounting to £415, 810. These payments will need to be accounted for in the June/July 2020 payroll run.
3. Pay statutory redundancy and agree with individuals that that enhanced terms will be payable when funding is available – this is dependant (sic) on the future financial performance of the organisation.
4. Remove the individuals from the redundancy process and manage their performance in line with organisational requirements going forward. This will reduce the payroll savings by £18.7k (gross) per month."

33. She also recommended to "[t]est clause 28.4 with 'independent' legal advice who can advise the Board prior to decision on options."

34. It appears that the Trustees decided to pay the enhanced redundancy to all eligible employees. Due to long notice periods in their employment contracts, two of the six employees on the enhanced redundancy terms left the Respondent only in April and May 2021. They were paid their enhanced redundancy payments in full, £33.5k and £25.6k, respectively.

Claimant's Redundancy

35. On 14 October 2020, Ms McClelland wrote to the Trustees setting out her proposal to restructure the leadership team (including making the Claimant's role redundant) and outlining various options with respect to enhanced redundancy and associated costs. She recommended that "..*in all cases that we pay the statutory amount for the redundancy settlement rather than the enhanced amount as this saves a significant amount of cost while still providing a sensible settlement for anyone where redundancy is the outcome*."

36. Ms McClelland confirmed to the Board that there was no evidence that in previous redundancy exercises enhanced redundancy payments had not been made.

37. Initially, there were three employees on the enhanced redundancy terms in scope for redundancy with the total variance between the enhanced and the statutory settlements of circa £95.3k.

38. On 19 October 2020, the Claimant was put at risk of redundancy. There were redundancy consultation meetings on 21 October, 13, 20 and 24 November 2020. During the first consultation meeting the Claimant asked his manager, Mr Stockley, to confirm that he would receive his enhanced redundancy payment. Mr Stockley told the Claimant that the decision would be made by the Trustees' Board at a meeting on 26 October 2020 and the Claimant would be informed of the Board's decision the following week.

39. On 22 October 2020, in the preparation to the Board meeting on 26 October, Ms McClelland wrote to the Trustees providing details of the proposed redundancies, including costs involved and again recommending that "*in all cases we pay the statutory amount for the redundancy settlement rather than the enhanced amount as this saves a significant amount of cost while still providing a reasonable settlement for anyone where redundancy is the outcome*".

40. The matter was discussed at the Trustees' meeting on 26 October 2020. It was noted that there were two staff on the enhanced redundancy terms in scope (eventually the other person was not made redundant). The discussion included considerations of previous rounds of redundancies when enhanced redundancy payments had been made, the importance to bear in mind that setting any precedent now would affect any future restructuring, uncertainty around the lender group's support and future COVID-19 impact on the Respondent's financial position. The Trustees agreed with Ms McClelland's recommendation not to pay the enhanced redundancy amount. When reaching their decision, the Trustees were not given a clear definition of what "subject to funding availability" meant.

41. On 30 October 2020, Ms McClelland wrote to the Claimant notifying him of the decision. In her letter she explained the decision not to pay the enhanced redundancy as follows (**my emphasis**):

"***Payment of the enhanced redundancy pay (but not the notice entitlement) is subject to funding availability. It is this precondition of paying the enhanced redundancy pay which the Board has focused on in its deliberations***.

…

The charity is operating at a loss currently. Our current three year plan details all projected income and expenditure, cash needs and potential growth we assess as realistic and achievable, as well as the impact of the repayment of cost deferrals taken during the COVID-19 crisis over the period of the plan. This plan demonstrates that we will need to manage our cash very carefully to return to profitability and recent COVID-19 developments are adding further uncertainty for all businesses.

The Board has carefully considered the situation and in doing so has taken account of the following:

• *ensuring that all colleagues who are made redundant are treated equitably and fairly;*

• *abiding by the terms under which colleagues are employed,* ***including the requirement for payment to be affordable****; and therefore*

• *ensuring that the charity has the available* ***funding both now and in the foreseeable future to be able to afford to pay any enhancements to the statutory redundancy scheme***.

The Trustees are also mindful of their duty to promote the charitable purposes of the charity. If they allow the charity's assets to be applied for a purpose other than the specific charitable purpose it has been set up to pursue, they will have acted in breach of trust. We shall therefore need to be able to demonstrate to the Charity Commission a prudent and appropriate management of our funds, if called upon to do so.

On top of this, continued support from our investors also depends on prudent and appropriate use of charity funds.

The Board has considered the financial situation of the charity very carefully and concluded that there is not sufficient funding available to be able to pay the enhanced redundancy terms on top of statutory redundancy pay *and the enhanced notice entitlement described above.*

I appreciate this is a difficult outcome for you and would like to assure you that the Board found it a difficult decision to make even after much discussion and analysis. Considering the balance between the needs of our colleagues and the long term welfare of the charity is a difficult balance and we are cognisant of your long service record. However, the difficult decision is based on the need to maximise the chances of charity survival, and is in no way a reflection on you or the contribution you have made."

42. On 3 November 2020, the Claimant responded to Ms McClelland requesting information on redundancy payments made to other employees on the enhanced redundancy terms, who had been made redundant in the preceding six months. On 5 November 2020, Ms McClelland replied confirming that they had been paid enhanced redundancy settlement and explaining that in the case of the Claimant the Board had "*made a decision that [the Board] felt balanced the best interest of the charity with the best interest of the individual in the current context and with the data and information available to them*".

43. There were further email exchanges between the Claimant and Ms McClelland on this matter. The Claimant sought further details on how the Board had arrived at its decision. Ms McClelland refused to provide it on the grounds of confidentiality.

44. On 10 November 2020, the Claimant spoke on the telephone with one of the Trustees, Ms J. Winter, which then prompted Ms Winter to write to Ms McClelland suggesting a compromise solution should be found for the Claimant's redundancy pay. Ms Winter said that she had discussed a possible settlement of £30,000 with the interim chair of the Board, Mr A. Ross, however, she did not wish to put Ms McClelland under pressure "*as the Board decision was to go with [Ms McClelland's] proposal.*"

45. On 11 November 2020, Ms McClelland replied to Ms Winter stating her view that it was not "*a good idea for [her] to talk to [the Claimant]*" and that the "*decision was always going to be bigger than any one team member*…".

46. On 13 November 2020, Ms Winter and Ms McClelland discussed that matter on the telephone. Ms Winter accepted Ms McClelland position that the Respondent should not offer a compromise option and stick with the Board decision to pay the Claimant the statutory redundancy.

47. In subsequent consultation meetings the Claimant kept raising this matter indicating that he was not accepting the Respondent's explanations for not paying him the enhanced redundancy, or that the Respondent did not have available funds to pay him the full amount of the enhanced redundancy settlement. The Respondent did not change its position.

48. On 27 November 2020, the Claimant's employment was terminated. The Claimant was paid £57,216.94 comprising a payment in lieu of his contractual notice calculated in accordance with clause 24.2 plus his statutory redundancy. If the Respondent had paid the Claimant his enhanced redundancy settlement, the total payment would have been greater by £52,137.60.

The Law

49. When interpreting express terms of a contract, the aim is to give effect to what the parties intended. In ascertaining that intention, the words of the contract should be interpreted in their grammatical and ordinary sense, assessed in the light of any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed, and commercial common sense, but disregarding subjective evidence of any party's intentions. (***Chartbrook Ltd and anor v Persimmon Homes Ltd and anor 2009 1 AC 1101, HL***)

50. "[T]he particular provision must be construed in the context of the clause as a whole, and the clause itself must be construed in the context of the contract as a whole, which must in turn be considered in its factual matrix or against the circumstances surrounding it" (per Sir Anthony Clarke MR in ***Cosmos Holidays plc v Dhanjal Investments Ltd 2009 EWCA Civ 316, CA)***.

51. The general rule under English law is that the subsequent conduct of the parties cannot be used by the court as an aid in construing the contract terms (see **James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd** [1970] A.C. 583). The rational for that is said to be that: "*Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later*" (per Lord Reid, ibid.) and that "*Conduct of a party after the making of the contract does not provide relevant factual context to explicate the meaning with which the parties used the words at the time they made the contract*" (per Sales J in **Sattar v Sattar [2009] EWHC 289 (Ch)**). The rule is subject to limited exceptions: where the agreement is partly written and partly oral to determine the full terms, where it is alleged that the contract was a sham, or where a party conduct give raise to an estoppel by convention, which precludes it from relying on the true construction of the written contract.

52. The rule equally applies to the construction of employment contracts. Giving the leading judgment in **Keeley v Fosroc International Ltd** [2006] EWCA Civ 1277 Lord Justice Auld said (***my emphasis***): "*In my view, the issue or issues for the Judge were essentially ones of construction of an acknowledged contract, the written terms of which were not in issue, only in the instance of this provision its effect.* ***The variously expressed views on both sides from time to time in the formulation and application of the provision are not, in my view, admissible on that issue.*** *They are potentially relevant and admissible only in the event of the failure of Mr Keeley's case on construction of the express term, driving him to rely on his alternative case based on an implied term - or if Fosroc had pleaded some form of estoppel, which it has not*".

53. The continuing correctness of the rule and the underlying policy has been doubted on several occasions by judges and legal commentators. For example, in **Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] Q.B. 84 at 120**) Lord Denning quoting Lord Reid's statement in James Miller (see paragraph 51 above) said: "*I can understand the logic of it when the construction is clear: but not when it is unclear. Still, we must accept it.*"

54. More recently, in **BCCI v Ali [2002] 1 A.C. 251 at 31** Lord Nicholls expressed the view that the underlying policy might need to be revisited: "*This is not the moment to pursue this topic, important though it is, because the point does not arise on this appeal. I desire, however, to keep the point open for careful consideration on a future occasion*".

55. The rule appears at odds with the laws in many other civil and common law jurisdiction and international instruments. The Unidroit Principles for International Commercial Contracts state that in interpreting a contract regard shall be had to all the circumstances including "*any conduct of the parties subsequent to the conclusion of the contract*". Likewise, the Principles of European Contract Law state that in interpreting a contract, regard must be had to "*the conduct of the parties, even subsequent to the conclusion of the contract*".

56. Finally, it is a well-established rule of construction in contract law that any ambiguity shall be resolved against the party who seeks to rely on it to avoid obligations under the contract (the '*contra proferentem rule*').

Discussion and Conclusions

The meaning of "funding availability"

57. The central issue to this dispute is one of construction of the Claimant's contract and in particular clause 24.4. In constructing the contract, I applied the legal principles outlined in paragraphs **Error! Reference source not found.** 49-56 above.

58. Although the parties agree that the case is essentially one of legal construction of clause 24.4, neither party in their pleadings stated their case on the true meaning of the phrase "funding availability". The closest the parties came to deal with this issue in the pleadings was the Claimant's contention that the Respondent had "*sufficient capital*" to make the enhanced redundancy payment (paragraph 1 of the Grounds of Claim), and the Respondent's pleading that "*the terms of clause 24 entitled the Respondent to exercise discretion in respect of whether or not to pay the enhanced redundancy terms, based on the circumstances and funding availability at that time*". The plea of discretion was

not pursued by the Respondent at the hearing (and, in my view, rightly so), either as a matter of construction of clause 24.4 or by way of an implied term.

Respondent's interpretation

59. In his closing submissions, when pressed by me, Mr Webster for the Respondent said that the phrase "funding availability" should be interpreted as meaning that the Respondent had "*sufficient surplus of funds*" from which to pay the enhanced redundancy. He argued that the Respondent should be in "*good financial order*" and "*substantially short of insolvency position*" for the Respondent to be obliged to make the enhanced redundancy payment under clause 24.2, because that obligation is conditional on the Respondent having "*sufficient surplus funds*" from which to pay redundant employees.

60. Mr Webster further argued that the Claimant's apparent position that unless the business was insolvent the enhanced redundancy payment must be made was plainly wrong, because if that interpretation were to be adopted, clause 24.4 would lack any practical sense. That is because if the business were insolvent, it would not have to pay any, let alone the enhanced, redundancy payments as a matter of law. Therefore, Mr Webster argued, that meaning could not have been reasonably intended by the parties when the contract was made.

61. I agree with Mr Webster on the last point. However, I do not accept his alternative "sufficient surplus of funds" interpretation for the following reasons.

62. Firstly, I find clause 24.4 ambiguous. Adopting his interpretation of the ambiguous term would mean resolving the ambiguity in the wording in the most advantageous way to the Respondent, which would be contrary to the *contra proferentem rule*.

63. Secondly, clause 24.4 must be interpreted in the overall context of the contract. Unfortunately, the hearing bundle did not contain a copy of the whole contract. I assume the parties decided that other terms of the contract would not be of assistance to the tribunal for the purposes of finding the true meaning of clause 24.4. However, clause 24.4 forms part of the section dealing with redundancies.

64. While it is possible that a business may decide to carry out redundancies when its financial position is strong, it is a far more common scenario when redundancies are made as a means of addressing financial difficulties faced by the business. Therefore, to read clause 24.4 as allowing the Respondent not to make the contractual enhanced redundancy payments in the circumstances when it operates at a loss or otherwise does not have "*sufficient surplus of funds*", in my judgment, would render the enhanced redundancy provisions in clause 24.2 devoid of its practical effect. Such interpretation goes against the overall purpose of the enhanced redundancy contractual promise, that is to give a certain level of financial security to employees when through no fault of their own they lose their job due to financial difficulties of the employer. In my view, such limited application of the enhanced redundancy terms could not have been intended by the parties at the time of the contract.

65. Further, if that were the true meaning of the clause, as intended by the parties at the time of the contract, the Respondent would not have paid enhanced redundancy payments to the employees in the February 2020 redundancy cohort. Even with limited financial data available to the Trustees at that time, it would have been clear to the Board that the Respondent did not have a "*substantial surplus of funds*". It would appear that the Respondent's financial position was in fact worse in February 2020 than it was in October 2020. The Board called an insolvency advisor, commissioned a report from a turnaround specialist. The Respondent did not have a recovery plan. Yet, all enhanced redundancy payments were made in full.

66. Mr Webster argued that the Respondent could have been simply wrong in making the decision in February 2020 that it had had "funding availability" to make enhanced redundancy payment to those employees. In principle I accept his argument, but it goes to the factual issue as to whether the Respondent in fact had "funding availability" to make the enhanced redundancy payment, not to the question of construction of the terms.

67. Mr Webster further argued that the fact that the two employees from the February redundancy cohort had been paid their enhanced redundancy in April and May 2021 could not be taken as an aid in construction. He referred me to paragraph 65 in the judgment of Mr Justice Burnton (as he then was) sitting in

the High Court in the case of **Choudhry & oths v. Treisman [2003] EWHC 1203**. To be understood paragraph 65 should be read together with the paragraph 64 in that judgment.

"64. *I have reached this conclusion without reference to the principle contended for by Mr Giffin that the rules are to be interpreted in accordance with the practice of the Party. He referred me to the judgment of Lord Denning, the Master of the Rolls, in Lewis v Heffer [1978] 1 WLR, 1061 at page 1076 D and to the judgment of Lord Woolf, the Lord Chief Justice, in Dunlop Tyres v Blows [2001] EWCA, CIV, 1032 at paragraphs 21 and 22.*

65. In my judgment, the principle applied in those cases must be applied with caution, particularly in view of the principle established by the House of Lords in James Miller and Partners v Woodworth Street Estates [1970] Appeal Cases, 583, that it is illegitimate to use the conduct of the parties to a contract after its conclusion as an aid to construction. Where there is no equivalent of paragraph 5 at clause 10, it cannot be right for a member of a party to be bound by the interpretation of rules of which he has no notice. Just as a custom relied upon in support of an allegation of implied term must be certain, well established and notorious, so must any practice relied upon as establishing a particular meaning to contractual rules of the kind presently under consideration."

68. That case was essentially about construing the Labour Party's rules on selecting the party's candidates. I do not find that the passage in paragraph 65 of that judgment that Mr Webster relies upon is of a particular assistance to the Respondent's case. I do not read it as the judge saying that the parties conduct can never be used as an aid in construction. On the contrary, the judge appears to be saying that a practice may be relied upon as establishing a particular meaning to contractual rules if such practice was "*certain, well established and notorious*". In any event, he was able to resolve the interpretation issue in favour of the defendant in that case without needing to consider the parties' conduct, upon which the defendant relied. Therefore, his observation on this issue appears to be *obiter*.

69. However, in the **Dunlop Tyres** case referred in paragraph 64 of that judgment, Lord Woolf, the Lord Chief Justice (with whom Lord Justice Tuckey and Lady Justice Arden agreed) said (**my emphasis**):

"*17. I take the view that the relevant standard terms of the agreement are truly ambiguous. I can see powerful arguments for saying that the employees' approach is correct. I can also see the force of the submissions which are advanced on behalf of the employers.* ***I would find it difficult to give preference to either interpretation. In such a situation it is open to the court to look at the practice adopted by the parties and, indeed, in this context to attach considerable importance to the practice***.

…

"19. ***Where the language of a contract of employment is ambiguous, that practice is self evidently powerful evidence of the parties' intentions to which the court can turn in order to resolve the ambiguity***. ***A contract can be brought to an end and new terms agreed, but until that is done the practice indicates the proper interpretation of the terms of the contract***.

20. The employers made it clear, once they discovered that there might be a mistake, what they considered to be the position. But, nonetheless, the fact of the matter is that they could not change the terms of an existing contact unless there was an agreed variation."

70. In paragraph 21 of that judgment, Lord Woolf acknowledges the principle established in **James Miller** (see paragraph 51 above), however finds that the principle will not be offended if the court, tasked with interpreting an ambiguous term, looks "*at [the] practice beforehand because something different happens subsequent to the contract*". That is because "*looking at the practice before the contract was entered into and noting that it did not change after the contract was made… is not to suggest that the contract meant one thing on one day and another thing on a different day*".

71. In my judgment, the same logic applies where the contract terms remain the same, but a party changes its conduct in performing its obligations under the contract and seeks to justify the change in its conduct by relying on its newly adopted interpretation of an ambiguous term in the contract, despite such new

interpretation being inconsistent with its prior conduct. It will be that party, which through its changed conduct, essentially be suggesting that the contract meant "*one thing on one day and another thing on a different day*".

72. In reality, however, the party will be purporting to change the terms of the contract without agreeing the change with the other party, which is what Lord Woolf said was impermissible without "*an agreed variation*".

73. The fact that the Respondent has paid the enhanced redundancy in February does not, of course, prove as a matter of fact that it had "funding availability" in October 2020 or indeed in February 2020 (on the true meaning of the term). It could have been simply mistaken as to the true state of its finances. However, as a matter of legal construction of clause 24.4, in my view, it is a relevant factor for the tribunal to consider.

74. The Respondent puts forward an interpretation, which is clearly inconsistent with the way the Respondent chose to act with the full knowledge (see my findings of fact in paragraphs 32 and 33 above) of the relevant contract terms.

75. The Respondent's newly adopted interpretation is also inconsistent with Ms McClelland's evidence that at the time the decision not to pay the Claimant's enhanced redundancy was taken there was no settled view on the meaning of clause 24.4, and that the lack of a clear definition of the phrase "funding availability" was a major difficulty for the Respondent.

76. In my judgment, the inconsistency between the interpretation of the ambiguous term the Respondent invites the tribunal to adopt and how it acted in the past in performing its obligations under that term, and the inconsistency between the Respondent's interpretation and the evidence of its witness on the Respondent's understanding of the meaning of the term at the relevant time, by themselves have a very relevant evidential value the tribunal must not ignore.

77. However, even if I am wrong on that, and the fact that the Respondent paid the enhanced redundancy payments to the February cohort is inadmissible in establishing the true meaning of clause 24.4, I still reject the Respondent's "*sufficient surplus of funds*" interpretation for the reasons set out in paragraphs 62 - 64 above.

Claimant's interpretation

78. Mr Ford, for the Claimant, submits that "funding availability" should be interpreted as making the Respondent's obligations to pay the enhanced redundancy conditional only when the enhanced payment would "*tip the Respondent into insolvency*".

79. I am equally unpersuaded that this is the true meaning of what was intended by the parties when the contract was made. In my judgment, it would be contrary to common sense if the clause were to be interpreted as obliging the Respondent to make an enhanced redundancy payment to an employee even when the consequence of making such a payment is to put the Respondent on the brink of insolvency.

80. An enhanced redundancy payment in such circumstances would most likely result in the Respondent having to cut its costs further by making other employees redundant. If they too must be paid the enhanced redundancy, unless the payment to them would "*tip the Respondent into insolvency*", the "tipping point" would not be too far off.

81. I do take into account that the enhanced redundancy contractual promise with a limited escape route, could be just a bad bargain made by the Respondent at the time, and it is not the function of this tribunal to re-write the contract terms to make them more balanced, fair or reasonable. However, for the reasons stated above, I find that at the time the contract was made the words "funding availability" would not have been understood by a reasonable person with relevant background as requiring the Respondent to pay the enhanced redundancy in all circumstances, expect when the payment would result in the Respondent's insolvency.

True meaning

82. Having rejected both parties' alternative interpretations, I still need to go on and find the true meaning of clause 24.4, applying the legal principles on construction of contract terms I outlined above.

83. There was no contemporaneous evidence to help the tribunal to establish the "relevant background" at the time of the contract. The Claimant in his evidence said that he had not applied his mind to the meaning of this clause at the time

of the contract. He said he did not pay much attention to the redundancy terms in his contact. He only turned his attention to those terms much later, after some of his colleagues had been made redundant. In any event, his subjective understanding of the clause would not be admissible as the evidence of its true meaning.

84. However, I take into account that it is an employment agreement and not a heavily negotiated commercial contract. It was entered on the Respondent's terms. Clause 24 was not specifically negotiated by the parties. The clause is designed as an incentive for employees to remain in the Respondent's employment for a long time, so to accrue the benefit of a substantial payoff in case they are made redundant, thus giving them a certain level of financial security in the unfortunate event of redundancy.

85. I find that against that background the words "funding availability" would have been understood by a reasonable person aware of that background and considering it at the time the contract was made (and not in 2020 when the Respondent was dealing with its financial challenges) as having the following meaning.

86. Firstly, "funding availability" must not be viewed as a "snapshot" of the Respondent finances when the decision is taken, or when the payment is due to be made. Instead, it must be considered against a reasonable future reference period, for example, the Respondent's then current financial year or the three years' business plan.

87. Further, "funding availability" must be assessed by reference to the value of the enhanced payment to the redundant employee, or if more than one employee were selected for redundancy – the total value of the enhanced redundancy payments.

88. Finally, "funding availability" must not be conflated with "affordability" of the enhanced redundancy as a benefit. Even if from the business perspective enhanced redundancy becomes a too expensive benefit for the Respondent to maintain, it is not the same as the Respondent not having "funding availability" to make a particular promised redundancy payment to a particular employee or a group of employees on a particular occasion.

89. Taking the above considerations into account, I find that "funding availability" shall be interpreted as meaning that: (i) the Respondent has immediately available funds (cash at bank or in hand) sufficient to make the enhanced redundancy payment(s), (ii) it is not prevented by its statutory or regulatory duties from using such funds for the purposes of making the enhanced redundancy payment(s), and (iii) making the enhanced redundancy payment(s) of a particular value will not result in a real and material threat to the Respondent's going concern status.

Did the Respondent have "funding availability"?

90. Having established the true meaning of clause 24.4, I now need to decide whether the Respondent had or did not have the "funding availability" to pay the Claimant his enhanced redundancy payment. Unlike the question of construction of clause 24.4 (which is a question of law), this is a question of fact, which I must answer on the balance of probabilities and based on the evidence in front of me.

91. I accept that the Respondent faced very serious financial challenges, and although the turnaround plan was producing encouraging results the Respondent was still far from being "out of the woods". It was still operating at a significant loss, albeit projecting returning to modest profit in the following financial year. It carried substantial debts to HMRC and the leasing company. It was under regulatory requirements to hold a certain amount of cash in escrow. Covid-19 risks and impact on its operations were still not behind it.

92. On the hand, it continued to operate as a going concern, it continued to pay its suppliers, the business revenue grew, operating losses came down, it was in the process of unwinding unprofitable acquisitions. It agreed repayment plans with HMRC and the leasing company. It had more than sufficient free cash to pay the Claimant his enhanced redundancy.

93. On the evidence in front of me, I am unable conclude that a payment of £52,321.57 to the Claimant in November 2020 would have resulted in a real and material threat to the Respondent's going concern status, or that it would have caused the Respondent to breach its statutory or regulatory duties.

94. Taking a wider view, I am also unable to conclude that such payment would have put the Respondent's three years' recovery business plan in jeopardy. There was no evidence advanced by the Respondent to show that a payment of £52,321.57 to the Claimant in November 2020 would have made such an impact on its finances or the three year recovery plan.

95. In so far as such payment might have set an unhelpful precedent for the Respondent with respect to subsequent redundancy exercises (and thus indirectly causing negative impact on its recovery plan), that, in my judgment, is not a relevant consideration in determining the question whether there was "funding availability" at the time the enhanced redundancy payment to the Claimant was due to be made.

96. If the "funding availability" test, considering it objectively, is met the enhanced redundancy payment must be made to the employee, even if that means that in subsequent rounds of redundancies the Respondent will be in a more difficult legal position to refuse such payments or in a worse bargaining position to negotiate an alternative.

97. Therefore, from the point of view of the application of clause 24.4 to the Claimant, Ms McClelland was wrong when she wrote to Ms Winter that the "*decision was always going to be bigger than any one team member…*". The decision on the "funding availability" to pay the Claimant his enhanced redundancy had to be about one member, and one member alone – the Claimant.

98. I reject the Respondent's plea (see paragraph 3.2 in the Grounds of Resistance) that clause 24 gives the Respondent discretion to make or not to make the enhanced redundancy payment. Mr Webster did not argue the Respondent's case on that basis.

99. As it is a contractual term, and it does not reserve for either party discretion to decide the question, the "funding availability" test must be determined objectively, and not by considering whether the Respondent had reasonable grounds to conclude that there was no "funding availability". If the Respondent wished to retain discretion to make such determination unilaterally, it should have put that in clause 24.4 in clear terms. Therefore, whether the Respondent

acted "reasonably and proportionately" in not paying the Claimant his enhanced redundancy is simply irrelevant.

100. It appears that in deciding not to make the enhanced redundancy payment Ms McClelland and the Board were more concerned about setting a precedent for the future, rather than assessing whether the Respondent had "funding availability" to pay the Claimant his enhanced redundancy of a particular value.

101. In her evidence Ms McClelland said several times that the ambiguity of clause 24.4 presented a major difficulty in the discussions at the Board. She acknowledged that there was no common understanding on what "funding availability" meant. Judging by the redacted minutes of the Board meeting on 26 October 2020, (and contrary to Ms McClelland assertion in her email to the Claimant of 30 October 2020), it appears that the Board did not sufficiently engage with that issue, but simply assumed that there was no "funding availability", and has done that even without agreeing on what was meant by that phrase.

102. Therefore, it is not clear on what basis the Board has concluded that there was no "funding availability" to pay the Claimant his enhanced redundancy payment of £52,321.57. Ms McClelland emails to the Board of 14 and 22 October 2020 justify the recommendation not to pay the enhanced redundancy by the fact that it will "*save significant amount of costs*", but do not say that the Respondent did not have the "funding availability" to make the payment to the Claimant and what the Respondent understands the "funding availability" to mean.

103. It appears from Ms. McClelland's email to the Claimant of 30 October 2020, that the Respondent in deciding that it did not have "funding availability" to pay the Claimant his enhanced redundancy payment focused on the overall "affordability" of enhanced redundancy terms as a legacy benefit.

104. I accept that the Respondent had sound business reasons to try and move away from that benefit, this, however, does not mean that in the case of the Claimant it did not have the required "funding availability" to pay him his enhanced redundancy.

105. I also accept Ms McClelland evidence that Ms Winter's attempts to find a middle ground had been driven by her sympathies to the Claimant, this, however, still shows that the issue of whether there was or there wasn't "funding availability" was not fully settled, at least in some of the Trustees' minds.

106. It is the Respondent's case that it was not liable to make the enhanced redundancy payment to the Claimant under clause 24.2 because there was no "funding availability". For the reasons stated above I find that the Respondent has failed to establish that it did not have "funding availability", considering the true meaning of that phrase (see paragraph 89 above).

107. However, it is not sufficient for me to find in favour of the Claimant simply because the Respondent has failed to prove its positive case on the meaning of "funding availability", or on the lack of "funding availability" as a matter of fact. The burden of proof is on the Claimant to show that the Respondent was in breach of contract by failing to pay him the enhanced redundancy. Therefore, he must show, on the balance of probabilities, that the Respondent did have the necessary "funding availability" to pay him £52,321.57.

108. In support of his contention, the Claimant relies on the following:

a. the Respondent had substantial and growing revenue,

b. it had sufficient cash on the balance sheet,

c. the turnaround plan was producing positive results,

d. the Respondent successfully negotiated repayment plans with HMRC and the leasing company, and

e. the Respondent paid other employees who had been made redundant before and after the Claimant their full enhanced redundancy pay.

109. The Claimant also points out that the shortfall in his redundancy pay represents less than 0.1% of the Respondent's revenue and less than 1% of the Respondent's the then current cash balance.

110. While I rejected the Claimant's submission that "funding availability" should be determined by considering whether the enhanced redundancy payment would "*tip the Respondent into insolvency*", I find that applying the true meaning of the term (see paragraph 89 above), on the balance of probabilities,

the Respondent did have the necessary "funding availability" to pay the Claimant his enhanced redundancy payment. I find that for the reasons already explained in paragraphs 92- 95 above.

111. Furthermore, while I accept the Respondent's position that the enhanced redundancy payments to the two employees made redundant in April and May 2021 had been agreed as part of the February 2020 round of redundancies, and cash for those payments had been reserved before the October round of redundancies, the fact that the Respondent's financial position allowed it to make those payments in April and May 2021, totalling some £59.1k, without breaching the "funding availability" test, gives me a further ground to conclude that on the balance of probabilities the Respondent did have the necessary "funding availability" to pay the Claimant £52,321.57 in November 2020.

112. It follows that I find that the Respondent was in breach of contract by not paying the Claimant his enhanced contractual redundancy payment.

113. The shortfall in the Claimant's redundancy payment is £52,321.57. However, under s10 of Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 the maximum amount a tribunal can award in a contract claim is £25,000, and that is the amount I order that the Respondent pays to the Claimant.

Employment Judge P Klimov
24 September 2021

Sent to the parties on:

25/09/2021.

For the Tribunals Office

Notes

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