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WHEN IS AN ENHANCED REDUNDANCY POLICY CONTRACTUAL?

EMPLOYMENT

It is well established that enhanced redundancy policies can, under certain circumstances, become implied into employees' contractual terms by virtue of "custom and practice". How to identify the point at which such a policy becomes contractual is often an area of difficulty, depending greatly on the particular factual circumstances of each case. Help is at hand in the form of the Court of Appeal decision in *Park Cakes Ltd v Shumba & others*. In this case the Court provides useful guidance on the factors that should be taken into account:

- **On how many occasions, and over how long a period, have the enhanced payments been paid?**
  Generally, the greater the frequency and period over which the payments have been paid, the greater the likelihood that the policy has become contractual.

- **Are the payments always the same?**
  Variable amounts or terms of payment may (but not always!) point towards a non-contractual policy.

- **The extent to which the enhanced payments are publicised generally.**
  "Publication" may take many forms (e.g. to a group of employees, trade union or other employee representatives), with the key question being "whether the employer has conducted himself so as to create… widespread knowledge and understanding on the part of employees that they are legally entitled to the enhanced benefits".

- **How the terms are described.**
  In the Court of Appeal's view, where an employer clearly and consistently describes its enhanced redundancy terms in language that makes it clear that they are offered as a matter of discretion, it will be "hard to see how the employees or their representatives could reasonably understand them to be contractual". This underlines the importance of expressly stating that the policy is non-contractual and discretionary (both on the face of the policy and in discussions with employees).

- **What is said in the express contract.**
  Under normal contractual principles, a term should not be implied (including via custom and practice) if it is inconsistent with an express term of the contract. In other words, an express term will usually "trump" any argument for an inconsistent implied term. However, express terms will often be silent on the question of redundancy and so this principle may be less useful in practice.

- **"Equivocalness".**
  The burden of establishing whether or not a practice has become contractual is on the employee. The Court of Appeal glosses this by explaining that the employee is unlikely to get over this hurdle if "the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation".

- **Did the employer intend to be bound?**
  Here, the important question is not whether the employer actually intended to be bound but whether its conduct, viewed objectively, conveyed to employees that it intended to be bound.

While the Court of Appeal highlighted that this list was not exhaustive (and that usually no one factor will be determinative) it nonetheless provides a helpful framework when considering the contractual status of redundancy enhancements.

On the particular facts of this case, the enhanced redundancy scheme was described in various internal documents as an entitlement, and had been followed without exception for several years. Despite this, the Employment Tribunal found it was not contractually binding. Somewhat unsurprisingly, the Court of Appeal has ordered a fresh hearing.

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