Withdrawing post-termination benefits: a breach too far?

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Adekoya & Ors v Heathrow Express Operating Company Ltd [2024] EAT 72

The Claimants in *Adekoya & Ors* were former employees of Heathrow Express who took voluntary redundancy in 2020. They brought claims for damages in breach of contract, arguing that under their contractual terms, they were entitled to retain life-long travel benefits ('**the Scheme**'), including substantial discounts on rail travel for them and certain dependents, provided they had acquired at least 5 years' service.

The Respondent's defence was threefold. Firstly, it denied that the Scheme survived termination because it was operated by a third party, Rail Delivery Group ('**RDG**') who had unilaterally withdrawn it from certain former employees. Secondly, even if the Scheme survived termination, the Claimants had waived their right to it by accepting a £750 settlement payment. Thirdly, under regulation 3(c) Employment Tribunals (Extension of Jurisdiction) England and Wales Order 1994, there was no breach outstanding or arising from the dismissals and the Tribunal lacked jurisdiction.

The Tribunal's judgment

The Employment Tribunal considered the first argument at a preliminary hearing. It found that (i) the Respondent was a member of the Association of Train Operating Companies ('**ATOC**'), which provided certain benefits to its members; (ii) the Scheme itself was operated by Rail Staff Travel Ltd (synonymous with RDG) via an agreement with the Respondent. That Reciprocal Agreement permitted that the Scheme could be withdrawn (iii) the terms and conditions of both the ATOC agreement and the Reciprocal Agreement were initially incorporated into the Claimant's contracts of employment; (iv) the position changed by a letter in May 2019 when RDG withdrew the Scheme from any retired staff (including those who took voluntary redundancy) whose employment commenced after 31 March 1996 ('*non-safeguarded staff*'). Although the Claimants had not been sent the letter, the ATOC agreement

permitted variation by the employer. The Respondent had clarified its position during the redundancy negotiations that non-safeguarded staff would not retain Scheme benefits after termination and the notice of redundancy letter also made this clear. The Tribunal therefore agreed with the Respondent's first argument that the Scheme did not survive termination owing to a contractual variation and dismissed the claims for lack of jurisdiction. No determination was made on the second and third arguments.

The Claimants appealed to the EAT on eight grounds. In broad summary, they argued that the incorporation of the Reciprocal agreement had not been raised at the hearing; in any event, there was no proper basis for a finding of incorporation, the Tribunal had not explained its reasons for the same and the terms of the Reciprocal agreement did not permit the variation. There was no cross-appeal by the Respondent against the finding that the Claimants were initially entitled to retain Scheme benefits until the position changed in May 2019.

The EAT's judgment

Upholding all eight grounds of appeal, the EAT held, *per* His Honour Judge Auerbach:

1. It was possible for a contractual benefit to be made subject to a third party continuing to provide it. However, any ambiguity or uncertainty regarding an employer's obligation to provide benefits limited by the acts of a third party should be resolved against the employer and in favour of the employee. That approach was said to reflect an '*ancient common law rule*' in *Amdocs Systems Group Ltd v Langton* [2022] EWCA Civ 1027 *per* Bean LJ at §§46-47, citing HHJ Auerbach's judgment below in a case concerning employee benefits tied to an employer's insurance cover. For an employer's obligation to be limited in this way requires unambiguous express communication to the employee (§§19-20);

2. Here, the Tribunal had not set out any reasoning explaining why or how the Reciprocal agreement had been incorporated by '*some unarticulated route*'. It was not a *Meek*-compliant decision for the Tribunal to simply set out its conclusion on the point (§§22 & 33);

3. In any event, on principle, the Tribunal could not have reached that conclusion. The fact that the Claimants were aware that the Scheme was being provided by a third-party was not sufficient to contractually incorporate that third-party's agreement with the employer (or terms under it) into the Claimants' contracts. There was no contractual

basis for the Respondent's reliance on the May 2019 withdrawal letter from RDG, not least where the letter had not been sent to the Claimants (§§26-27);

4. The Respondent had not properly pleaded or argued that the Reciprocal agreement had been incorporated into the Claimants' contracts. Its case was that the ATOC agreement did not confer contractual entitlements the Claimants contended for (§§29-30). As such, the Tribunal had erred by relying on a point that was neither pleaded or argued before it;

5. The Respondent was not permitted to raise further arguments that were not the basis of the Tribunal's reasoning and had not been made via a cross-appeal (§§38-39).

Having preserved the Tribunal's finding that the Claimants had been entitled to Scheme benefits by the incorporation of the ATOC agreement, the EAT remitted the case to the Tribunal to determine: (i) whether the Tribunal lacked jurisdiction because the claims were not arising or outstanding on termination; and (ii) whether the Claimants had waived their entitlements under the Scheme by accepting settlement monies of £750 each.

Analysis

The outcome in *Adekoya* may not surprise contract lawyers given the importance of certainty, communication[1] and unequivocal conduct[2] when it comes to incorporation, variation or waiver of contractual terms to the disbenefit of employees.

However, in practice, there are several salient pointers here for employers, employees and practitioners alike:

- Those designing employee benefits (such as medical insurers or travel discounts etc.) should ensure a high degree of clarity where a provision that is made in the employee's contract is (or may be) affected by decisions by third party providers;

- *Before* employers seek to rely on the terms of an agreement with a third party to vary or otherwise limit an employee's benefits, they should seek professional advice on the contractual position. To avoid a potential breach of contract, there should be no uncertainty or ambiguity in the documents relied on. In addition, clear communication with employees affected by the proposed variation is recommended;

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[1] See for example *Judge v Crown Leisure Ltd* [2005] I.R.L.R. 823 *per* Lady Smith at §§7 & 23, with whom Mummery and Nourse LJJ agreed).
[2] See *Abrahall v Nottingham City Council* [2018] I.C.R. 1 *per* Underhill LJ at §§85-89.

Representatives and Tribunals should always analyse and articulate the position on contractual incorporation, variation and/or waiver with precision. Which terms are relied on and how should they be interpreted? By what route/s were they incorporated? In what circumstances? How and when did any variation or waiver take effect? How were any changes communicated? These are just some of the broad questions to consider when analysing how the evidence interacts with the principles of contract law in order to anticipate and address difficulties where they arise.

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