Neutral Citation Number: [2022] EWHC 3188 (KB)

Case No: QB-2021-001069

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2022

Before :

MR JUSTICE FREEDMAN

- -

Between :

(1) COLETTE SMITH
(2) ANDY O'DONNELL
(3) IAN LAWTHER
(4) WENDY TURNER
(5) PUBLIC AND COMMERCIAL SERVICES UNION

Claimants

- and –

THE COMMISSIONERS FOR H.M REVENUE & CUSTOMS (HMRC)

Defendant

- -
- -

Oliver Segal KC and Darshan Patel (instructed by **Thompsons Solicitors**) for the **Claimants**

Clive Sheldon KC and Jack Feeny (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 6 & 7 July 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

MR JUSTICE FREEDMAN :

Introduction

1. The First, Second, Third and Fourth Claimants (together "the Individual Claimants") are employed by the Defendant ("HMRC"). HMRC was established by an Act of Parliament in 2005. It was a merger between the predecessor departments of Inland Revenue and HM Customs and Excise. At the time of the merger, there were approximately 24,000 civil servants transferring from Inland Revenue and 85,000 from HM Customs and Excise.

2. Prior to this, the First and Second Claimants were employed by the Inland Revenue, and the Third and Fourth Claimants were employed by the HM Customs & Excise. The Individual Claimants are members of the Fifth Claimant, the Public and Commercial Services Union ("PCS"), a trade union recognised by HMRC for the purposes of collective bargaining.

3. The union subscriptions payable by the Individual Claimants to the PCS were until 1 May 2015 collected by means of check-off arrangements, that is to say that they were deducted from pay via the payroll system and paid to the PCS by HMRC. By a letter dated 15 January 2015, HMRC notified the PCS of its intention to remove this facility with effect from the end of April 2015.

4. The Individual Claimants seek a declaration that the termination of their entitlement to have their PCS subscriptions collected by means of check-off amounted to a continuing breach of their contracts of employment, and that they remain contractually entitled to have their trade union subscriptions collected by check-off after 1 May 2015. There is an issue as to whether there is a contractual right to insist HMRC continues to implement with the check-off facility. There is also an issue as to whether since the withdrawal of check-off by HMRC, the Individual Claimants have accepted a variation of the contracts of employment so as to remove any contractual right of check-off or that they are precluded from enforcing any such right by waiver, estoppel, acquiescence or otherwise.

5. There is also an issue as to whether the PCS, which is not a party to the contracts of employment, is entitled to enforce that right under the Contracts (Rights of Third Parties) Act 1999 ("the 1999 Act"). The PCS seeks a declaration that the material term of the Individual Claimants' contracts of employment confers a benefit on it within the meaning of section 1(1)(b) of the 1999 Act, that HMRC cannot show that the parties to the contracts of employment did not intend that term to be enforceable by the PCS within the meaning of s. 1(2) of the 1999 Act. As a consequence, the PCS seeks a declaration that it is entitled to be compensated by HMRC for damage caused by HMRC's breach of the contracts of employment of the Individual Claimants, and the like breach of that term of the contracts of the PCS members employed by HMRC as at 1 May 2015, whose circumstances were materially identical to those of the Individual Claimants as at that date and to whose contracts the 1999 Act applied. The PCS also brings a claim for compensation arising from the above breach of contract, pursuant to the 1999 Act.

6. This matter comes before the Court as a Part 8 claim in common with other such cases to which reference is made below. The parties agreed that the Court could determine the legal issues without live evidence on the basis of the witness statements and the materials exhibited to the witness statements. I wish to express my thanks to Counsel in this case for the high quality of their written and oral arguments. Their expertise and experience have been of great assistance to the Court.

List of agreed issues

7. The list of agreed issues as regards the Individual Claimants is as follows:

> Issue 1: Whether it was a term of (some or all of) the Individual Claimants' contracts that they were entitled to the continued collection of their PCS subscriptions by means of check- off, specifically:
>
> a) where the contractual provision relied on is found.
>
> b) whether the document containing the provision was incorporated into the Individual Claimants' contracts of employment.
>
> Issue 2: Whether it was an implied term that check-off could be removed by the Defendant giving reasonable notice.
>
> Issue 3: Whether HMRC breached the Individual Claimants' contracts by (a) removing check-off-on 1 May 2015 and/or (b) without reasonable notice.
>
> Issue 4: Whether the Individual Claimants accepted a variation of their contract of employment to exclude check-off by their conduct: whether viewed as affirmation, waiver, estoppel, acquiescence or express/implied acceptance.

8. The PCS's claim under the Contracts (Rights of Third Parties) Act 1999 ("1999 Act")

> Issue 5: Did the term confer a benefit on the PCS as per s 1(1)(b) of the 1999 Act? This is admitted by HMRC.
>
> Issue 6: On a proper construction of the contracts did it appear that the parties did not intend that the term would be enforceable by the PCS as per s 1(2) of the 1999 Act?
>
> Issue 7: If the defence (at issue 4) is made out, does this defeat the PCS's claim under the 1999 Act pursuant to s 3(2), read with s 2.

Observations by HMRC regarding the issues

9. The issues for determination in this case are, in general, the same as those determined in the recent decisions in *Cox & Others v Secretary of State for the Home Department* [2022] EWHC 680 (QB) and *Crane & Others v Secretary of State for the Department of Environment, Food and Rural Affairs* [2022] EWHC 1626 (QB).

10. The Court of Appeal has granted the SSHD permission to appeal the *Cox* judgment insofar as it relates to the issue of waiver/variation and the 1999 Act. Permission to appeal has not been granted in relation to the issue of contractual entitlement. In the light of this, HMRC did not argue those points of general application pleaded in the Defence which were determined against the SSHD in *Cox*. However, HMRC submitted that there were some factual differences with the effect that there is no contractual entitlement to check-off for the Individual Claimants. Likewise, HMRC submitted that there were some factual differences from both *Cox* and *Crane* which meant that the waiver/variation defence should be decided on its own merits.

11. In respect of the 1999 Act, whilst HMRC relies on the same submissions as the defendants in *Cox* and *Crane*, it also has a discrete point which arises from the fact that the PCS paid a service charge to HMRC, legally enforceable as a debt, for provision of the check-off service.

Liability: Claims by Individual Claimants

Issue 1: Whether it was a term of (some or all of) the Individual Claimants' contracts that they were entitled to the continued collection of their PCS subscriptions by means of check- off, specifically:

a) where the contractual provision relied on is found.

b) whether the document containing the provision was incorporated into the Individual Claimants' contracts of employment.

12. The Claimants contend that it has for many decades been a term of all contracts of employment of those employed by HMRC (or predecessor departments) that those employees have the right to have their PCS subscriptions collected by check-off. That term was originally agreed by HMRC's predecessor departments and other government departments collectively with the recognised trade unions; it was incorporated by express reference into individual contracts; and it has never been removed by either collective or individual agreement. Further, the Individual Claimants contend that the following parts of documents are express sources of their contractual right to have the PCS subscriptions collected by check-off in the years prior to the removal of the alleged right:

(i) the extract from the Inland Revenue Handbook (as regards the First and Second Claimants);

(ii) the extract from G3-1 Pay and allowances document (as regards the Third and Fourth Claimants);

(iii) the extract from the TG3 Pay Policy; and

(iv) policy documents HR41100 and HR41101 published on the intranet.

Legal principles

13. A policy adopted by an employer can be the source of contractual rights and obligations, whether or not the relevant policy is expressly incorporated in the employees' terms and conditions of employment. In *Alexander and others v Standard Telephones and Cables Ltd (No 2)* [1991] IRLR 286, Hobhouse J explained the applicable principles in the following way:

> *31 … 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.*

14. In *Keeley v Fosroc International Ltd* [2006] IRLR 961 CA, it was held that the fact that a document is presented as a 'policy' does not prevent it having contractual effect if, by its nature and language, it is apt to be a contractual term - see paras 33 - 36. At para 36, Auld LJ observed that a good way of testing whether a provision in a policy was intended to have contractual effect may be to ask whether, if the provision in

question had been set out in identical terms in the statement of employment terms, it could seriously have been argued that it was not apt to be a contractual term.

15. In *Hussain v Surrey and Sussex Healthcare NHS Trust* [2011] EWHC 1670 (QB), Andrew Smith J stated that the indicia of whether terms of disciplinary procedure had been incorporated include (i) the importance of the provision to the contractual working relationship between employer and employee, (ii) the level of detail prescribed by the provision, (iii) the certainty of the provision, (iv) the context of the provision and whether it is amongst other provisions of a contractual nature, and (v) whether the provision is workable or would be if it were taken to have contractual status.

The contracts of employment of the Individual Claimants

16. The sample terms and conditions for HMRC staff at the time that check-off was removed said as follows in the opening paragraph:

> *"HMRC's full terms and conditions of service, policies and procedures can be found in the guidance pages on the departmental intranet. Your terms and conditions may be amended from time to time and these changes will be displayed on the relevant intranet pages."*

17. The First Claimant received a statement of changes to her written particulars of contract on around 23 November 2010, stating *"further details on all terms and conditions can be found on the Intranet"*. The only full set of written particulars that is available from before this contained the following paragraph (emphasis added):

> *"The following paragraphs and the schedule attached to this letter summarise your main conditions of service as they apply at present. Any significant changes will be notified by means of the Revenue Record.* ***Details of conditions of service*** *applicable to civil servants* ***are to be found in the Civil Service Pay and Conditions of Service Code****, Industrial Memoranda, and in Section K(b) (relating to discipline) of Estacode* ***and in the Inland Revenue Staff Handbook****. Copies of these documents can be consulted in your office."*

18. The Second Claimant received a statement of changes to his written particulars stating "Amendments to Chapter 1 of The Guide will be taken to amend your contract. We will tell you in writing about all the changes to your contract" and referring on several occasions to different chapters of "The Guide". The last available full set of employment particulars he received before this stated (emphasis added):

> *"The following paragraphs summarise your main conditions of service as they will apply from 7th July 1997…. Any significant changes will be notified by letter.* ***Details of conditions of service*** *applicable to civil servants* ***are to be found in the staff code****, a copy of which you hold."*

19. The last available set of main employment particulars received by the Third Claimant before the removal of check-off stated:

> *"This document sets out your main terms and conditions of employment. These, together with those parts of the guidance in G3 Parts 1-26 which have contractual effect (and as amended from time to time) will constitute your contract of employment in HM Customs and Excise. You should keep this safely. All local Personnel Management Units (PMUs) have copies of G3 Parts 1-26 which you can look at."*

20. The last available full set of written particulars or terms and conditions received by the Fourth Claimant prior to the removal of check-off stated:

> *"1. GENERAL. Complete details of the Terms of Employment applicable to all non-industrial Civil Servants employed by HM Customs and Excise are contained in Establishment Instructions Volume G3 Parts 1 to 13, a copy of which is available for consultation in all local staff sections. (Part 11A 'Discipline' is issued on a personal basis.) The Department has the right to change its employees' Terms of Employment at any time. Changes to the Terms of Employment are promulgated by means of Departmental Weekly Orders, Establishment Circulars, Temporary Amendments to Establishment Instructions, or otherwise notified. This present document summarises only the main Terms of Employment."*

Relevant check-off related provisions in Staff Handbooks and Policies

21. The section on Voluntary deductions from the Inland Revenue Handbook states (emphasis added):

> *"109. You may have deductions from salary or wages for premiums or subscriptions to the following organisations.*
>
> *[this lists a number of organisations, which includes a predecessor to PCS]*
>
> *…*
>
> *You should obtain forms of authority from the organisations concerned…Staff association subscriptions may begin in any*

> *month. Other deductions may begin from the start of a quarter only. You should forward your authorities to the organisations in time for them to be sent to FDW (Pay Section) 14 days before the deductions are due to commence….*
>
> ***In the event of industrial action the facility to make deductions pay to any Union may be withdrawn You may stop paying Staff Association subscriptions during a quarter but from the end of a quarter only for other deductions. You must notify FDW (Pay Section), 14 days before".***

22. The above wording provides for an entitlement to have union subscriptions paid by way of deductions from salary or wages without any qualification. The qualification in respect of industrial action suggests that it is the only situation in which the government department can withdraw the facility. The Claimants also rely upon the fact that next to "Ceasing deductions", provision is made for the employee to stop deductions, but not for the employer.

23. The Claimants also point to this provision being among other contractual provisions, relating to the dates of payment, leave pay in advance, balance of pay due to deceased officers, thereby suggesting that this provision too must be contractual. This Handbook was expressly stated to be a source of contractual terms for the First Claimant, and is where employees would expect to find details of their terms and conditions.

24. The extract from G3-1 Pay and allowances policy states:

> *"17.2 Introduction*
>
> *ADP Chessington has arrangements with a number of charities, companies and organisations to make voluntary deductions from pay. You can arrange direct with them for certain subscriptions/premiums to be deducted from your salary. A list of these organisations is shown in Appendix E….The Department has no involvement in the administration and accepts no liability for these arrangements so you must ensure that deductions are correct and in accordance with your instructions.*
>
> *17.3 How to arrange for deductions to be made from your salary*
>
> *If you want to authorise new deductions from your salary you must complete a form that the organisation you have joined will give you. You should send the completed form back to the organisations who will forward it to ADP Chessington.*
>
> *17.4 Cancelling your deductions from salary*

> *If you want to stop any voluntary deductions from your salary you should write to the organisation and ask them to cancel the deduction.*
>
> *17.5 Trade Union Subscriptions*
>
> *The two Civil Service unions with recognition rights in this Department are the:*
>
> *Public and Commercial Services Unions…"*
>
> *3.4.1. You may authorise deductions from your salary for direct payment to organisations such as trade unions, the Civil Service Sports Council, the Civil Service Benevolent Fund, the Civil Service Retirement Fellowship or charitable organisations via "Give As You Earn". Notification should be made in writing or e-mail to Shared Services Enquiries".*

25. The Claimants rely upon the entitlement at para. 17.2 being without qualification. At para. 17.4, there is an entitlement provided to the employee without a parallel entitlement to the employer. This Policy is expressly referred to as a source of contractual terms in both the Third and Fourth Claimant's contracts and is where employees would expect to find details of their terms and conditions. Other paragraphs in the policy (e.g. 1.2, 2.5, 2.6, 2.11, 4.2, 4.3,14, 16.2, 16.5, 17.1) are contractual in nature, providing a supporting context to the above provisions being intended to have contractual effect.

The Blue Book

26. The above documents precede the formation of HMRC in 2005. HMRC's case in para. 2 of its Defence is that at that stage, the Individual Claimants agreed to new terms and conditions contained in the Blue Book which followed collective negotiation. It made no mention of check-off and accordingly there is no entitlement to check-off.

27. As Ms Martin, head of pay and reward policy of HMRC, explained in her witness statement, in preparation for the merger there was a collective negotiation between the incoming employing department and the recognised trade unions, including the PCS, to agree new terms and conditions of service in HMRC. This led to the "Blue Book" offer. The civil servants were given the choice of opting in to the Blue Book terms or remaining on reserved rights. Most opted in, including all of the Individual Claimants.

28. The Blue Book did not mention check-off, including in the "reserved rights" section. Ms Martin, who was involved in the collective negotiation at the time, does not recall check-off being discussed (para. 5 of her witness statement) and there is no evidence from the Claimants that it was. HMRC submits that there is an inference that the reason why there was no collective negotiation in 2004/05 about check-off was because that was not a contractual entitlement. It was therefore the subject of

"consultation" rather than "negotiation" in the collective bargaining agreement, and it was by "consultation" that check-off was removed in 2015.

29. The Claimants answer this by saying that the Blue Book contained only "the main" or "the key" HMRC terms and conditions. They submit that if the right to check-off had been removed, it would not have been provided for in the HMRCs 2007 Pay Policy or in the HR41100 policy, both of which post-dated the Blue Book and the formation of HMRC. HMRC submits that these documents were not expressly incorporated by the Blue Book and there is no reason why they should be treated as incorporated by implication, nor is there any other basis to treat the same as incorporated. This judgment now turns to those policies.

30. The TG 3 – Chapter 3: Pay policy dated 2007 states:

> ***"TG3.26 Voluntary deductions from your pay***
>
> ***What can you pay voluntarily?***
>
> *You can pay premiums or subscriptions to approved organisations (including the IRSA and IRSA Lottery) by deduction from your salary. Pay Section can tell you what the approved organisations are.*
>
> ***Starting voluntary deductions***
>
> *Before voluntary payments can begin you must complete a form of authority for each one and send it to Pay Section. If you retire you will be sent a form to complete which enables payments to continue to be made from your pension. These authorities must reach Pay Section 14 days before the deductions are to start.*
>
> ***Stopping voluntary deductions***
>
> *You can stop paying deductions at any time by writing to Pay Section…*
>
> ***TG3.27 Industrial Action***
>
> *If there is industrial action, the facility to deduct union subscriptions from pay may be withdrawn. Where you are absent from work in breach of your contract because you are taking part in Industrial Action the absence will be without pay."*

31. The Claimants submit that the wording "*you can pay premiums or subscriptions"* and "*there are facilities for the deduction from pay, at the request from staff*" is the language of unqualified entitlement. Likewise, the withdrawal of check-off in industrial action is inconsistent with an unfettered discretion to withdraw from check-off. This is in contrast to the ability of an employee to withdraw from check-off

at any time. The check-off provisions are located amidst several obviously contractual terms (e.g. TG3.3. TG3.21, TG3.32, TG3.33, TG3.35, TG3.36).

32. The HR41100 Policy states:

> ***What is a Consolidated Voluntary Deduction (CVD)?***
>
> *CVDs are deductions authorised by the employee. These deductions can be used to pay premiums or subscriptions to approved organisations directly from your salary.*
>
> ***Starting Voluntary Deductions***
>
> *Before deductions can begin, you must complete a form of authority for each desired deduction. You can obtain these authority and membership application forms from the organisations concerned or their representatives. Send completed application forms to the relevant organisations for registration. After registration the forms are forwarded to Pay Services for input to the Pay System.*
>
> ***Stopping Voluntary Deductions***
>
> *You can stop CVDs by completing the Request to Stop Consolidated Voluntary Deductions form (Word 54KB)….If you do not have intranet access because, for example, you are on long term absences such as maternity leave, you can send the form by post to:...*
>
> *Pay Section must receive this form before 10th of the month to process it for that month. They may not be able to process requests received after 10th of the month until the following month.*
>
> *Pay Section do not send out confirmation of processing so please allow for the above time constraints and check your pay statement before contact HRSC.*
>
> *Please also remember to tell the relevant company that you are ceasing the deductions from your pay."*

33. HMRC's Policy HR41101 Pay: CVD – Approved Organisations sets out a list of organisations to whom subscriptions can be deducted. This includes "PCS Union".

34. The wording, *"These deductions can be used to pay premiums or subscriptions to approved organisations directly from your salary",* provides for an entitlement to have union subscriptions paid a certain way, and contains no qualification. Like the Handbook which had been phased out (see the witness statement of Ms Keen, the head of employee relations in HMRC at para. 12), these provisions provide a mix of contractual and non-contractual matters.

Incorporation of Check-Off related paragraphs

35. The following factors are alleged by the Claimants to point towards the conclusion that the above check-off related paragraphs were intended to have contractual effect:

(i) these provisions have been mirrored in the applicable Civil Service Codes, which are binding on employing departments and regulate the terms and conditions on which civil servants are employed;

(ii) they are expressed in language which is apt for incorporation in individual contracts of employment;

(iii) they form part of a set of documents which clearly include provisions intended to have contractual force;

(iv) they create an arrangement which is of importance to the contractual relationship.

The Civil Service Codes

36. Some of the terms and conditions available for the First Claimant expressly refer to Civil Service Pay and Conditions of Service Code ("CSPCSC"). The rules and guidance set out in the CSPCSC were expressed to be "mandatory" on the employing department. The CSPCSC contained a section on Voluntary Deductions from Pay, which included the following (emphasis added):

> *"4051 A civil servant who wishes to authorise deductions from his pay for any of the ... organisations listed in Annex 1* [which is headed LIST OF ORGANISATIONS FOR WHICH DEDUCTIONS MAY BE MADE FREE OF CHARGE and which includes 'Nationally … recognised unions representing civil servants'] *should obtain from the organisation concerned the standard form of authority approved by the Treasury, complete it and forward it to the organisation. The organisation will forward the completed forms ... to the officer paying salary, wages or pension. ...* ***Deductions for union subscriptions will be made from the earliest date practicable after receipt of the authority. … However, this method of payment may be withdrawn in respect of union subscriptions in the circumstances described in paragraph 4100****.*
>
> *4100.* ***Subscriptions to nationally or departmentally recognised unions representing civil servants may be paid by means of deductions from the pay of members. However, in the event of official industrial action … and for the duration of such action, this method of payment may be withdrawn by the Official Side in whole or in part in respect***

> ***of deductions payable to any unions with members officially involved in the industrial action.***"

37. The "Civil Service Management Code ("CSMC") *"sets out regulations and instructions to departments and agencies regarding the terms and conditions of service of civil servants"* (para 2). It also states, *"When exercising the delegated powers permitted by this Code, departments and agencies should remember that existing rights cannot be altered arbitrarily"* (para 6).

38. Paragraph 7.3 of CSMC deals with Voluntary Deductions from Pay and states (emphasis added):

> *Trade Union Subscriptions*
>
> ***7.3.3*** *Where departments and agencies offer arrangements for deducting subscriptions to trade unions, they must ensure that:*
>
> ***a.*** *they comply with the relevant statutory provisions (including those concerned with political levies, where appropriate);*
>
> ***b.*** *they recover the costs of the provision of the facility from the trade unions concerned; and*
>
> ***c.*** *subscriptions deducted during the quarter in which an officer ceases to be a subscriber will be paid to the relevant trade union.*
>
> ***In the event of official industrial action by non-industrial civil servants, departments and agencies may withdraw the facility, in whole or in part, in respect of deductions payable to any union with members officially involved in the industrial action for the duration of that action. Withdrawal is subject to the approval of the Cabinet Office.***

The arguments of HRMC

39. The standard written terms and conditions for HMRC employees say:

> *"This document, together with the accompanying letter of appointment, constitutes the written statement of particulars for the purposes of Section 1 of the Employment Rights Act 1996. HMRC's full terms and conditions of service, policies and procedures can be found in the guidance pages on the departmental intranet."*

40. The written particulars therefore draw a distinction between terms and conditions on the one hand (such as were set in the Blue Book) and "policies and procedures" on the other. The provisions on voluntary deductions from pay fall into the latter. Whilst in some circumstances such provisions could be treated as incorporated, the distinction between terms and conditions and policies and procedures made clear, according to HMRC, that the policies and procedures were not contractual.

41. Accordingly, notwithstanding the decision in *Cox*, HMRC submitted that the circumstances here can be distinguished. Whatever the historic significance of the Code (as per *Cox* and other cases), in this case the parties did not regard check-off as a contractual right at any material time. Further and in any event, the effect of the merger in 2005 was to confirm that check-off was not part of the civil servant's terms and conditions of service. The removal of check- off in 2015 was therefore not the removal of a contractual right.

42. Following the merger, the process for check-off was contained in HR policy documents, specifically HR41100 and HR41101. HMRC submitted that the HR policy documents, specifically HR41100 and HR41101, were not expressly incorporated by the Blue Book. There was there no basis for the check-off provisions to be incorporated, as contractual terms, into the individual civil servant's contract of employment.

Previous court judgments and the Claimants' arguments

43. In *Cavanagh v Secretary of State for Work and Pensions* [2016] EWHC 1136 (QB), [61-66], Laing J (as she then was) said that the CSPCSC and CSMC are an important *"pointer"* to the correct interpretation of the relevant provisions. This was, in particular because (a) the CSPCSC appears to be the *"common root"* of the contractual arrangements with employees ([62]), and (b) the relevant provisions of the CSMC relating to check-off are to be interpreted as authorising Departments, where they offer check-off, *"to continue the historic position"* ([64]). In *Hickey v Secretary of State for Communities and Local Government* [2013] EWHC 3163 (QB); [2014] IRLR 22 at [11], Popplewell J interpreted words *"subscriptions can be paid"* meaning that the employee is entitled to pay in that way if that is what is asked for. If that were withdrawn, then the employee would not be entitled to paid that way, which is contrary to that language. At [20], he said that it was *"the language of unqualified entitlement"*.

44. In construing the provisions of the Staff Handbooks, etc., *"... the historical position is important. That is, that the parties to the original collective agreement which is reflected in paras. 4051 and 4100 of the [CSPCSC] intended the Crown to abide by those provisions. It would be surprising, if similar language is used in two sets of provisions, the first of which was intended by the parties to be binding, to conclude that the second is not"* (*Cavanagh* at [66]).

45. Choudhury J in *Cox* at [50] "*respectfully agree*[d] *with that analysis* [in *Cavanagh*] *as to the effect of the Codes*", noted that the pre-1996 position of the Code was identical across all departments [52], and considered that the decisions of *Hickey* and

Cavanagh should be followed in respect of the construction of the Codes and their role in interpreting present documents [52, 57]. See also [7] of *Crane*.

46. Notably, the provisions of the successive Codes (which are similar to HMRC's check-off provisions above) state that HMRC or its predecessors have at all material times been permitted to suspend the check-off facility specifically in the event of official industrial action (latterly under the CSMC, only after first securing the approval of the Cabinet Office); and therefore, by obvious implication, HMRC has no power to withdraw this facility for any other reason. The circumstances in which HMRC is entitled to withdraw check-off (in the event of industrial action) would not have been circumscribed in this way if the check-off arrangements had not been intended to have contractual effect - see [12] of *Hickey*, [64, 66- 67] of *Cavanagh,* [54-55] of *Cox*, [7] of *Crane*. In the words of Popplewell J in *Hickey* at [12], *"the natural inference is that those are the only circumstances in which withdrawal from such an arrangement is permitted."*

47. The wording used in the Staff Handbook in *Hickey,* the Salary Policy in *Cavanagh* and the documents in *Cox* and *Crane* are similar to the wording in HMRC's documentation in relation to check-off. Contractual entitlements to check-off were established in all three cases (see in particular [11] and [20] of *Hickey* and [67] of *Cavanagh,* [61] of *Cox*, [31-38] of *Crane*).

48. The check-off facility is of real benefit to employees because it makes it unnecessary for them to make their own arrangements to pay their union subscriptions and provides for a greater and more secure source of funding of the union which exists to protect and promote their interests. As stated by Laing J in *Cavanagh* at [69], the check-off provisions *"affect an aspect of the pay/work bargain, which is central to the contract of employment"* (see also [61] of *Cox*).

Discussion

49. I am satisfied that the Claimants' arguments are correct and that there was a contractual right to have the deductions made from earnings to PCS. I also accept and follow the reasoning in the cases of *Cox*, *Hickey* and *Cavanagh*, albeit recognising that the facts of each case are not the same. Without limiting the scope of the reasons set out above, I particularly emphasise the following factors, namely:

    (i) the check-off related paragraphs were intended to have contractual effect having regard to the fact that they (a) were mirrored in the applicable Civil Service Codes which regulate the terms and conditions on which civil servants are employed, (b) were expressed in language apt for incorporation in individual contracts of employment, (c) formed part of a set of documents including provisions intended to have contractual force, and (d) created an arrangement which is of importance to the contractual relationship;

    (ii) the fact that even if and to the extent that the same was contained in policy or procedural documents, they were apt to be treated as

contractual rights;

(iii) there is no clear delineation between terms and conditions and policies and procedures;

(iv) there was no express or implied removal of the right to check-off in the arrangements of 2005 on the merger. In particular, the case at that stage is that there was *"an all-encompassing and self-contained pay deal"* in the form of the Blue Book (Ms Keen's statement at para. 9) is refuted. This is by the numerous documents in which the right was expressed in clear and unequivocal terms both before and after the merger into the new body known as HMRC in 2005;

(v) the clear acceptance of arguments of these kinds in the above-mentioned cases of *Cox*, *Hickey* and *Cavanagh*;

(vi) despite the case of HMRC that there are distinctions between the instant case and these cases, and every case has to be considered on its own facts, the facts in this case require a similar analysis and the result of the analysis leads to similarity in the result.

50. HMRC in *Cox* argued that the above provisions cannot be contractual because this would require HMRC to be contractually obliged to make deductions to bodies such as a lottery and a Hospital Saturday Fund, which obligation (the Defendant argues) no government department could conceivably have intended to undertake: see e.g. para 26. In *Cox*, Choudhury J held at [53] that there is nothing objectionable in principle to the existence of such an obligation in respect of a limited number of organisations expressly approved by the employer, in the main connected with the civil service.

51. There was also an argument on behalf of HMRC that the PCS's conduct in relation to the removal of check-off indicated that it did not believe check-off to be contractual. It is doubtful that this was of admissible value, but in any event it was contradicted by Mr Paul O'Connor of the PCS at paras. 18-22 of his witness statement showing that the PCS asserted before and after the decision to remove check-off that there was a contractual right to it. It also brought the test cases in *Hickey* and *Cavanagh* based on that understanding at around the same time.

Issue 2: Whether it was an implied term that check-off could be removed by the Defendant giving reasonable notice.

The case of HMRC

52. It is a part of HMRC's case that if there is any contractual obligation owed by the Permanent Secretary to the Individual Claimants, then such obligation was capable of being terminated on reasonable notice: see Defence para. 15. HMRC goes on to suggest that *"Reasonable notice (of three months) is implied as it is necessary to give business efficacy to the contract alternatively, as it represents the obvious, but unexpressed, intention of the parties"*. It is said that it cannot have been intended that such reasonable notice would last for ever.

53. The test for implying such a term is that it must be necessary to give business efficacy to the contract or be so obvious that it goes without saying: *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 724.

54. The CSMC explicitly delegated to individual departments for the first time a discretion as to whether or not check-off would continue to be provided. It is implicit in this discretion that departments could cease to provide check-off. If a clause by which reasonable notice could be given to do so could not be implied into the individual's contracts then the discretion purportedly conferred on the departments by the CSMC would be meaningless.

55. As to the period of reasonable notice HMRC contends for three months (which was the notice given following the consultation period). The test must be judged by reference to the circumstances of the contracting party, i.e. the Individual Claimants. Three months was more than sufficient time for them to provide a direct debit mandate to their bank.

56. It is not normally possible to vary the terms of a contract of employment unilaterally. As Lord Woolf explained in *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193 CA:

> *"100 The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort."*

57. In *Securities and Facilities Division v Hayes* [2001] IRLR 81 CA, the question before the Court of Appeal was whether the employer had been entitled to reduce the amount of subsistence allowance payable if an employee was absent from home overnight. There was no express term permitting unilateral variation but the employer argued that there was an implied term to that effect. The Court rejected that contention. Peter Gibson LJ said:

> *"44 It is a strong thing to imply a term into a contract of employment when that term allows the unilateral variation of the contract. That is all the more so when there are established means for reaching consensual variations to the contract through the Whitley Council procedures. No authority was*

> *cited to us in support of Mr Samek's submission; and it seems to me inherently improbable that the right to make a unilateral variation in the terms of the subsistence allowances was intended by the parties. I do not see how it satisfies the test of necessity for the implication of such a term.*
>
> *...*
>
> *46 ... Had the parties intended a provision allowing the unilateral variation of the rate of the allowances, in my judgment the contractual terms would have had to provide unambiguously for that."*

Discussion

58. In the instant case, there is no basis for concluding that HMRC has an implied right to terminate the check-off facility unilaterally. Such a term would be inconsistent with the fact that the Handbooks/Policies and/or the Codes define the circumstances in which the Defendant can withdraw check-off as limited to the occurrence of official industrial action.

59. As to business efficacy specifically, it cannot be said that the contract would lack commercial or practical coherence without the implied term contended for by HMRC, or that the relevant implication is necessary to make the contract work or to avoid absurdity: see *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2015] 3 WLR 1843 UKSC at [14 – 21], [57], [75] and [77].

60. The same argument, on very similar facts, was rejected in *Cavanagh* with *"no difficulty"* on the basis that *"[s]uch a conclusion would be contrary to the tenor of the relevant authorities"* [72]. Choudhury J also rejected the same argument in *Cox*, considering it to have *"no real merit"* [62] (see also [39] in *Crane*).

61. There is nothing repugnant in the fact an employee could end this arrangement, but that the employer could not. The employer could seek to negotiate a different arrangement by a consensual variation. The employer could also seek to terminate the contract as a whole, subject to contractual and statutory rights. For these reasons, I find that there was no implied term that check-off could be removed by the Defendant giving reasonable notice.

Issue 3: Whether HMRC breached the Individual Claimants' contracts by (a) removing check-off-on 1 May 2015 and/or (b) without reasonable notice.

62. It follows from this reasoning that the issue of what was a reasonable period of notice to terminate the payment of union dues does not arise for consideration.

Issue 4: Whether the Individual Claimants accepted a variation of their contract of employment to exclude check-off by their conduct: whether viewed as affirmation, waiver, estoppel, acquiescence, or express/implied acceptance.

63. The issue here is that it is said by HMRC that if there was a contractual entitlement to check-off, the Individual Claimants accepted the removal of the term. Factually, the emphasis is on various factors including (a) the removal of check-off without legal action for almost six years, (b) the setting up of direct debits by the Individual Claimants in favour of the PCS with the assistance of HMRC, (c) the absence of protest from the Individual Claimants and (d) the limited protest by the PCS. The Claimants have a different analysis of the facts. There are a variety of legal analyses to express different ways of expressing the consequences of such facts. The following principles are potentially engaged: variation of contract, waiver by estoppel (also known as promissory estoppel or equitable waiver), and affirmation.

Legal principles

64. Any variation of contract must be agreed by both parties. In *Abrahall and ors v Nottingham City Council and anor* [2018] ICR 1425, where the employer imposed a pay freeze which amounted to a unilateral variation of the contract, it was argued that the employees' conduct in continuing to work without protest constituted an implied acceptance to such variation. The Court of Appeal rejected that argument.

65. The cases discussed by Underhill LJ in *Abrahall* draw a distinction between variation of terms which have immediate effect (such as a pay cut) and those which would only be felt some time in the future (such as changes to redundancy entitlement and restrictive covenants). In the case of the latter, the courts have been slow to endorse the suggestion that merely continuing to work constitutes acceptance of the varied term: see especially paragraph 31 of *Solectron Scotland Ltd v Roper* [2004] IRLR 4, EAT.

66. According to Browne-Wilkinson J in *Jones v Associated Tunnelling Co Ltd* [1981] IRLR 477, EAT (para.22):

> *"If the variation relates to a matter which has immediate practical application (eg the rate of pay) and the employee continues to work without objection after effect had been given to the variation (eg his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where, as in the present case, the variation has no immediate practical effect, the position is not the same."*

67. Also as per Elias J in *Solectron* (para.30):

> *"The fundamental question is this: is the employee's conduct, by continuing to work, **only** referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights."*

68. This principle was endorsed by Underhill LJ in *Abrahall* (para.85):

> *"[T]o take the position that to continue to work following a contractual pay cut could never constitute acceptance would be contrary to the dicta of both Browne-Wilkinson J in Jones v Associated Tunnelling Co Ltd [1981] IRLR 477 and Elias J in Solectron Scotland Ltd v Roper [2004] IRLR 4, in an area where the specialist expertise of the Employment Appeal Tribunal must be accorded particular respect; and I do not believe that it would be right in principle. A contractual offer can of course be accepted by conduct, and that must include the offer of a variation. Under a contract of employment the parties are in a complex relationship in which they are both required to perform their mutual obligations on a continuous basis, and those obligations are frequently modified by their conduct towards each other. I can see no reason why an employee's conduct in continuing to perform the contract, in circumstances where the employer has made clear that he wishes to modify it, may not in principle be reasonably understood as indicating acceptance of the change."*

69. That does not mean that continuing to work following a contractual pay cut (or other contractual change with immediate impact) will always be treated as acceptance. As Underhill LJ noted at para. 86: "*what inferences **can** be drawn must depend on the particular circumstances of the case."* (emphasis added). It is clear, however, that continuing to work following a contractual change which has immediate impact *can* be treated as acceptance.

70. Underhill LJ identified the following principles at [87-89] for determining when continuing to work may constitute acceptance:

> *"[T]he inference must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a*

> *different explanation it cannot be treated as constituting acceptance of the new terms…" [87].*
>
> *"Secondly, protest or objection at the collective level may be sufficient to negative any inference that by continuing to work individual employees are accepting a reduction in their contractual entitlement to pay" [88].*
>
> *"I do not think that the difficulty in identifying the precise moment at which an employee should be treated as first accepting a contractual pay cut means that the question has to be answered once and for all at the point of implementation [of the variation]" [89].*

71. On the facts of *Abrahall*, Underhill LJ did not find that the employment judge's decision was "perverse": it was a decision to which the employment judge was entitled to come (paragraph 101). In support of this conclusion, Underhill LJ relied upon a number of factors: (i) the proposed variation was wholly disadvantageous to the employees; (ii) the matter was not put to the employees as something on which their agreement was required: there was equivocality on both sides; and (iii) there was *"strenuous protest on the part of the unions not only up to but beyond the date of the implementation"* of the pay freeze.

72. In his judgment in *Abrahall*, Sir Patrick Elias (agreeing with Underhill LJ) observed that employees will often agree to a variation by conduct. At paragraph 107, Sir Patrick Elias observed that if the employee *"is promoted, is given a new contract and acts in accordance with its terms, he will be deemed to have accepted the whole of the terms"*, including disadvantageous terms and those which do not immediately bite.

73. At paragraph 110, Sir Patrick Elias addressed the point that although a party can in principle bring a claim for breach of contract within the limitation period without having to notify the other party that he objects to the breach, things may be different in the employment context. He went on to explain:

> *"I think that the answer lies in the fact that the employment relationship is typically a continuing relationship based on good faith, and exceptionally in that context it might be appropriate to infer that a failure to complain about a proposed variation of the contract for the future may be taken as agreement to that variation which prevents it constituting a breach."*

74. Sir Patrick Elias accepted that there were *"some powerful reasons"* on the facts of that case why the employment judge should have found an acceptance, *"in particular the lengthy period of almost two years without complaint when no*

pay increments were given". Ultimately, however, Sir Patrick Elias held that the judge's decision was one which he was entitled to reach: paragraph 111.

75. Waiver by estoppel requires the following (*see Chitty on Contracts 34th Edition,* 6-089 to 6-105, 25-042, 25-046):

(i) a clear and unequivocal promise or representation (whether by words or conduct) that indicates the promisor will not act on their strict legal rights (see *Chitty,* 6-098 to 6-099). *"[M]ere inactivity will not normally suffice since "it is difficult to imagine how silence and inaction can be anything but equivocal"" (Chitty 6-100).*

(ii) the other party has altered his position in reliance on it, or at least acted on it such that it is inequitable for the promise or to go back on his promise (*Chitty,* 6-101 – 6-103).

76. Affirmation is not relevant to HMRC's argument. It only exists where, when faced with a breach of contract, an innocent party elects to continue the contract and thereby abandons the right to terminate the contract. Such abandonment only involves the abandonment of the right to terminate, not of the right to claim damages for breach of contract (*Chitty*, 27-060).

The facts

77. The relevant factual circumstances to this issue are as follows.

a) the consultation period to remove check-off opened on 10 November 2014. The PCS believed that the consultation period was "far too tight" and it stated that the deadline for making a decision should be extended to ensure that all of the issues were investigated and properly considered: see branch briefing of 11 December 2014 at JK1 p.119.

b) in an email sent on 10 December 2014 Sheila Hills at HMRC stated that it was HMRC's conclusion that check-off was not a contractual right. The trade unions were *"invited to present any evidence to the contrary"*.

c) the evidence of Paul O'Connor is that the PCS strenuously opposed the withdrawal of check-off: see his statement at [6-7]. In internal notes of 11 and 23 December 2014, the PCS stated that they intended to ensure that their negotiators would *"ensure that the case for the retention of check off is made robustly"* and will continue *"to argue for the best possible outcome to the consultation process"*. Nevertheless, there was also a recognition that in previous such consultations, the decision has been for check-off to be withdrawn.

d) the PCS prepared a response to the proposal. It is apparent from that document that the PCS required much more time for a detailed

consultation exercise with its members. Reference was made to a breach of the Equality Act 2010 and it was requested that an Equality Impact Assessment be carried out. There was reference to the time to be taken in implementing any decision and asking for a minimum period of 6 months. The response stated: "… the formal consultation period in HMRC only began a couple of weeks ago and has yet to conclude. We expect Lin Homer to take a reasonable amount of time to consider the outcomes before making her decision.". At that stage, there was no reference to a breach of contract.

e) during consultation on the proposal to remove check-off, the Individual Claimants did not make any submissions about the proposal. However, their evidence is that the PCS had protested against the withdrawal of check-off at the time that it was withdrawn and that they were opposed to what the Defendant was seeking to do: see the statements of the First Claimant at [14], the Second Claimant at [13 and 16], the Third Claimant at [14 and 17] and the Fourth Claimant at [11 and 14].

f) following a meeting in the nature of consultation on 8 January 2015 between HMRC and the PCS, on 12 January 2015, the PCS wrote a letter including the following:

> *"Our view remains that Check-off is a contractual right that has been employed without any problem for decades. More importantly perhaps, it is something that is seen as a key benefit by our members & something that they would prefer not to give up."*
>
> *"…Our view is that this arrangement constitutes a contractual relationship between us and if the provision were to be withdrawn a notice period would need to be agreed specifically to bring this relationship to an end...."*
>
> *"In the event that check-off is withdrawn, our considered view is that a reasonable notice would be no less than 6 months...."*
>
> *"We would, though, prefer to reach a comprehensive agreement on the way forward. We are therefore proposing that should you take the view that check-off is to be withdrawn a further period of discussion is timetabled with a view to reaching agreement on all aspects of the withdrawal process, including: notice periods, support arrangements for the switch to Direct Debit & communications: we would see these further discussions being concluded by the end of this month."*

g) on 15 January 2015, notice was given by HMRC to the PCS to remove check-off for all civil servants at HMRC with effect from 1 May 2015;

h) before the withdrawal of check-off, a letter dated 15 April 2015 was sent by Thompsons solicitors on behalf of Dominic McFadden and Alan Runswick through the PCS to Lin Homer on behalf of HMRC saying:

> *"We take the view that this constitutes an anticipatory breach of our clients' contractual right that their employer continues to deduct from their salary their union subscriptions and pays those subscriptions to the PCS."*
>
> *"... we therefore require HMRC to rescind the notice to end the check-off facility in respect of PCS and we require an undertaking that this will happen to be provided to us within 7 days. If that undertaking is not provided, we are instructed to issue proceedings to obtain interim declaratory relief in the High Court."*

The letter referred in detail to some of the various staff handbooks and policies referred to above. It stated that the terms were apt for incorporation, and it referred to the case of *Hickey* above cited. There was a letter from GLD (the Government Legal Department) in response dated 23 April 2015 refusing to rescind the intention to withdraw check-off facilities at the end of April 2015.

i) check-off was removed from the pay run at the end of April 2015.

j) there was no individual grievance from any of the Individual Claimants after check-off was removed at the end of April 2015, but there had been a complaint raised by three other civil servants in early 2015.

k) after check-off had been removed, steps were provided by HMRC to facilitate each individual member's transfer from check-off to direct debit after check-off had been removed until the end of October 2015. By the end of August 2015 there had been an 87% take up of direct debit by PCS members.

l) the PCS pursued litigation against the Department of Work and Pensions (*Cavanagh*); judgment in *Cavanagh* was handed down on 13 May 2016, and damages were agreed in *Cavanagh* in 2018.

m) a claim for breach of contract was notified to HMRC by a letter sent on 21 December 2020, but there had been no earlier

notification of a claim since the withdrawal of check-off.

n) legal proceedings were issued on 24 March 2021.

The case of HMRC

78. HMRC submitted that if there was a contractual right to check-off, this was lost by the Individual Claimants whether due to a contractual variation or to waiver or estoppel or acquiescence. In the first instance, this occurred because HMRC notified its intention to change the terms without any protest on the part of any of the Individual Claimants. Insofar as there was a protest by the PCS, it was rather faint, concentrating in January 2015 on the question of reasonable notice. Just before check-off was removed, there was a letter of protest from Thompsons for two employees (not among the Individual Claimants).

79. HMRC submitted that this did not assist the Individual Claimants because (a) they continued to be employed without the deduction of the union fees which alleged variation had immediate and monthly effect on each payment of salary, (b) they took the benefit of the HMRC assisting with the direct debit to the PCS in lieu of check-off, and (c) in the case of the First Claimant, she was promoted on two occasions without check-off.

80. HMRC also submitted that even if the acceptance was not unequivocal at first, there must have come a time prior to the issue of proceedings after a delay of 5 ½ years that it was unequivocal that the Individual Claimants had accepted the removal of check-off. There was no response to the GLD letter of 23 April 2015 reserving the position and no collective protest after the decision to implement the decision. HMRC submitted that any objective bystander would assume that the matter had been dropped by the PCS at that point. Where there is an ongoing relationship, employers are entitled to manage their affairs on the basis that their employees on the common understanding that there are no extant disputes between them requiring resolution. It is said to be inconsistent with the mutual trust and confidence in an employment relationship to harbour claims over years.

The case of the Individual Claimants

81. The Claimants say that there was no act of acceptance and no unequivocal act signifying a waiver or an estoppel or the like. On the contrary, HMRC could have sought an unequivocal acceptance of the removal of check-off, but it did not. Further, the PCS protested in its communications directly with HMRC and through the letter of Thompsons on behalf of two of its members.

82. The Individual Claimants submit that against the background of protest by the PCS and the action by the PCS against a different government department, there was a sufficient protest to rebut any suggestion of acceptance. The continuation of work was not an indication of acceptance. There was only a change to the detriment of the

Individual Claimants. This is very different from a case of a new bundle of rights some in favour of an employee and some in favour of the employer where it is easier to infer acceptance of the detriment. The case law does not provide that there is a blanket rule in all cases that wherever the variation is implemented on a month by month basis (in this case the payment of the salary without deduction for check-off) that the contractual right is lost. It depends on all the circumstances of the case.

83. Further, the assumption that the protest can be lost and merge into acceptance because the action was not brought for years is said to be a fallacy. Once the protest has been made or there has been no unequivocal acceptance, the late commencement of an action is not sufficient to give rise to an acceptance or a waiver or estoppel. There was nothing in this action to indicate an acceptance or a waiver or an estoppel or the like.

Discussion

84. I shall start by analysing the position at the point of the implementation of the decision to stop check-off at the end of April 2015. There was no agreement to the change. On the contrary, the change was in the face of the statement of the PCS of 12 January 2015 that the arrangement of check-off was contractual and that specific agreement would be required to bring the check-off relationship to an end. The communication did refer to a reasonable notice period of at least six months, but this was not provided or agreed. In any event, the clear letter of Thompsons of 15 April 2015 was in stronger terms and referred to an "anticipatory breach of contract" by the removal of check-off. It required HMRC to rescind notice to cancel the check-off facility. It said nothing about a reasonable period of notice.

85. In my judgment, that showed that there was no agreement on the part of the PCS to the proposed end to check-off, and, on the contrary, the assertion that the intention to rescind check-off would, if implemented, amount to a breach of contract.

86. The Court is assisted by the analysis of Choudhury J in *Cox* at [68-71] in the following respects:

(i) the inference of consent is less easy to draw where, as here, the change is entirely detrimental: see *Abrahall* at [102] and *Cox* at [68]. This was not a case where the removal of check-off was proposed in conjunction with the conferring of any beneficial terms.

(ii) as in *Abrahall* at [102], the new term of removing check-off was not presented as requiring agreement;

(iii) although the Individual Claimants did not protest, there was protest at a collective level. As Choudhury J said in Cox at [46] *"The fact that the Individual Claimants did not raise any objections to the variation is not determinative. This was a case where the Individual Claimants had the benefit of trade union membership in relation to a contractual benefit that was itself union-related. It is unsurprising that they would leave PCS to take the lead on registering any protest, which is what it did."*

(iv) the protest of the PCS did not identify the Individual Claimants, and indeed in the solicitors' letter identified different individuals. Nonetheless, there was sufficient to identify that the proposed withdrawal was challenged. There was no reason to believe without more that some employees accepted the withdrawal, but others did not. As Underhill LJ said in Abrahall at [88] *"...protest or objection at the collective level may be sufficient to negative any inference that by continuing to work individual employees are accepting a reduction in their contractual entitlement to pay, even if they themselves say nothing."*

(v) there was reason to expect that the PCS would take the lead in dealing with management, and as such the employees relied on the union to advance the protest about the removal of check-off. This arose out of the form of collective bargaining of the PCS for the benefit of the members. There was therefore no reason to believe that the continuation of their work was an acceptance of the removal of check-off.

87. What then is the position thereafter when the check-off was removed in fact and the Individual Claimants continued to work? There was no evidence of an agreement or unequivocal conduct capable of giving rise to an acceptance or a waiver of any breach or acquiescence or the like. The employees' conduct by continuing to work was not only referable to their having accepted the right to a deduction of the union dues. I first of all consider why this is not evident in respect of say the first two years, namely:

(i) there was no reason to believe that the protests had been removed simply because the Individual Claimants continued in employment. There would be serious consequences associated with not working (i.e. loss of pay).

(ii) although this was a case in which the alleged variation had a practical effect each month, it did not 'bite' for each employee in the same way as examples given in the case law such as *Solectron* of *"changing the wage or perhaps altering the job duties"*. Before and after the alleged variation, the employee had the ability to decide whether to be a member of the PCS.

(iii) there had been a threat of legal action which was never withdrawn. In any event, the Individual Claimants knew and it is to be inferred that HMRC knew that the PCS was pursuing litigation against the Department of Work and Pensions in the *Cavanagh* case arising out the removal of check-off. In her statement dated 17 March 2021, the First Claimant stated at [14] *"The union and its members have always regarded that case [Cavanagh] as testing the water for mine and other cases; and I expected that if Mr Cavanagh and the union was successful in that litigation, then HMRC would no longer contest the claims of myself and my colleagues."*

(iv) there was evidence to like effect from the other Individual Claimants. As noted above, judgment in *Cavanagh* was given in 2016 against the Secretary of State for Work and Pensions, and damages were agreed in 2018. The knowledge of that case being pursued was evidence that the PCS would take action to challenge the removal of check-off. In *Crane*, Choudhury J held by reference to evidence to substantially the same effect that the *Cavanagh* case was known about to the senior employees of DEFRA, the employer in *Crane*. There is no evidence in the evidence for HMRC of a lack of knowledge on the part of HMRC and its senior officers of the *Cavanagh* case. On the contrary, an exhibit to the statement of Judith Keen (pp.179-180 of JK1) was an internal email to Ms Keen of HMRC dated 17 April 2015 referring to the PCS having lodged papers with the High Court seeking a declaration that PCS members in the Department for Work and Pensions had a legally binding contractual right to check-off. This shows knowledge within HMRC of the *Cavanagh* case.

(v) there were direct debits being made by Individual Claimants in favour of the PCS, following the removal of check-off. This was not clear and unequivocal acceptance of the removal of check-off: rather it can be treated as mitigation of the position so that union representation could be retained for those who made these direct debits. This has been explained by the Claimants to be not an acceptance of the withdrawal, but as a fall-back position designed to counter the effects of the withdrawal of check-off facilities: see the evidence of the First Claimant at [12-13], the Second Claimant at [14-15], the Third Claimant at [15-16] and the Fourth Claimant at [12-13]. This was the approach in *Cox* at [70] where it was held that *"the direct debit arrangements entered into were nothing more than reasonable mitigating steps that the employees could be expected to take when faced with a breach: the alternative would have been to risk losing the benefit of union protection and potentially incur further loss"*. This was therefore referable to taking mitigating steps, and not evidence, unequivocal or otherwise, of acceptance of the removal of check-off.

88. The case law makes clear that each case depends on its own facts. A question is whether the conduct as a whole gives rise to an inference that an employee has accepted the change in terms and conditions. In some cases, that may be inferred. In my judgment, in the circumstances of this case, at this stage the conduct of the Individual Claimants and each of them in continuing to work was not only referable to their accepting the end of the deductions of union dues as a change in their terms of employment.

89. Might it be said that the absence of continued protest by the PCS or the Individual Claimants over a period of years would indicate eventually clear and unequivocal conduct to the effect that the removal of check-off was accepted by the Individual Claimants? Even if the first few months were equivocal, the argument is that there must have come a time within the next period of over five years that the acceptance could be inferred. I do not accept this for the following reasons, namely:

(i) whilst it is the case that there is not a point in time when an acceptance has to be shown, there is also a problem about how there could at one stage of time be no acceptance or waiver or acquiescence, but acceptance or the like at a later point of time without identification of how the change took place.

(ii) there is no shortened limitation period to deal with such problems. There is no special 'limitation' rule applicable to claims arising out of employment contracts. Once it is not possible to infer consent on the part of individual employees at the time of/in the period of weeks immediately following a variation imposed by their employer, the normal contractual limitation period of 6 years applies no less to such claims than to any contractual claim. In any event, as noted above, the fact that the *Cavanagh* case was being pursued at least up to 2018 is another factor militating against a finding of acceptance of a change in contractual terms.

(iii) there is no event in this case which led to a clear and unequivocal acceptance or the like.

(iv) the way in which Choudhury J expressed this in *Cox* at [71] was to say that the substantial gap between the objection and the letter before action did not alter the analysis. Once the PCS had made the objection clear, nothing done or said would have indicated unequivocally to the employer that the objection was being withdrawn.

90. The position of the PCS was not put as clearly as it ought to have been put in the following respects, namely:

(i) the January 2015 correspondence could have been clearer. When referring to the possibility of a withdrawal on reasonable notice said to be at least 6 months, it could have been said more clearly that until and unless this was agreed, the right to check-off would remain.

(ii) it would have been clearer if the PCS had communicated to the effect that (a) pending any action, nothing was accepted and the contractual entitlement to check-off remained, (b) any direct debits which ensued were without prejudice to the contractual entitlement, (c) the position was reserved in respect of each PCS member as at the time of the removal and of the PCS itself, (d) the action in *Cavanagh* was being brought against the Department of Work and Pensions, but its result was relevant to the complaint against HMRC.

91. It does not follow from this that there was any acceptance, let alone unequivocal acceptance, of the position of HMRC either by the PCS or by the Individual Claimants. In the event that HMRC had wanted to ensure that the removal was agreed by the Individual Claimants such as to abandon any rights in respect thereof,

they could have sought that acceptance to be set out in writing clearly and unequivocally, and not to proceed until agreement was reached. HMRC never sought to do so.

92. The position of the First Claimant who had had promotions twice since the purported removal of check-off is no different. HMRC submits that this showed that the First Claimant must at that point have accepted the removal of check-off. In *Crane*, Choudhury J considered a similar point at [58-60]. He rejected the point in that there was nothing in the documentation to show that the new terms and conditions sought to replace all that had gone before and in particular to remove the contractual entitlement to check-off. There is nothing in the instant case which shows an intention to replace all earlier terms including the entitlement to check-off.

93. There are obvious alternative explanations why the Individual Claimants continued to work without individual protests:

(i) as just noted, there would be serious consequences associated with not working (i.e. loss of pay);

(ii) in this case, the PCS had protested before notice of removal of check off was given. Despite the very clear protest in the letter of Thompsons of 15 April 2015 communicating that the intended withdrawal of check-off would be a breach of contract and the threat of legal action, the Defendant went ahead with the removal of check-off in the face of the letter: see paras 18 and 22 of Paul O'Connor's statement and see by analogy *Abrahall* at [69], [104] and *Cox* at [68-69];

(iii) the Individual Claimants were aware that the PCS was pursuing a case in *Cavanagh* about like issues (see e.g. para 14 of the First Claimant's statement), and it appears that HMRC was aware of this (see *Crane* at [48-50]).

94. The removal of check-off was disadvantageous to the Individual Claimants (see *Hickey* at [24]) which points away from an inference being drawn in relation to their conduct (see *Abrahall* at [102] and *Cox* at [68]).

95. HMRC did not present the removal of check-off as something which required the agreement from individual employees, which again points away from such an inference of acceptance being drawn (see *Abrahall* at [103]).

96. Once objections had been made by or on behalf of the Claimants to the removal of check-off, the mere passage of time between such objections and a letter before action is equivocal, and may therefore be irrelevant (see *Cox* at [71]).

97. The suggestion that the principle of waiver is engaged is not made out. First, there was no express or implied promise not to claim for breach including a letter before action sent on 15 April 2015 by the PCS, albeit for two other employees. Second, there is no evidence that HMRC relied on any such supposed promise such that it would be inequitable for the Individual Claimants to seek to enforce the contract.

Conclusion

98. Whatever legal framework is adopted, the conclusion is as follows. On the premise that there was a contractual right to check-off, there was not an acceptance, let alone a clear and unequivocal acceptance, of the removal of the right. There are arguments based on various events which occurred, and the Claimants could have done more to indicate their lack of acceptance, but that is not to say that there was ever an acceptance of a change in the terms. It therefore remains that the right to check-off was not lost, despite the attempts on the part of HMRC to remove the same. The requirement to show unequivocal conduct or an omission is on the party seeking to prove the variation or waiver or the inability to enforce the contractual term, and there is no such conduct or omission which has been demonstrated. It has not been shown that the right to check-off was removed. The Individual Claimants did not consent to the removal of check-off. There was no variation of the terms of their employment contracts or any of them nor was there an express or implied waiver or other circumstances precluding the right of check-off.

Liability: Claim by the PCS

99. Issues 5-6 relate to the claim brought by the PCS in reliance on the 1999 Act. That claim is, of course, predicated on the premise that the Individual Claimants had the contractual right to have their union subscriptions paid by check-off.

Material provisions of the Contracts (Rights of Third Parties) Act 1999

100. The relevant parts of section 1, 2 and 3 of the 1999 Act are as follows (emphasis added):

> *"**1. Right of third party to enforce contractual term***
>
> *(1) Subject to the provisions of this Act,* ***a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if--***
>
> *(a) the contract expressly provides that he may, or*
>
> *(b)* ***subject to subsection (2), the term purports to confer a benefit on him.***
>
> *(2) Subsection* ***(1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party."***

> *"2. **Variation and rescission of contract.***
>
> *(1)Subject to the provisions of this section, where a third party has a right under section 1 to enforce a term of the contract, the parties to the contract may not, by agreement, rescind the contract, or vary it in such a way as to extinguish or alter his entitlement under that right, without his consent if—*
>
> *(a)the third party has communicated his assent to the term to the promisor,*
>
> *(b)the promisor is aware that the third party has relied on the term, or*
>
> *(c)the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.*
>
> *..."*

> "3. **Defences etc. available to promisor.**
>
> *(1) Subsections (2) to (5) apply where, in reliance on section 1, proceedings for the enforcement of a term of a contract are brought by a third party.*
>
> *(2)The promisor shall have available to him by way of defence or set-off any matter that—*
>
> *(a)arises from or in connection with the contract and is relevant to the term, and*
>
> *(b)would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.*
>
> *..."*

101. So far as material, section 10 of the 1999 Act provides:

> *"(2) This Act comes into force on the day on which it is passed but, subject to subsection (3), does not apply in relation to a contract entered into before the end of the period of six months beginning with that day.*
>
> *(3) The restriction in subsection (2) does not apply in relation to a contract which—*
>
> *(a)is entered into on or after the day on which this Act is passed, and*
> *(b)expressly provides for the application of this Act."*

Issue 5: Did the term confer a benefit on the PCS as per s 1(1)(b) of the 1999 Act?

102. This is admitted by HMRC and was, in any event, established on the very similar facts of *Cavanagh* (see [73]). It was there conceded that a contractual term can have more than one purpose. It therefore follows that a term can confer a benefit at the same time both on the promisee and on the third party. I accept the submissions on

behalf of the Claimants to this effect at paragraph 48 above about the real benefit of the check-off facility to employees.

103. There is also a benefit to the PCS which coincides with some of the benefit to the employee. It provides greater and more secure funding for the union. Without compelling employees to join the union, the facility makes it more likely that members will join and maintain their memberships of the union. Without it, there is the danger that employees will not get round to joining the union.

104. As found by Laing J in *Cavanagh*, citing previous case law, especially at [52 and 73], the benefit does not have to be the predominant purpose or intent behind the term. Further, the conclusion that there is a benefit is not negated by the fact that there is also benefit to parties to the contract, in *Cavanagh* (as here) to employees.

Issue 6: On a proper construction of the contracts did it appear that the parties did not intend that the term would be enforceable by the PCS as per s 1(2) of the 1999 Act?

105. In *Nisshin Shipping Co Ltd v Cleaves and Co Ltd* [2004] 1 All ER (Comm) 481, Colman J pointed out (at [23]) that s.1(2) of the 1999 Act does not provide that s. 1(1)(b) is disapplied unless on a proper construction of the contract it appears that the parties intended that the benefit term should be enforceable by the third party. Rather it provides that s. 1(1)(b) will be disapplied only if, on a proper construction of the contract, it appears that the parties did not intend third party enforcement. This reasoning was applied expressly by Laing J in *Cavanagh* at [74]. It follows that where the contract is neutral on the question, subsection (2) does not disapply subsection 1(b).

106. HMRC submits that *Nisshin* is in error in describing the 1999 Act as copying the corresponding section of legislation in New Zealand, namely the New Zealand Contracts (Privity) Act 1982 ("NZ Act"). There is an argument raised by HMRC that there is a material difference between the 1999 Act which refers to "the parties" not intending the term to be enforceable by the third party and the NZ Act referring to a promise which is not intended to create an obligation enforceable at the suit of that person.

107. The 1999 Act fastens in on the parties whereas the NZ Act fastens in on the contract itself. HMRC says by reference to section 6 of the Interpretation Act 1978 that unless the contrary intention appears, the parties is a plural which includes a singular and so is to be interpreted as referring to one or more of the parties to the contract. On this basis, HMRC submits that it suffices to rebut the presumption if one of the contracting parties did not intend for the third party to have the right of enforcement. It is said that no employer would intend to give a trade union the right to third party enforcement in respect of members' subscription fees, particularly because that liability could apply in respect of employees who no longer wished to remain as members of the PCS.

108. I do not accept this reading. First, the reference in context to parties as bearing the singular is subject to a contrary intention appearing. In context, the intention must have been that the parties should refer to the parties to the contract. That is because in

contractual interpretation, the intentions that matter for s.1(2) are the combined intentions of the Individual Claimants and the Defendant, as objectively ascertained; and not the subjective intentions of the Defendant (see *Cavanagh* at [74]). When HMRC then refers to classic statements of the law of construction in cases in the highest courts, they are referring to what the words would mean to the parties e.g. *Arnold v Britton* [2015] AC 1619 at [15].

109. The understanding that "the parties" is not to be construed in the singular is supported by Chitty on Contracts 34th Edition at para.20-096 which reads as follows:

> *"To rebut the presumption, A must (in the words of s.1(2)) show that "the parties" did not intend the term to be enforceable by C. Thus it is not enough for A to show that they [A] did not so intend;* ***they [A] must show that neither they [A] nor B had this intention."*** (emphasis added)

110. In any event, it is not apparent from the skeleton for HMRC what difference this analysis is said to make, as HMRC recognised at [57] of the skeleton argument. There is no basis for inferring that the Individual Claimants intended that the PCS should not be able to enforce the check-off related terms, given the clear benefit to the union – and thus, indirectly to them – offered by that term (see Paul O'Connor's statement, paragraphs 12-13) – see *Cox* at [80.2].

111. It is said also that the presumption is displaced because the origin of the words used is a collective agreement between the union and the employer. A collective agreement does not give rise to an enforceable agreement: see *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers & Others* [1969] 1 WLR 339 and. s.179 of the *Trade Union Labour Relations (Consolidation) Act* 1992. HMRC submits that just as in construing a commercial contract, it is permissible to take into account commercial common sense, so too in an employment contract, employment common sense should be taken into account: see *Altes v University of Essex* [2021] EAT 2 November 2021. HMRC submits that it makes no employment common sense for a collective term to become enforceable through the medium of the employment contract; it is to attempt to get through the back door when one cannot get through the front door.

112. This argument fails to take into account adequately that the collective agreement is not being enforced. The collective agreement was expressly incorporated into the agreement between the employer and the employee and thus the parties whose combined intention matters for this purpose is the employer and the employee. It therefore does not matter that there is a presumption that a collective agreement is not legally enforceable because it is not that agreement which is being enforced. Under the 1999 Act, the ability of the third party to enforce the contract is not an enforcement of the collective agreement, but of contracts of employment in which the intention to be considered is the objective combined intention of the employer and the employee.

113. Once a collectively agreed term is incorporated into individual contracts of employment, the intentions of the parties entering into the collective agreement from

which it originated are in the judgment of Choudhury J in *Cox* at [79] of no relevance to the construction of that term. He cited *Harvey on Industrial Relations and Employment Law*, AII, [62] and *Hooper v BRB* [1988] IRLR 517, CA) – see *Cox* at [79]. This is reinforced by the fact that the terms of a collective agreement incorporated into individual contracts continue to have force even where the collective agreement ceases to have force (*Morris v Bailey* [1969] 2 Lloyd's LR 215) – and *Cox* at [80.3].

114. HMRC also relies on a passage in the textbook Labour Law by Professor Ewing and others 2nd Ed. That contains criticism of *Cavanagh* in that it is said that it was not clear how the union's claim could succeed in the light of TULCRA 1992 s.179 having regard to the 1999 Act s.1(2). The answer is that the collective agreement is not being enforced: the source of the benefit is not the collective agreement but the later stage of the collective agreement being incorporated into the contract between employer and employee. In the light of the case law referred to above, that is entirely orthodox.

115. HMRC seeks to say that other organisations used check-off arrangements, where a third party right may not have been intended, who may not have a right to enforce such terms. It is not apparent whether there are contractual rights in respect of other organisations. There is no value in a comparison with the position of other organisations using check-off arrangements within HMRC (see [80.5] of *Cox*). As pointed out by Choudhury J, at its highest *"[t]he fact that an organisation is an unlikely candidate for third party rights might be one factor to be taken into account in construing the intentions of the parties to the contract in relation* ***to that organisation****"* (emphasis added) It does not shed any light on the question whether the contracting parties intended that the PCS should not be able to enforce the relevant contractual obligation.

116. It is further submitted for HMRC that the parties could not have intended such a term to be enforceable because the term was originally incorporated before the 1999 Act. In the instant case, the Court is only concerned in this context with *"contracts entered into"* after the 1999 Act came into force and in particular in 2005 which was the earliest time when the contracts with HMRC came into existence.

117. It was at one point a part of HMRC's case that another way of negativing the presumption is that there was an independent contract between the PCS and HMRC for the costs of providing check-off to be paid by the PCS to HMRC: see Defence para. 19d and para. 29 of Ms Keen's statement. There were invoices from HMRC to the PCS. It was suggested that HMRC and its employees cannot have intended that the PCS would be able to enforce the contracts between employer and employee when *"a more direct route for enforceability existed"*: see HMRC skeleton argument para. 73. This argument had insuperable difficulties. First, if the arrangement about reimbursement was contractual, it did not prove that there was a right of check-off agreed under that arrangement. Second, if there had been a right of check-off under that arrangement, it did not inform as to whether or not the PCS was entitled to enforce the contract between HMRC and an employee. This was very much a subsidiary argument which was sensibly no longer pursued in the course of oral argument.

118. In the end, the critical point is that none of the contracts or their terms on which the Individual Claimants are employed can be construed as expressing an intention that

the PCS should not be entitled to enforce the benefit conferred on it by the check-off provisions. This was held to be the case in *Cox* where the defendant had not been able to point to any part of the check-off provisions as negating the presumption of enforceability by the PCS as a third party (see [79-80]), and see also *Crane* at [70]. Accordingly, s.1(2) of the 1999 Act has no application in the instant case.

119. Given the industrial relations backdrop to the agreement of the term entitling check-off – namely, that government departments were expressly telling their staff of the advantages of collective representation by trade unions and encouraging them to become members of those trade unions – if it were necessary under the legislation to infer the parties' combined intention on this point (which it is not), then one could readily infer an intention that the term should be enforceable by the unions for whose direct benefit it was in essence introduced.

120. For these reasons, the answer to this issue is that the check-off provisions were enforceable by the PCS pursuant to s.1(1) of the 1999 Act.

Issue 7: If the defence (at issue 4) is made out, does this defeat the PCS's claim under the 1999 Act pursuant to s 3(2), read with s 2?

121. Since the defence at issue 4 is not made out, this does not arise for consideration. This issue was raised in *Crane*, and considered by Choudhury J. It was counter-factual (on the facts as found) because the Court had found that there had been no defence of rescission or variation or waiver. Thus, the Court was examining what would have occurred if there had been a finding that there had been a defence as between the parties to the contract. The Court then tested whether such variation or the like would be rendered void by the provisions of section 2 of the 1999 Act. Choudhury J found that even if there had been acceptance of a variation, such variation would have be ineffective pursuant to section 2 of the 1999 Act to defeat the PCS's third party claim as the PCS would not have consented to such variation. HMRC submits that the provisions of section 2 are not met in this case at para. 87 of its skeleton argument which has been answered in a one page argument headed "Claimants' submission on s.2 of 1999 Act".

122. In view of the findings which I have made, these arguments are also based on a counter-factual on the facts of the instant case. Whilst there have been alternative findings in *Crane*, Choudhury J entertained doubts as to the precise basis on which a counter-factual would work: see his observations at [80] in which he said that it was not clear that the counter-factual would involve rescission of the existing contract as opposed to discharge by agreed termination. If the matter had not been a counter-factual, it could have been that the relevant facts and law in this regard might have been examined in greater detail.

123. In view of my findings above, it is not necessary for me to rule about a counter-factual and its legal consequences. I prefer not to express a view about this area. I do not thereby intend to express or indicate in silence any view, let alone any disagreement, with this part of the judgment of Choudhury J in *Crane* or the Claimants' submission on s.2 of 1999 Act.

Conclusion

124. The Individual Claimants have a contractual right to check-off. This is the natural interpretation of the HMRC's handbooks and policies against the material industrial relations historical context, consistently with the analysis of the courts in *Hickey*, *Cavanagh, Cox* and *Crane*.

125. There is no basis for implying a term that this right could be removed by HMRC giving reasonable notice, and no basis for saying the Individual Claimants agreed to vary their contracts by their conduct (or that they waived any breach of contract).

126. There is nothing express or implied in the terms of the contracts of employment to lead the court to conclude that the parties to those contracts did not intend the check-off term to be enforceable by the PCS. HMRC's arguments to contrary effect are rejected.

127. For the reasons set out above, I determine the issues referred to above in favour of the Claimants, save for those issues that I have not needed to resolve.