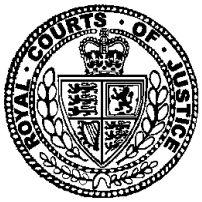

Neutral Citation Number: [2022] EWHC 1626 (QB)

Case No: QB-2021-000304

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2022

Before :

MR JUSTICE CHOUDHURY

- -

Between :

1) KEITH CRANE **2) ELSPETH GANON WAGG** **3) CAROLINE MACKENZIE** **4) PUBLIC & COMMERCIAL SERVICES UNION**	**Claimant**
- and -	
SECRETARY OF STATE FOR THE DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS (DEFRA)	**Defendant**

- -
- -

Oliver Segal QC and Darshan Patel (instructed by **Thompsons Solicitors**) for the **Claimant**
Clive Sheldon QC and Jack Feeny (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: Thursday 31 March and Friday 1 April 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on Friday 24 June 2022.

.....

MR JUSTICE CHOUDHURY

Mr Justice Choudhury :

1. The First to Third Claimants (together "the Individual Claimants") are employed by the Defendant and are members of the Fourth Claimant, the Public and Commercial Services Union ("PCS"), a trade union recognised by the Defendant for the purposes of collective bargaining. The union subscriptions payable by the Individual Claimants to PCS were, until 30 January 2015, collected by means of 'check-off' arrangements whereby deductions were made directly from their salaries through the payroll system by the Defendant and paid to PCS. The principal issues in this case are: (a) whether the Individual Claimants had at the material time a contractual entitlement to check-off; (b) if so, whether the Individual Claimants had accepted a variation of their contracts of employment so as to exclude check-off or had waived the breach of contract arising from the removal of check-off; and (c) whether PCS has an entitlement to bring a third-party claim against the Defendant pursuant to the *Contracts (Rights of Third Parties) Act 1999* ("the 1999 Act") in respect of the subscriptions payable by check-off.

2. This is the fourth claim brought by PCS and its members to establish a contractual right to check-off, the previous ones being against different Government departments. The others are *Hickey & another v Secretary of State for Communities & Local Government* [2013] EWHC 3163 (QB) ("*Hickey*"), *Cavanagh and others v Secretary of State for Work and Pensions* [2016] EWHC 1136 (QB) ("*Cavanagh*") and, most recently, *Cox v Secretary of State for the Home Department* [2022] EWHC 680 (QB) ("*Cox*"). In each of these cases, the claimants were successful in establishing the rights claimed in respect of check-off.

3. The parties are in agreement that the principal issues of contractual entitlement to check-off and the application of the 1999 Act raised in the present case are materially the same as those arising in *Cox*, the judgment in that case being one of mine. The Defendant acknowledges that, in these circumstances, this Court is likely to follow the decision in *Cox* in respect of those issues. The Defendant contends, however, that in relation to one issue, the position in the present case is materially different to that which was found in *Cox*. That issue is whether (assuming that check-off is a contractual entitlement) the Individual Claimants had accepted the variation to their contracts removing that entitlement or had waived the breach of contract involved.

4. Mr Sheldon QC, who appears with Mr Feeny for the Defendant (as they both did for the defendant in *Cox*), informs me that, whereas the government departments in *Hickey* and *Cavanagh* did not appeal against those judgments, the Home Secretary does intend to appeal the decision in *Cox*. Mr Sheldon invited me at the outset of this trial to consider staying the trial on all issues save for the variation/waiver issue and the impact this has on the claim under the 1999 Act pending the outcome of the appeal in *Cox* (assuming permission to appeal is granted), and permitting this hearing to proceed as a trial of two preliminary issues. I declined that invitation. It appeared to me that whatever the merits of the appeal in *Cox*, the determination of the claims in this case should not be delayed. Furthermore, should the Defendant seek to challenge the outcome of this matter it would be beneficial for the appellate court to have this Court's findings of fact on the contractual background.

5. As was the case in *Cox*, the claims here are brought as Part 8 claims and come before me for a determination on liability only. The parties have filed and served witness statements (with attached exhibits) from: on behalf of the Claimants, each of the

Individual Claimants, Mr Mark Serwotka (General Secretary of PCS) and Mr Paul O'Connor (Head of Bargaining at PCS); and, on behalf of the Defendant, Mr Geoff Robbie (Head of Employee Relations in DEFRA). The parties agreed (as in *Cox*) that no live evidence needed to be heard as there was little in the way of factual dispute, although there were clearly differences between the parties as to the way in which certain documents are to be construed. My findings of facts are based on the witness statements and the attached exhibits.

Background

The origins of check-off

6. The origins of the check-off arrangements lie in collective agreements reached between the Government and the relevant trade unions in the 1960s. There was no direct evidence of such agreements before me: unsurprisingly, many of the documents from that period can now no longer be located. However, I was referred to a research paper, "The Check-Off. A Study of its Growth and Functions", published by AI Marsh and JW Staples in 1966, which confirms that in July 1965 the Treasury offered to provide check-off to the staff associations recognised by the Government at that time (including PCS's predecessor), thus suggesting that this was the source of check-off for civil servants working for central Government.

The Codes

7. Prior to April 1996, the terms and conditions of service for Government employees were determined centrally and were largely uniform. The Treasury was responsible for pay bargaining with the relevant unions, and the terms and conditions centrally established were set out in the Civil Service Pay and Conditions of Service Code ("CSPCSC"). The CSPCSC was superseded in 1996 by the Civil Service Management Code ("CSMC"). As the CSPCSC and the CSMC (together "the Codes") are historically common to all Government departments, the conclusions reached in *Cox* as to the meaning and significance of the Codes (insofar as relevant to check-off) in understanding whether there is a right to check-off apply equally in the present case. My conclusions, which are set out more fully at [3] to [11] and [49] to [57] in *Cox*, can be summarised as follows:

    i) The CSPCSC contained a section on 'Voluntary Deductions from Pay', which included the following:

> "4051 A civil servant who wishes to authorise deductions from his pay for any of the purposes or organisations listed in Annex 1 and 2 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. Notice of termination for authority should be given direct to the paying officer of the departments. 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. Staff will be advised by an office notice of any decision to withdraw this method of payment ("check-off")."

ii) From 1996 onwards, the Defendant had the power to set his own terms and conditions for civil servants working in his department subject to those terms and conditions complying with the CSMC.

iii) The CSMC did not itself set out terms and conditions of service.

iv) When exercising delegated powers permitted by the CSMC, departments and agencies had to bear in mind that "existing rights cannot be altered arbitrarily": para 6 of the CSMC.

v) Paragraph 7.3 of CSMC deals with 'Voluntary Deductions from Pay', and provides:

> 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.

vi) Thus, the CSMC contained similar, albeit not identical, provisions to those in the CSPCSC in respect of check-off arrangements. However, in respect of the withdrawal of check-off in the event of industrial action, the CSMC further provides that such withdrawal is also subject to the approval of the Cabinet Office.

vii) To the extent that the Codes are referred to in the Individual Claimants' contracts of employment, one can legitimately look to the Codes (and other documents and policies so referenced) to ascertain contractual intention.

viii) Although not strictly binding on this Court, the decisions in *Hickey* and *Cavanagh* insofar as relevant to the documents in the present case, should be followed.

ix) The CSPCSC is the "common root" for the current contractual arrangements which was "clearly intended to have contractual or quasi-contractual effect and it was intended that the Crown should abide by it": [62] of *Cavanagh*. I agreed with Laing J (as she then was) as to the effect of the Codes on the analysis of the contractual position at the material time.

x) The limited circumstances in which the check-off could be withdrawn (i.e. in the event of industrial action) is, as Popplewell J (as he then was) concluded in *Hickey*, inconsistent with there being an unfettered discretion to modify or withdraw check-off in any other circumstances (which discretion would exist if the provision were non-contractual).

xi) The fact that deductions may also be made in respect of other (non trade union) organisations does not render it absurd to conclude that there is a contractual right to check-off.

xii) The language used in the Codes in relation to check-off is that of obligation and not, as contended for by Mr Sheldon, that of mere authorisation.

Individual Claimants' Contracts of Employment

8. The First Claimant joined the Ministry of Agriculture, Fisheries and Food ("MAFF") in May 1986 as an Administrative Officer, and remained within that department until it merged with part of the Department for Environment, Transport and the Regions ("DETR") to form the Defendant's department, DEFRA, in 2001. The First Claimant was promoted to Executive Officer in around 2001, Higher Executive Officer in 2015 and then Senior Executive Officer in DEFRA in 2017. He has throughout been a member of PCS, currently holding the position of Vice Chair of EFRA London and South East Branch, EFRA being the PCS Group within DEFRA.

9. As is common for civil servants whose employment commenced decades ago, the First Claimant does not hold a copy of his contract. However, there is a "Memorandum of conditions of service", which was signed by the First Claimant at the time of his appointment, and which contains a "Summary of the main conditions of service". Paragraph 1 of the Memorandum provides that "Any significant changes will be notified by Office Notice" and that "Further information about conditions of service is contained in the Ministry's Staff Manual and "A Handbook for the New Civil Servant"". That manual and handbook are no longer available. However, it is reasonable to infer, given the commonality of the CSPCSC across Government Departments at that time, that one or both of them would have referred to that Code.

10. A draft Model Contract is exhibited to the First Claimant's witness statement. It is believed to be similar to that which actually applied. As there is no contrary evidence

from the Defendant, I accept that the Model Contract (or something substantially similar) applied to the First Claimant's employment. The introductory paragraph of the Model Contract provides:

> "This document sets out your principal terms and conditions of employment. It incorporates the written particulars required by the Employment Rights Act 1996 and, together with the staff handbook[1] [or departmental equivalent] as amended from time to time, constitutes your contract of employment with the Crown."

11. The footnote provides that:

> "1 All references to "staff handbook" in this model contract are references to the departmental/agency document(s) which in compliance with the Civil Service Management Code set out the terms and conditions of service of the civil servants in each Department/Agency with amendment made by agreement with the Trade Unions."

12. There is no express reference to check-off within the Model Contract itself.

13. The Second Claimant commenced employment with the Rural Payments Agency ("RPA") as an agency worker in 2001. The RPA is an executive agency of DEFRA. The Second Claimant became a permanent employee in 2007. The Second Claimant also does not hold a copy of her contract of employment. However, there is a written statement of her employment particulars (signed as having been accepted on 9 February 2006), which refers expressly to the CSMC and the "on-line Staff Handbook". There is an extract from the RPA Handbook exhibited to the Second Claimant's statement dealing with "Voluntary Deductions from Pay". So far as relevant, this section of the RPA Handbook provides:

> "80 There are facilities for the deduction from pay, at the request of staff, of periodic payments to organisations with which the Agency as arrangements for the collection and remittance of such payments.
>
> …
>
> Trade Unions
>
> 84. Under an arrangement known as 'check-off', members of staff can arrange for trade union subscriptions to be paid directly from their salaries, free of charge. In the past, authorisation for such payments was only required when staff first joined a trade union. Now, under the Trade Union Reform and Employee Rights (TURER) Act 1992, all union members have to sign new authorisations every three years.
>
> 85. Staff are notified in advance of any increase in subscriptions, and can withdraw from the check-off arrangements on

> publication of such a noticed, or at any time, although a reasonable period should be allowed between an instruction to stop and cessation of deductions.
>
> 86. Currently a number of staff contribute to the following:
>
> FDA Administrative grades
>
> IPMS Scientific and Technical grades
>
> PCS Executive, Clerical, Secretarial and Support grades
>
> 87. In the event of official industrial action by civil servants, and for the duration of such action, the Treasury may require the facility to be withdrawn in whole or in part in respect of deductions payable to any unions with members officially involved in the industrial action…."

14. It is notable that, as with the Codes, the RPA Handbook provides that check-off may be withdrawn in the event of official industrial action. No other circumstances for withdrawing the facility are mentioned. By contrast, the employee can withdraw from the arrangement "at any time".

15. A similar set of provisions in respect of check-off arrangements is contained in the RPA's Voluntary Deductions from Pay policy.

16. The Third Claimant joined MAFF in 1990 as an Assistant Scientific Officer. She was promoted to Scientific Officer prior to 2001, and in 2014 transferred to the role of Executive Officer. The Third Claimant moved to her current role as an Administration Officer for the Animal Plant and Health Agency ("APHA") of DEFRA in February 2017. She too does not have a copy of her contract of employment, but exhibits an unsigned copy of MAFF's "Schedule of terms and conditions of employment for full time appointments", which is believed to apply in her case. That is confirmed by her letter of appointment which provides that the "following paragraphs [of the letter of appointment] and the schedule attached to this letter summarise your main Conditions of Service as they apply at present." The letter of appointment goes on to state that "Any significant change will be notified by means of Office Notices" and that "Details of conditions of service applicable to civil servants are to be found in the [CSPCSC]; Industrial Memoranda, and in Section Kb (relating to discipline) of Estacode etc." Paragraph 4 of the schedule attached to the letter refers both to the CSMC and the "Staff Handbook" which is described as containing the "Departmental rules implementing the [CSMC]…".

Other policies and handbooks

17. A document entitled "Interim Defra Staff Handbook" contains a section on Industrial Relations. Under the heading, "Trade Union Subscriptions", the interim handbook provides:

> "You may arrange for your trade union subscriptions to be debited directly from your pay. Contact your local trade union representative for details."

18. Nothing is said in this policy about the withdrawal of check-off in the event of industrial action. Similarly, paragraph 3.4.1 of DEFRA's Pay Policy provides:

> "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."

19. That was the context in which each of the Individual Claimant's union subscriptions were paid by way of check-off until January 2015.

Withdrawal of check off

20. In December 2013, the Minister for the Cabinet Office wrote to the Permanent Secretaries for Civil Service Departments setting out his view that, "… it [was] not desirable for Civil Service employers to provide an unnecessary service on behalf of the Trade Unions and their members, which can impose additional costs as well as constraints on the way employers administer their payrolls". That letter was accompanied by guidance on the "Deduction of Trade Union Subscriptions at Source ("Check-Off")", which referred expressly to "the recent court case involving the Department for Communities and Local Government…". That was, as found by Laing J in *Cavanagh*, a reference to *Hickey*: see *Cavanagh* at [28]. There can therefore be no doubt that Permanent Secretaries were alerted at that time to the fact of the decision in *Hickey*. The letter went on to request that Departments review their check-off arrangements. DEFRA wrote to PCS on 5 August 2014, explaining that, having undertaken a review of the check-off facility, DEFRA was minded to remove check-off. PCS was invited to take part in a consultation on the proposal. Mr Christian Bishop, PCS Efra Group President, responded on 15 September 2014 in the following terms:

> Thank you for your letter of 5th August.
>
> PCS is opposed to the removal of check off believing it to be a political attack on trade unions. You appear to support this view by your statement that "it is not desirable for Defra as a Civil Service Department to provide a service for an external organisation whose perspective is often at odds with our own".
>
> Yet your rationale indicates a complete failure to understand or appreciate the essential role that unions play in the workplace. The Civil Service attaches importance to ensuring effective consultation and involvement of staff. Indeed staff are encouraged to join an appropriate trade union and to play an active part within it (see the Employee Relations pages on the Defra's intranet - "Defra encourages you to join and play an active role in your appropriate Trade Union").

Far from being external PCS forms part of the landscape of the Defra network by being a trade union recognised by the Department for collective bargaining purposes. Our elected representatives are staff who are given facilities and accreditation by Defra in order to carry out lawful trade union duties. We make no apology for the fact that we campaign for fair pay, pensions and conditions, as well as protecting members from job cuts, privatisation and dismissal. Whilst this may mean that we do not always reach agreement with you, PCS representatives always conduct themselves in a professional manner.

On the consultation itself your letter not only fails to address many of the questions raised by us at the meeting on 11th July but does not set out any justification for removal beyond the views of the Cabinet Office. You mention that Defra has considered several factors including costs (both maintaining and removing) and legal implications but you provide little detail as to what they are. It would help the consultation therefore if you could provide the following information:

• Whether Departmental Ministers have been consulted on the issue and what their views were?

• Which organisations currently have check off/payroll giving subscription deduction facilities in core Defra and the executive agencies?

• Which organisations other than the unions are having deduction facilities removed? If they are not, can you explain why not?

• Whilst you have confirmed the cost of providing the current check off facilities for the unions, what would be the cost in removing them?

• Would Defra consider retaining the facility if the unions offered to meet the cost of it?

• You state that you have sought legal advice; our understanding is that some staff have a contractual right for have their union subscriptions collected by check off. Can you explain how you are proposing to deal with this?

…

It goes without saying that should you decide to remove check off then we will consider this to be detrimental to good industrial relations. Therefore we would urge that you do not simply consider the economics of removing check off but the long term impact on management/union relations. If this is not to be

> perceived as an attack on PCS then we must be given sufficient time and facilities to consult and engage our members…"

21. On 21 October 2014, DEFRA wrote to inform the PCS that it had reached a decision to remove check-off as of 30 January 2015. The letter confirmed that DEFRA would provide the trade unions with reasonable workplace access to assist in the transition from check off. This included the use of DEFRA IT to access the PCS website so members could sign up to direct debit.

22. In response, Mr Jack Papasavva, PCS Industrial Officer, stated that "PCS remains opposed to the removal of check-off (our letter of 15 September refers)", and raised some further queries about DEFRA's plans. One such question was in the following terms:

> "Would Defra consider retaining the facility if the unions offered to meet the cost of it? Bearing in mind that you have accepted that there is a contractual right for a small group of staff and the cost of continuing these arrangements for all staff is the same, PCS would be grateful if you could answer this question."

23. This small group of staff, in respect of which DEFRA had accepted that there was a contractual entitlement to check-off, comprised former DETR staff. The DETR handbook was identical to that of the DCLG (considered in *Hickey*) and had expressly highlighted the check-off provisions as contractual. As will be apparent from the extracts above, the DEFRA, RPA and APHA handbooks did not do the same.

24. There was little more in the way of correspondence between the parties about this issue until the letter before action sent on behalf of the Individual Claimants on 11 December 2020. There were no collective or individual grievances raised in respect of the withdrawal of check-off.

25. Meanwhile, in an attempt to maintain the flow of subscription income from staff affected by the withdrawal of check off, PCS, in May 2014, had adopted a policy of moving members to Direct Debit arrangements. It was clear to PCS that the removal of check-off would mean that the collection of trade union subscriptions would be rendered less secure and reliable. PCS claims to have suffered loss in the form of lost subscriptions following the removal of check-off. Mr Serwotka, in his evidence, states that 195 out of 625 PCS members within DEFRA had not signed a Direct Debit mandate after the withdrawal of check-off, representing a 31.2% loss of subscriptions. Similarly, in RPA, 320 out of 1,156 and in APHA, 90 out of 310, PCS members had not signed a Direct Debit mandate representing a 27.7% and 29% loss of subscription income respectively from the membership in these agencies.

26. Mr Serwotka further states that, although PCS protested against the withdrawal of check-off within DEFRA and its agencies on behalf of its members, it took the view that it should fund what PCS saw as effectively test litigation against one Government Department that had unilaterally withdrawn check-off, in the hope that other Departments would follow the result. PCS considered that to be a proportionate way to proceed and focused its efforts by way of the claim in *Cavanagh* against the DWP, which had a larger number of PCS members.

Was there a contractual entitlement to check-off?

Submissions

27. The parties' submissions on this issue are very similar to those in *Cox* (although with some differences in emphasis) and may be summarised as follows:

28. Mr Segal QC, who appears with Mr Patel of Counsel for the Claimants (as they did for the Claimants in *Cox*), submits that the following factors point towards the conclusion that check-off provisions referred to above were intended to have contractual effect:

    i) These provisions have at all material times been mirrored in the 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.

29. Mr Sheldon submits that the check-off provisions should not be construed as having contractual effect because:

    i) It is wrong to presuppose that the provisions in the Codes were intended to have contractual effect in the first place, given that the language is that of authorisation and not obligation.

    ii) Paragraph 4100 of the CSPCSC (which deals with withdrawal of check-off in the event of industrial action) cannot be used to construe the language of paragraph 4051 since paragraph 4100 was only introduced into the CSPCSC in 1987.

    iii) After April 1996, check-off became a matter of discretion for each individual department as is apparent from the discretionary language used in CMSC: "Where departments and agencies offer arrangements for deducting subscriptions to trade unions…"

    iv) The fact that voluntary deductions may be made to sports clubs and charities point away from such deductions being a matter of contractual entitlement.

    v) The fact that deductions can only be made in respect of organisations approved by the Defendant underlines the discretionary nature of the facility.

    vi) Both the Defendant and PCS drew a distinction between ex-DETR staff and non-DETR staff, with only the former acknowledged by both to have contractual rights. The Defendant relies upon PCS's correspondence to support this contention, which he says, explains the PCS's consent to dealing with the

> proposed change by way of consultation rather than negotiation, which would have been the case if check-off was thought to be contractual.

30. Mr Sheldon did not develop these submissions orally to any significant extent because the issues in *Cox* were materially the same and the Court had decided against the defendant Department in that case.

Discussion

31. The Defendant is correct to acknowledge that the issue of contractual entitlement in this case is materially the same as that which arose for consideration in *Cox*. Both the Home Office in *Cox* and DEFRA in the present case, had the "common root" documents of the CSPCSC and the CSMC. The provisions as to check-off as set out in the policies and handbooks in both departments are similarly phrased and include the limited right to withdraw check-off in the event of industrial action. As such, the decisions in *Hickey* and *Cavanagh* as to the meaning and effect of the Codes and/or the wording of the check-off provisions are as relevant to the present case as they were in *Cox*. The conclusions reached in *Cox* in respect of the Codes, which are summarised at [7(i)] to [7(xii)] above, apply to the present case.

32. In the light of those conclusions, it is clear that Mr Sheldon's first point, namely that the language used in the Codes is that of authorisation and not obligation, cannot stand. In my judgment, the language used in paragraph 4051 of CSPCSC is that of obligation: see *Cox* at [49], [50] and [54].

33. Mr Sheldon's second point is that paragraph 4100 of the CSPCSC (which deals with withdrawal of check-off in the event of industrial action) cannot be used to interpret paragraph 4051 as paragraph 4100 came later. I do not consider this point to have any real merit. Whilst it is true that a later amendment cannot change the meaning of another provision as it was at a point in time before the amendment was made, the amendment (once made) can certainly be read with the existing provision to discern the meaning of the provisions together. Moreover, the amendment could have the effect of clarifying or confirming the meaning which the other provision had all along. Thus, the introduction of a very limited right to withdraw the check-off in the event of industrial action serves to confirm that previously there was no unfettered discretion to withdraw the check-off at all; in other words, check-off was always intended to be contractual.

34. The use of the phrase, "Where departments and agencies offer arrangements for deducting subscriptions to trade unions…" in the CSMC does not render the entire check-off facility discretionary. As explained by Laing J in *Cavanagh*:

> "I appreciate that the CSMC does not of itself set out terms and conditions of service. Its significance, however, is that in a context where legislation permits terms to be imposed on civil servants, it sets out, in areas where departments and agencies are given discretion to determine terms and conditions, 'the rules and principles which must be followed in the exercise of those discretions'. Paragraph 7.3.3 of the CSMC supports the view that what Departments are being authorised to do in relation to check-off, where they offer it, is to continue the historic position. I say that because of the continuing presence of the express

> permission to withdraw check-off when there is industrial action. I agree with Popplewell J's analysis of the significance of that express permission. I also note that departments must get the approval of the Cabinet Office if check-off is withdrawn, and the general warning in paragraph 6 of the CSMC that departments should remember that existing rights cannot be altered arbitrarily'."

The discretion (if there is any) is thus in relation to whether or not check-off is offered at all upon the delegation of powers in 1996. However, where it is offered, (as it was in this case continuously from before 1996 when the CSMC became applicable) then the Department is to continue the historic position. Where the check-off had become a matter of contractual entitlement, there was no discretion to withdraw it unilaterally. Similarly, the need for prior approval for an organisation to benefit from check-off does not mean that check-off is rendered discretionary. Once approved, and a check-off arrangement is made in respect of that organisation, the Defendant is obliged to continue with that until the employee withdraws the authorisation or participates in industrial action. Any discretion is in relation to the initial approval decision. The policies do not expressly address the situation where approval is subsequently withdrawn. Of course, approval may be withdrawn but that does not necessarily confer on the Defendant a right automatically to cease the check-off: in my judgment, the cessation would have to be agreed with the employee that had authorised the check-off.

35. The fact that other organisations may benefit from the policy on voluntary deductions does not undermine the contractual nature of the check-off provisions: see *Cox* at [53].

36. Mr Sheldon's final point was that both the Defendant and PCS acknowledged that only the ex-DETR staff had a contractual right to check-off. Mr Sheldon places considerable reliance on the following statement in PCS's letter of 15 September 2014:

> "You state that you have sought legal advice; our understanding is that *some staff* have a contractual right for (sic) have their union subscriptions collected by check off." (Emphasis added)

37. Mr Sheldon submits that the reference to "some staff" having a contractual right to check-off amounts to a clear acknowledgment that others (i.e. non-DETR staff) did not. I do not agree that so much can be read into the use of the word "some" in this context. There is no express reference to the sub-group denoted by "some" as being confined to ex-DETR staff. Even if that had been the intent, it would not necessarily mean that others were not considered to have a similar contractual right, particularly given the overall tenor of the letter, which refers to the removal of check-off as being an attack on PCS. In any event, the views of the PCS can hardly be determinative of the contractual effect of check-off as between members and the Defendant, that being a matter that must be determined by reference to the interpretation of the relevant documents. As stated above, and as held in three previous cases, the clear effect of those documents is that check-off is a contractual benefit.

38. I also do not consider that the PCS's request for consultation on the proposed removal of check off means that the check-off must have been considered by PCS to be non-contractual. I was not taken to any document or statement of policy or practice (whether of the PCS or the Defendant) suggesting that there is a strict demarcation between

consultation and negotiation (with the latter purportedly being reserved exclusively for contractual issues) in dealings between PCS and the Defendant. There does not appear to me to be any reason why proposed changes to contractual entitlements cannot be the subject of consultation. In any case, the label attached by the parties to the mechanism for resolving a dispute cannot determine whether or not that dispute relates to a contractual term.

Was check-off withdrawn by the giving of reasonable notice?

39. The Defendant sought to argue that if there was a contractual entitlement to check-off then there was an implied term that it could be withdrawn by the giving of reasonable notice. The same argument was rejected in *Cox*:

> "62. The principles are, once again, very well-established, the test being whether a term as to notice is "necessary to give the contract business efficacy" or is "so obvious that it went without saying": *Marks and Spencer plc v BNP Paribas [2016] AC 742* . The Defendant submits that if check-off is contractual then the need for notice is so obvious as to go without saying. The argument was not developed in any detail in oral submissions. I consider the argument to have no real merit. Business efficacy does not demand that there be a notice provision. Check-off can operate perfectly well without it and for so long as the authorisation is maintained. The Defendant identified no reason, whether administrative, financial or otherwise, that would render it necessary for her to be able to terminate check-off on notice. Insofar as deductions are made in respect of other organisations, business efficacy does not demand notice in respect of such deductions either. The prior approval given by the department in respect of deductions to be paid to such organisations confers sufficient control on the Defendant over the process. As stated by Laing J in *Cavanagh* , "Such a term [as to reasonable notice] is very far, in the employment context, from being a term which is so obvious as to go without saying: see [72]."

40. There is nothing in the present case which leads me to take a different view as to the existence of an implied term here.

Did the Individual Claimants accept the variation to their contracts removing check-off or had they waived the breach of contract involved?

Submissions

41. It is in respect of this issue that Mr Sheldon contends that the facts of the present case materially depart from those in *Cox* such that a different conclusion ought to be reached.

42. It was submitted that the removal of check-off had an immediate effect, comparable to a pay cut, and, as such, any continued working without objection ought to be taken as implied acceptance of the changes. Reliance was placed in this regard on the decisions

of Browne-Wilkinson J (as he then was) in *Jones v Associated Tunnelling Co. Ltd* [1981] IRLR 477, EAT at [22], Elias J (as he then was) in *Solectron Scotland Ltd v Roper* [2004] IRLR 4, EAT at [30] and Underhill LJ in *Abrahall v Nottingham City Council* [2018] ICR 1425 at [85]. It is clear from these authorities, submits Mr Sheldon, that continuing to work without protest after a change of terms and conditions *can* amount to acceptance of the change, although he accepted that it would not invariably do so. Mr Sheldon points out that in the present case: the Individual Claimants did not raise any objections to the proposal; that whilst PCS did protest the removal of check-off, such protest was far from "strenuous"; there were no individual or collective grievances after check-off was removed; DEFRA facilitated the transfer from check-off to direct debit; there was no indication that *Cavanagh* was considered to be a test case; the first intimation of a breach of contract came with the letter before action almost six years after check-off was removed; and the Individual Claimants had, in the meantime, agreed to substantive changes in their roles by which they had accepted different terms and conditions which made no mention of check-off. It is submitted that the evidence in this case is overwhelming that, objectively, the Individual Claimants had "accepted the variation to remove the contractual entitlement to check-off … and/or waived any breach that occurred when check-off was removed in January 2015". It is not necessary for DEFRA to show that there was any consideration for the contractual variation other than continued employment; however, if there was any need to do so, it was clearly provided by the practical assistance in changing to direct debits.

43. Mr Segal submits that the proper test is whether there was unequivocal acceptance of the variation and not the absence of an unequivocal rejection. Viewed thus, it is clear, he submits, that the variation was not at any stage the subject of unequivocal acceptance. The Individual Claimants could not be expected to cease working in protest at the change. Whilst they did continue working, it was in light of the clear protest registered on their behalf by PCS. The decision in *Cox* on this issue at [68] to [72] applies with equal force in this case. In particular, as in *Cox*, the failure by the Individual Claimants expressly to mention the *Cavanagh* litigation as test litigation upon which they wished to rely does not mean that that there was unequivocal acceptance. The more pertinent question is whether the Defendant knew about the *Cavanagh* litigation; there is no evidence that he did not. As to the changes in terms and conditions resulting from changes in role, there is nothing to suggest that all existing terms and conditions were thereby replaced.

Discussion

44. In *Abrahall*, where the issue was whether a contractual pay cut had been accepted by the affected employees continuing to work, the claimants had argued that an employee ought never to be held to have accepted a variation merely because they had continued to work without protest. That argument was rejected by Underhill LJ, who, having reviewed the authorities of *Jones v Associated Tunnelling* and *Solectron Scotland v Roper*, said as follows:

> "85. However, to 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 8 ; 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. As for the Khatri case [2010] IRLR 715 , the general language of para 46 of Jacob LJ's judgment must be read in the context of his overall reasoning. He did not rely on the simple proposition that silence can never indicate consent: rather, he went on to give particular reasons why it was not proper in the circumstances of that case to infer the employee's acceptance of the new terms which the employers sought to impose—namely that those terms had not yet bitten, and also that the employers had expressly sought the employee's acceptance in writing but he had not given it. *1452

86. However, to say that in some circumstances continuing to work following a contractual pay cut may be treated as acceptance does not mean that it will always do so. On the contrary, what inferences can be drawn must depend on the particular circumstances of the case. Neither Browne-Wilkinson J in the Jones case nor Elias J in the Solectron case went further than saying that continuing to work following a contractual pay cut might constitute acceptance: the language used was “may well be taken to have … agreed” and “it may be possible to infer”. The authorities illustrate some specific points about the proper approach to the question of when continuing to work may constitute acceptance. I briefly identify them as follows.

87. First and foremost, the 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: that is why Elias J in the Solectron case used the phrase “ only referable to”. That is simply an application of ordinary principles of the law of contract (and also of waiver/estoppel). It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively, clearly evinces an intention to do so. To put it another way, the employees should have the benefit of any (reasonable) doubt.

88. 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, even if they themselves say nothing. This is clear from Rigby v Ferodo Ltd [1988] ICR 29 : see para 74 above.
>
> 89. Thirdly, Elias J's use in para 30 of his judgment in Solectron of the phrase "after a period of time" raises a point of some difficulty. It is easy to see how it may not, depending on the circumstances of the particular case, be right to infer acceptance of a contractual pay cut as from the day that it is first implemented: the employee may be simply taking time to think. Elias J's formulation is intended to recognise that a time may come when that ceases to be a reasonable explanation. However, it may be difficult to identify precisely when that point has been reached on anything other than a fairly arbitrary basis. In Khatri Jacob LJ discomforted counsel for the employers by making that very point: see para 47 of his judgment. But, again, that passage needs to be read in the context of the fact that in that case the variation had not yet bitten, and 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."

45. Thus, whilst the position is that continued working after a variation having immediate effect *may* give rise to the inference that the variation has been accepted, whether or not that inference may be drawn in a particular case will depend on the circumstances of that case, including whether or not the inference of acceptance can be drawn unequivocally and whether there is any protest at individual or collective level.

46. In my judgment, the particular circumstances of the present case are such that the inference of acceptance does not arise unequivocally. 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. Mr Sheldon submits, however, that whilst there was protest at the removal of check-off, there was an absence of the sort of "strenuous protest" that was found to exist in *Abrahall*, in particular after the impugned variation took effect: see *Abrahall* at [104]. In my judgment, the question of whether there is protest at the proposed variation so as to negative the inference that the Individual Claimants have, by continuing to work, accepted the variation, depends on whether that protest is clear and unequivocal, and not on whether it reaches a certain level of intensity. The decision in *Abrahall* does not suggest otherwise: see *Abrahall* at [88] where it was held that "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."

47. Viewed thus, there can be no doubt that there was protest or objection at the collective level. On 15 September 2014, PCS stated that it was "opposed to the removal of check-off believing it to be a political attack on trade unions"; and subsequently, on 23 October 2014, PCS stated that it "remains opposed to the removal of check-off". There was no

volte face on the part of PCS at any stage thereafter, and nor was there any communication that might even begin to hint that PCS's stance had changed or softened. Mr Sheldon's point that any such protest was not maintained after the removal of check-off in January 2015 disregards an important contextual feature in the present case, which was the decision in *Hickey*, which had been mentioned in the initial Cabinet Office communication to Ministers about check-off, and the ongoing *Cavanagh* litigation, which was viewed by the Individual Claimants and PCS as test litigation relevant to the position vis-à-vis DEFRA. The evidence as to the Individual Claimants' view of *Cavanagh* is contained in the statement of Mr Crane as follows:

> "16 I was aware that PCS had strenuously protested against the withdrawal of check-off on behalf of its members at the time that it was withdrawn. I am aware that PCS took the government to court over the removal of check-off in what we in PCS believed was the 'test case' of my fellow member, Mr. Cavanagh, against the DWP. I am aware that this was settled weeks before the final hearing on loss in late 2018. The union and its members have always regarded that case 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 DEFRA would no longer contest the claims of myself and my colleagues. However, that has not happened."

48. The evidence of the other Individual Claimants is in similar terms. Mr Sheldon submits that the use of the present tense – "I am aware…" – in the second and third sentences of that paragraph, in contradistinction to the use of the past tense in the first sentence, indicates that Mr Crane was merely aware of the *Cavanagh* litigation at the time of signing the statement and that one should therefore infer that he was *not* aware of it at the time check-off was removed in 2015. I do not accept that submission. Not only would that be to approach a witness statement as one would a statutory or contractual provision, it would also ignore what Mr Crane goes on to state in the very next sentence, which is that, "The union and its members have always regarded that case as testing the water for mine and other cases…". In my judgment, the evidence is clear that the *Cavanagh* litigation was regarded as test litigation by the Individual Claimants and PCS at the relevant time, and I so find. By contrast, the evidence of Mr Robbie for the Defendant says this about the *Cavanagh* litigation:

> "44. It appears that given the PCS's change of focus to making arrangements for the setting up of direct debits, and in the absence of any communication on the lawfulness of the removal of check off, the employees (including the Individual Claimants) and the PCS had accepted the change. By contrast, I note that the PCS initiated the proceedings in Hickey and Cavanagh shortly after this, but did not raise any issues with DEFRA at all (including after Hickey and Cavanagh litigation: the latter case was decided in May 2016) until sending a pre-action letter for this litigation. The PCS did not, for instance, communicate to DEFRA that they (or any of their members) would be pursuing a similar claim against DEFRA."

49. Whilst Mr Robbie criticises the PCS for not communicating any litigious intent to DEFRA, he does not state that he was not aware, at the time, of the *Hickey* case or the *Cavanagh* litigation. Senior officers within DEFRA would certainly have known about *Hickey* as that was mentioned in the December 2013 communication from the Minister for the Cabinet Office: see [20] above. Furthermore, the timing of the issuing of the *Cavanagh* proceedings ("shortly after" the removal of check-off at DEFRA: witness statement of Mr Robbie at [44]), its relevance to what was going on at DEFRA and the likelihood that there were discussions at a senior interdepartmental level about check-off, suggest that the Defendant and/or his senior officers would have known about *Cavanagh* at the time too. In the absence of any clear evidence from Mr Robbie that he did not have such knowledge, I find, on the balance of probabilities that the Defendant and/or his senior officers did know of the *Cavanagh* litigation at the time that check-off was removed.

50. In the light of that ongoing litigation, which would or ought to have made it clear to DEFRA that PCS was continuing vigorously to contest the removal of check-off in other Government departments, PCS's relative inactivity at DEFRA could not reasonably be construed as unequivocal acceptance of the position in that Department. PCS could undoubtedly have done more to make its position clearer, for example, by expressly relying upon the *Cavanagh* litigation in correspondence with DEFRA. However, the fact that it did not do so merely renders the position equivocal, and far short of what would be required to draw the inference of unequivocal acceptance. Similarly, DEFRA could itself have made its position unequivocal by indicating, for example, that continued working after the removal of check off would be viewed as acceptance. However, there was nothing of that nature either. The position in DEFRA as it appears to me was not materially different to that which pertained in *Cox*, in which the department there had similarly sought to argue that the failure expressly to rely on *Cavanagh* was indicative of acceptance:

> "69 … Mr Parr seeks to infer from the absence of any indication that a *Cavanagh*-type claim would be pursued against the Defendant that the Defendant's employees and PCS had accepted the change within the Defendant's department. However, in view of the fact that an objection had been raised by the PCS and had not been withdrawn, and that PCS was pursuing litigation based on check-off against other departments which shared common historical documents relating to check- off, it is not clear on what basis Mr Parr could treat the position as unequivocally in favour of implied acceptance. There is certainly nothing to suggest that the department sought to clarify the position with the PCS. Once again, there was equivocality on both sides."

51. Here too there was equivocality on both sides.

52. A related point taken by Mr Sheldon is that the Claimants waited almost 6 years before indicating that a claim would be brought. It is submitted that the protest, such as it was, could not negative the inference of acceptance for such an extended period. A lengthy gap between the removal of check-off and the letter before action also existed in *Cox*, where it was held:

> "71. Fourth, the fact that there was a substantial gap between the objection and the letter before action does not alter the analysis. Once PCS had made its objection clear (as I find it did in this case), nothing was done or said that would have unequivocally indicated to the Defendant that the objection was being withdrawn. The mere passage of time thereafter does not, in the circumstances of this case, lead to the inference that the objection was withdrawn and/or that the employees had accepted the change. That is all the more so where the Defendant is aware that ongoing litigation relating to check-off was being pursued elsewhere. Once again, it might be said that more might have been done by PCS to keep the Defendant apprised of the position in that litigation, or to re-state its objection as various milestones were reached in that litigation to remove any doubt that PCS was not conceding the position vis-à-vis the Defendant's department. However, the failure to take such steps means no more than that the position remained equivocal."

53. That analysis applies in the present case too. The position might have been otherwise had there not been any protest or any ongoing litigation being pursued over the identical entitlement against another Government Department. An employee, who is in a continuing relationship based on mutual trust and confidence, cannot ordinarily expect to continue working for lengthy periods approaching the limitation period for a contractual claim without being taken to have accepted a contractual variation. As stated by Elias LJ in *Abrahall*:

> "110. It may be said that the employee should never be held to have accepted a variation simply by working without protest under the new terms without more. After all, a party can bring a claim for breach of contract within the limitation period without having to notify the other party that he objects to the breach, and why should this be different? 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. It might also be said that an employer can always put the position beyond doubt by lawfully terminating the contract on notice and introducing the varied contract which includes the new disadvantageous term or terms. No doubt the employer's reluctance to do that is in part motivated by a desire to avoid potential unfair dismissal claims. But there are also less selfish reasons. In the context of a continuing relationship based on good faith, dismissing and re-employing might appear to be an unnecessarily hostile stance, only to be adopted as a last resort. Attempts to secure agreement should not be discouraged and exceptionally the circumstances may justify the inference that the employee has agreed to the new terms even where he has been reluctant to do so formally."

54. The circumstances in the present case, including the union's protest, which was not withdrawn, and the ongoing *Cavanagh* litigation, mean that the inference as to acceptance cannot be drawn.

55. Mr Sheldon's next point in support of acceptance is that the Individual Claimants willingly moved to direct debit arrangements, the transfer to which DEFRA had helped to facilitate. It is submitted that this cannot be viewed as an act of mitigation (in respect of breach).

56. The move to direct debits was also relied upon in *Cox*, where it was held:

> "70. Third, the setting up of direct debit arrangements to ensure continued payment of subscriptions cannot be seen as an unequivocal act implying acceptance. The employees were faced with a situation where their union subscriptions would cease to be paid (leaving them without the benefits of union membership) unless they made alternative arrangements. The union faced a substantial loss of income unless it secured an alternative means of collecting those subscriptions. It seems clear to me that, their union having registered its objection to the removal of check off at collective level, 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. The setting up of direct debits is another act that cannot be said, in these circumstances, to be only referable to an acceptance of the removal of check-off: it is equally consistent with the taking of reasonable mitigating steps."

57. Mr Sheldon's only basis for suggesting that a different approach ought to be taken here is that there was an absence of protest. However, as held above, the context here did involve protest about the changes, just as it did in *Cox*. In my judgment, there is no real basis for taking a different approach in the present case. There was a suggestion that the assistance provided by DEFRA in transferring individuals from check-off to direct debit is a significant difference, and that the taking up of such assistance was consistent with accepting the removal of check-off. However, if the transfer to direct debits is a reasonable mitigating step in the face of the Defendant's breach, the fact that the Defendant helps to facilitate such transfer does not render it any less so. In any event, there was no evidence before me that such assistance continued after the transition period that ended upon check-off being removed in January 2015. In these circumstances, the assistance provided by the Defendant does not really advance his case on acceptance.

58. Mr Sheldon's final point is that the Individual Claimants had accepted new terms and conditions upon taking on new roles and in so doing must be taken to have accepted the removal of check-off. However, there is nothing in the documentation before me to suggest that those new terms and conditions sought to replace all that had gone before, and in particular, sought to remove what is, on my findings above, a contractual entitlement to check-off. The only new contractual document referred to in the

Defendant's skeleton argument is one dated 9 May 2017 informing the Third Claimant, Ms Mackenzie, about a downgrade. The letter states:

> "If you are willing to accept downgrading on the basis of the terms and conditions referred to in this letter and the attached summary, will you please sign the summary and return it to me as soon as possible."

59. The letter refers only briefly to the start date, the identity of the manager, the employing organisation, the location and the salary. It does not contain a comprehensive statement of the new terms and conditions. As for the summary, it states at the outset that:

> "The following paragraphs summarise or refer to your main terms of employment…You are also subject to Civil Servants' conditions of service published in the Civil Service Management Code which can be found on the HR Intranet."

60. Thus, far from seeking to replace all existing terms and conditions, the new letter of appointment and summary refer the employee back to the CSMC, which, as set out above, is one of the common root contractual documents containing the right to check-off. In these circumstances, and on the basis of the limited evidence before me as to the new contractual positions post-January 2015, it cannot be said that by entering into these contracts, the Individual Claimants had unequivocally accepted the removal of check-off.

61. Mr Sheldon's alternative argument is that if, by removing the check-off, the Defendant had breached the Individual Claimants' contracts of employment, such breaches were the subject of a waiver (presumably by estoppel). The basis of the waiver argument is set out in the Defendant's Skeleton Argument as follows:

> "52. The same point applies to waiver of any breach: by agreeing to the removal of check-off, and with both parties (employer and employee) moving forward with and maintaining an on-going employment relationship, both parties were acting on a mutual understanding (viewed objectively) that there was no material dispute between them which might affect that relationship. In other words, the Defendant was entitled to rely on the conduct of the Individual Claimants to assume that there was no dispute between them which might affect their on-going working relationship including the possibility of promotion or redeployment. The right to claim for a breach of contract has therefore been lost, whether by variation and/or waiver."

62. Mr Segal submits that this is simply "bad law" in that moving forward on the basis that there is no material dispute does not begin to meet the requirements for an effective waiver.

63. Waiver by estoppel requires the following:

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 on Contracts*, 33rd ed. at 6-098 to 6-100).

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

64. The evidence in the present case falls far short of establishing the kind of clear and unequivocal promise or representation not to act on one's strict legal rights that would be required before there could be a waiver. I agree with Mr Segal that the mere absence of any material dispute will not suffice. As discussed above in relation to the acceptance arguments, the conduct on both sides was equivocal. As far as the Individual Claimants are concerned it is difficult to see that there was little more than "silence and inaction" on their part as to check-off given that they had left it to their union to register the protest about its removal. Such conduct as there was, such as the transfer to direct debits and the move to new contracts, cannot be anything but equivocal for reasons already set out. Mr Sheldon submits that the Individual Claimants, if not waiving the breach, could have been expected upon entering new contracts to say that they may still sue DEFRA for check-off. However, the absence of a positive representation that rights will or may be acted upon does not amount to an unequivocal representation that they will not. At best, there is silence about the rights, which remains equivocal and does not suffice. The first stage of establishing waiver by estoppel is therefore not met. Even if that were not the case, it is difficult to see in what sense there was any reliance on the part of the Defendant involving any change of position. The offers of new roles would have been made, it would appear, irrespective of the Individual Claimants' stance on check-off.

65. The answer to this issue, therefore, is that the Individual Claimants did not accept the variation to their contracts removing check-off and nor had they waived any breach of contract.

(iii) Is PCS entitled to bring a third-party claim against the Defendant pursuant to the 1999 Act?

66. Section 1 of the 1999 Act , so far as relevant, provides:

> "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…"

67. The Defendant accepts (as did the SSHD in *Cox*) that the check-off provisions confer a benefit on PCS. Accordingly, PCS would have the right to enforce those provisions in its own right unless, on a proper construction of the contract, it appears that the parties did not intend for them to be enforceable by PCS. The Defendant accepts, for the purposes of the arguments under this head, that the Individual Claimants had entered into contracts, whether by reason of commencing employment or entering into new contracts of employment upon promotion or transfer, after 11 May 2000, that being the date on or after which a contract must be entered into for the 1999 Act to apply: see *Cox* at [82] to [83]

68. Mr Segal submits that the check-off provisions are neutral as to enforcement by PCS, and that, as such, s.1(b) of the 1999 Act is not disapplied. Reliance is placed on the decision of Colman J in *Nisshin Shipping Co Ltd v Cleaves and Co Ltd* [2003] EWHC 2602 (Comm). It is further submitted that, as Laing J found in the *Cavanagh* case, there is simply no contractual material here which shows an intention that the check-off provisions were not to be enforceable by PCS.

69. Mr Sheldon submits that in construing the intentions of the parties for these purposes it is relevant to consider the external sources from which the term is derived; in this case, that would include the collective agreement between PCS and the Defendant. Since both the Defendant and PCS were expressly agreed that check-off would not be enforceable as part of the agreement at collective level (indeed, there is a statutory presumption against such collective agreements being enforceable: see s.179, *Trade Union and Labour Relations (Consolidation) Act 1992*), it follows that there could have been no intention as between the Individual Claimants and the Defendant that PCS would be able to enforce check-off. The same argument was pursued by the SSHD in *Cox*, and rejected:

> "80. There are several difficulties with that argument:
>
> 80.1. First, it presumes that the intentions at collective level are relevant to construing the intentions of the parties (which are different from those at collective level) to the individual contracts. That is not correct, as is made clear in *Hooper* [*Hooper v BRB* [1988] IRLR 517, CA].
>
> 80.2. Second, it presumes that any intention that PCS had at collective level must necessarily be consistent with the intentions (of different parties) to be construed at the individual contract level. However, there does not appear to be any reason why that should be so. A collective agreement may contain many provisions, few of which might confer any direct benefit on the union itself. Whilst the union may be content with the non-enforceable status of that agreement generally, it does not follow that individual employees, into whose contracts collectively agreed terms have been incorporated, must have intended PCS not to be able to enforce those terms which did confer a benefit

on the union. It is advantageous to the employees that PCS can directly enforce those arrangements since the employees then have the security of knowing that their union subscriptions will continue to be paid uninterrupted.

80.3. This analysis is reinforced by the further principle that the terms of a collective agreement incorporated into individual contracts continue to have force even where the collective agreement ceases to have force: see *Morris v Bailey* [1969] 2 Lloyd's LR 215. In such circumstances, the union may retain an ongoing interest in enforcing, as a third party, those terms in the individual contracts which benefit them even though the collective agreement from whence they derived has been terminated.

80.4. The suggestion in the Defendant's skeleton argument that PCS had an alternative direct route to enforcement against the Defendant, thereby rendering it unlikely that the employees and the Defendant would have intended that there be an indirect route to enforcement as a third party, appears to be at odds with the Defendant's primary position that there was no enforceable agreement at all between PCS and the Defendant. Unsurprisingly, this was not an argument developed in oral submissions and I need not consider it further.

80.5. The fact that other organisations might also have third party rights of enforceability under the 1999 Act does not undermine the Claimants' argument that PCS has such rights. The Defendant invokes the inherent implausibility of such organizations 2 having third party rights as a reason to find that none exist in respect of PCS. However, s.1(2) of the 1999 Act establishes a rebuttable presumption in favour of enforceability by a third party where the relevant term purports to confer a benefit on that third party. The starting point is therefore simply whether or not the term confers a benefit on the third party. The 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, but it would be far from determinative. Accordingly, the Defendant's plea as to the implausibility of the position of other parties does not advance matters as far as the PCS is concerned.

80.6. As a matter of construction, the Defendant has not been able to point to any part of the check-off provisions that could be construed as negating the presumption of enforceability by PCS as a third party. The provisions are, at worst (as far as the Claimants are concerned) neutral. In those circumstances, the presumption applies: *Nisshin* at [23] [*Nisshin Shipping Co Ltd v Cleaves and Co Ltd* [2003] EWHC 2602 (Comm)].

> 81. For these reasons, I find that the answer to this issue is that the check-off provisions are enforceable by PCS pursuant to s1(2) of the 1999 Act."

70. That reasoning applies equally in the present case.

71. Mr Sheldon did not, however, leave the matter there. He pursued a new argument, this time based on ss. 2 and 3 of the 1999 Act. The argument was predicated on the Defendant succeeding in its case that the Individual Claimants had accepted the removal of check-off or that they had waived their rights consequent upon the breach. Mr Sheldon first relied upon s.3, which, so far as relevant, provides:

> "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.
>
> (3) The promisor shall also have available to him by way of defence or set-off any matter if—
>
> (a) an express term of the contract provides for it to be available to him in proceedings brought by the third party, and
>
> (b) it would have been available to him by way of defence or set-off if the proceedings had been brought by the promisee.
>
> …"

72. The effect of s.3 of the 1999 Act is that the Defendant would have available as a defence to any claim brought by PCS pursuant to s.1 of the 1999 Act, any defence that would have been available if the claim had been brought by the Individual Claimants. The Defendant has relied on two defences in the primary claim by the Individual Claimants: the first was that the Individual Claimants, by their conduct, accepted the variation to their contracts that removed check-off; and the second was that the Individual Claimants had waived any breach of contract arising from the removal of check-off. Variation is the subject of specific provision under s.2 of the 1999 Act, and any argument based on variation cannot be relied upon as a defence under s.3. Both Counsel are agreed that if the Court found in the Defendant's favour on the waiver issue, then s.3 of the 1999 Act would provide a complete answer to PCS's third party claim.

73. The Defendant's waiver defence has not succeeded in the claim brought by the Individual Claimants: see [64] above. Accordingly, the Defendant cannot avail himself of that defence, pursuant to s.3, in the third party claim brought by PCS.

74. Mr Sheldon then sought to argue in the alternative that if it is accepted that there had been an acceptance of the variation to the contracts, then such variation was not rendered void by the terms of s.2. That section, so far as relevant, provides:

> "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.
>
> (2) The assent referred to in subsection (1)(a)—
>
> (a) may be by words or conduct, and
>
> (b) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him.
>
> (3) Subsection (1) is subject to any express term of the contract under which—
>
> (a) the parties to the contract may by agreement rescind or vary the contract without the consent of the third party, or
>
> (b) the consent of the third party is required in circumstances specified in the contract instead of those set out in subsection (1)(a) to (c).
>
> …"

75. The Defendant's argument that there was an accepted variation to the contract has also not succeeded: see [46] to [60] above. Accordingly, the right to check-off persists and PCS has a right under s.1 of the 1999 Act to enforce it on its own behalf. However, if I am wrong about that, and there was a variation, I go on to consider Mr Sheldon's argument that such variation is not rendered void by the operation of s.2 such that PCS's third party rights would lawfully have been extinguished by the removal of check-off.

76. The following conditions need to be satisfied in order for s.2 to apply:

    i) The variation must be "by agreement";

    ii) The third party (PCS) does not consent to the variation; and

        a) PCS has communicated his assent to the term (i.e. the right to check-off) to the Defendant (s.2(1)(a));

        b) The Defendant is aware that PCS has relied on the term (s.2(1)(b)); or

        c) Such reliance could reasonably have been foreseen and PCS has in fact relied on the term (s.2(1)(c)).

77. Mr Sheldon submits that any agreement for these purposes must be express and not the result of acceptance by conduct. I do not agree that the requirement that any rescission or variation be "by agreement" means that express agreement is required. Variation by implied acceptance through conduct would amount to an agreement in law just as would a signed written deed of variation. Only variations imposed without implied or express agreement, such as unilateral variations, would fall outside of this provision.

78. As to the requirement that the variation be "without … consent", Mr Sheldon submits that one can infer consent from PCS's conduct, including by its failure to pursue a collective grievance and to communicate that the *Cavanagh* litigation was being relied upon as a test case. However, it seems to me that such conduct falls very far short of consent to the removal of check-off. As discussed above, PCS registered its protest to the removal and did not subsequently change its position. It was not open to infer from the circumstances, including the fact that, to the Defendant's knowledge, PCS was vigorously contesting the removal of check-off in other departments having the same or similar root documents for check-off, that PCS had consented to its removal in DEFRA.

79. It was submitted that PCS had not communicated its assent to the term as to check-off. Reliance is placed on the fact that PCS did not assert that check-off was a contractual entitlement, save in respect of ex-DETR staff. In my judgment, PCS did unequivocally assent to the term. It was relied upon by PCS for many years to ensure continuity of subscriptions, and it objected to the removal of check-off when that was proposed. Assent for these purposes can be by words or by conduct (s.2(2)(a)). The mere fact that PCS did not expressly assert in terms that it considered the right to be contractual would not negate the objective conclusion based on conduct that there was assent. The same points may be made in respect of Mr Sheldon's related argument that PCS did not "rely" on the term within the meaning of s.2(1)(b) or that that the Defendant was not aware of such reliance. Even if the Defendant was not expressly aware of such reliance, he could reasonably have been expected to foresee that PCS would rely on it and that it had in fact done so. The long history of check-off, its importance to trade unions and the resistance being put up through litigation against other departments, rendered such reliance reasonably foreseeable.

80. Mr Sheldon's final point was that if the Defendant's argument were not correct then no employee could ever enter into new contracts upon promotion or transfer without check-off because that would necessarily entail a "rescission" of the existing contract.

This point is somewhat hypothetical as I have found that the entering into of new contracts upon promotion etc. did not have the effect of extinguishing the right to check-off. However, even if it did, it is not clear to me that it would involve the rescission of the pre-existing contract as opposed to its discharge by agreed termination. In any event, the point was not developed further in oral submissions and I say no more about it.

81. For these reasons, it is my judgment that even if there was an acceptance of variation as alleged by the Defendant, such variation would be ineffective pursuant to s.2 of the 1999 Act to defeat PCS's third party claim as PCS would not have consented to such variation. Accordingly, PCS would retain the ability to enforce the right to check-off against the Defendant.

Conclusion

82. For the reasons set out above, the principal issues in this case are determined in favour of the Claimants. It just remains for me to thank (once again) all Counsel for their assistance in this case.