



Neutral Citation Number: [2022] EWHC 680 (QB)

Case No: QB-2020-003572

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2022

Before:

MR JUSTICE CHOUDHURY

Between:

(1) JAMES COX
(2) MALCOLM DAVEY
(3) OWEN HUGHES
(4) DENISE SPEAKMAN
(5) PUBLIC & COMMERCIAL SERVICES UNION
- and -
SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Appellant

Respondent

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 3 and Friday 4 March 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.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 Thursday 24 March 2022.

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MR JUSTICE CHOUDHURY

Mr Justice Choudhury:

Introduction

1. The First to Fourth Claimants (together “the Individual Claimants”) are employed by the Defendant and are members of the Fifth 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 1 December 2014, 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 have a contractual entitlement to check-off; and (b) if so, 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. The claims 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 Mike Jones (Group Secretary for the Home Office Group of PCS); and, on behalf of the Defendant, Mr Simon Parr (Head of Employee Relations in the Home Office). The parties agreed 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 Codes

3. Historically, 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. The terms and conditions centrally established were set out in the Civil Service Pay and Conditions of Service Code (“CSPCSC”), the rules and guidance set out therein expressed to be “mandatory on employing departments”. The introduction to the CSPCSC (as set out in a version dating from 1976) provides:

“i. Under Article 5 of the Civil Service Order In Council 1969, the Minister for the Civil Service is empowered to make regulations for controlling the conduct of Her Majesty’s Home Civil Service. Instructions given in the exercise of this power are communicated to departments by the Civil Service Department as part of the consolidated Code. Such instructions stem mainly from two sources, legislation which binds the Crown or which, although not binding the Crown, Ministers have undertaken to apply as though it were so binding; and agreements reached in negotiation with the National Staff Side or with Staff Associations in accordance with custom and practice extending back over more than 60 years. Rules and guidance so issued are mandatory on employing departments. In some instances, the method of application of the rules is precisely defined; in others, the principles to be observed are defined and the method of application is left to departments.

ii. Within the Civil Service, the employer/employee relationship exists between the individual civil servant and his employing department. For convenience of departments, this Code collects together the results of negotiations with employees' representatives and the rules for their application, and all matters of pay and conditions of service which are handled by the Civil Service Department on behalf of all employing departments. It also contains a statement of accepted principles of conduct which have statutory backing or are based on expressed Government policy. Thus the Code forms the basis from which pay and conditions of service throughout the Civil Service derive but it needs amplification in respect of those matters which are settled by departments through their own negotiations with staff representatives or by management decision. It follows that individual civil servants should not approach the Civil Service Department directly on matters affecting their own pay and conditions of service....”

4. 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”).”

5. Annex 1, referred to in paragraph 4051 above, contains a list comprising organisations in respect of which deductions would be made free of charge; this list includes ‘Nationally ... recognised unions representing civil servants’. There is another list at Annex 2 comprising organisations (all financial institutions) in respect of which deductions would be made for a charge.
6. The process of transferring responsibility for pay bargaining from the Treasury to individual government departments commenced with the enactment of the *Civil Service (Management Functions) Act 1992*. From 1 April 1996, as a result of the *Transfer of Functions (Treasury and Minister for the Civil Service) Order 1995*, the Treasury ceased to have any role in pay bargaining, and responsibility for terms and conditions was delegated to the Ministers of the various departments (who could, of course, further delegate within their own departments).
7. The *Civil Service Order in Council 1995* (paragraph 10) directed that the Minister for the Civil Service (i.e. the Prime Minister) may “make and give instructions” for terms and conditions of service. It is from this that the Civil Service Management Code (“CSMC”) is derived. In 1996, a delegation made under the *Civil Service (Management of Functions) Act 1992* was given to departments to determine terms and conditions of service subject to the condition that the Department complies with the provisions of the CSMC. A more detailed analysis of the historical exegesis of the CSPCSC and CSMC (together “the Codes”) is set out in the judgement of Burton J in *DEFRA v Robertson* [2004] ICR 1289 at [9] to [13].

8. The position from 1996 onwards was, therefore, that the Defendant had the power to set her own terms and conditions for civil servants working in her department subject to those terms and conditions complying with the CSMC. The introduction to the CSMC (in the version before me) provides:
1. **This Code is issued under the authority of Part one of the Constitutional Reform and Governance Act 2010 under which the Minister for the Civil service has the power to make regulations and give instructions for the management of the Civil service, including the power to prescribe the conditions of service of civil servants.**
 2. **This Code, on which the recognised trade unions have been consulted, sets out regulations and instructions to departments and agencies regarding the terms and conditions of service of civil servants ... Where departments and agencies are given discretion to determine terms and conditions, the Code sets out the rules and principles which must be adhered to in the exercise of those discretions. It does not of itself set out terms and conditions of service. ... ”.**
9. Paragraph 6 of the CSMC (in a passage highlighted in bold in the original) provides:
- “When exercising the delegated powers permitted by this Code, departments and agencies should remember that existing rights cannot be altered arbitrarily.”**
10. 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.

11. Thus, the CSMC contained similar, albeit not identical, provisions to those in the CSPSC 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.

Individual Claimants’ Contracts of Employment

12. The First Claimant joined the Home Office in 2001 as an administrative assistant and is now a technical specialist in Asylum Casework. He is also currently the PCS’s Home Office Group President. The First Claimant does not hold a copy of his contract of employment, but exhibits a document entitled, “Summary of the Principal Terms and Conditions of Appointment” (“the Summary”). This document, which is not disputed as setting out the relevant terms and conditions, provides in its introductory section as follows:

“The following paragraphs summarise or refer to your main terms and conditions of service as they apply at present and, together with the attached letter, constitute the written statement the Home Office is required to provide. These documents are issued in accordance with the requirements of sections 1-7 of the Employment Rights Act 1996. You will be told about any

significant changes in Home Office Notices. Details of civil servants' conditions of service are in the Civil Service Management Code (known as the 'Code'), Home Office manuals (or, where they have yet to be issued, the Civil Service Pay and Conditions of Service Code), and in the Staff Handbook."

13. The Second Claimant started working in the Civil Service in 1987 and was deployed to the Home Office. He is currently the organiser of the Home Office Group, the personal case lead and the group journal editor.
14. The Third Claimant began working in the Home Office in 2006. His current role is as an immigration officer based at Lunar House in Croydon.
15. The Fourth Claimant commenced working for the Civil Service in the late 1970s and is currently within the change and engagement team in Her Majesty's Passport Office (HMPO) in a role that she has held since before 2014.
16. As with the First Claimant, none of the Second to Fourth Claimants holds a contract of employment; and they too rely upon a statement issued to them of the summary of the principal terms and conditions of appointment in similar terms to the Summary provided to the First Claimant. Clause 15 of the Summary is headed "Representation" and provides:

"There are various Trade Unions which can support officer reasonable claims represent points of view. It is, of course a personal decision whether or not to join a trade union, but we encourage staff to join an appropriate trade union and to play an active part within it, making sure your views are represented."

17. The standard terms and conditions for employees of the HMPO at the time check-off was removed had a very similar introductory paragraph.
18. It is noteworthy that the Summary expressly refers to significant changes being notified by way of Home Office Notices or office circulars and to the details of their conditions of service being in the Codes, Home Office Manuals and in the Staff Handbook.

Relevant check-off related provisions in Staff Handbooks, Policies and Home Office Notices

19. I was provided with an extract from the HMPO Handbook. This contains, as one might expect, multiple provisions relating to pay. The section relating to check-off is in the following terms (emphasis added):

"Voluntary deductions from pay

The SSC will, if you so authorise, make deductions from your salary for direct payment to the following organisations or other 'approved' organisation:

- **Trade union membership fee**
- **Certain insurers and assurance societies and companies**
- **Local hospital funds and hospital contributory schemes**
- **Payroll donations to charity**
- **The Home Office Sports and Social Association (HOSSA) lottery or similar**
- **Civil Service organisations, including the Civil Service Sports Council (from which HOSSA derives most of its funds)**
- **Additional Voluntary Pension Contributions (AVCs)**

If you are unsure whether an organisation is 'approved', check with the SSSC section.

If you wish to authorise deductions from pay, you should obtain a standard form of authority from the organisation concerned and complete and forward the form back to that organisation. **Once the authorisation has been accepted SSC will forward the contributions due and:**

- **make payments on the due date...**
- **continue to make payments on this basis as instructed until you wish to cease making payments** then you must notify the SSC direct in writing to the address above. You should also advise the organisation concerned.”

20. The Home Office Handbook (in a version dating from 1995) provides (emphasis added):

“5.5 If you wish, Pay Service may make voluntary deductions from your salary in respect of subscriptions or contributions to:

- **Civil Service Trade Unions**
- certain insurance and assurance societies and companies
- local hospital funds and hospital contributory schemes
- payroll donations to charity (“Work Aid”)
- the HOSSA lottery or similar
- Civil Service organisations, including the Civil Service Sports Council (from which the Home Office Sports and Social Association derives most of its funds)

If you are not sure whether an organisation is “approved”, Pay Service will be able to advise you.

5.6 If you take official industrial action as a non-industrial civil servant, payment of your union subscriptions by the method described above may be withdrawn, in whole or in part, while you take part in the action. You will be advised by a Home Office Notice or other communication of any decision to do so.

5.7 If you wish to authorise deductions from pay you should obtain from the organisation concerned a standard form of authority approved by HM Treasury or the Home Office, complete it and forward it to the organisation. If, on the other hand, you wish to cease making the payments, you should notify Pay Service yourself in writing. You should also advise the organisation concerned.”

21. The Home Office Notice 107/1987 introduced changes to paragraphs 4100 and 4051 of the CSPCSC relating to the withdrawal of check-off in the event of official industrial action. It also introduced related changes to the Staff Handbook as follows (emphasis added): -

“3. The provisions in the Staff Handbook about voluntary deductions from pay have also been amended to ensure that they remain consistent with the terms of the Code [the Civil Service Pay and Conditions of Service Code]. The following new paragraph should be inserted in manuscript after paragraph 432:

432A “In the event of official industrial action by non-industrial civil servants, and for the duration of such action, the method of payment described in Paragraph 432 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 a Home Office Notice of any decision to withdraw this method of payment”

A printed version of this paragraph will be incorporated into the Staff Handbook when the next revisions are issued...”

22. The Home Office Notice 110/2003 contained advice to Staff on the pay consequences of taking industrial action. It deals in some detail with the effect of such action on all aspects of pay and contains a similar provision to those above in respect of check-off arrangements:

“27. In the event of official industrial action by non-industrial staff, and for as long as such action continues, “check-off” (whereby the Department provides for the collection of trade unions

subscriptions from trade union members' salary) may be withdrawn in whole or in part. Staff will be advised by HON or other communication of any decision to withdraw this facility”.

23. The Defendant's policy HR41100 Pay: Consolidated Voluntary Deductions from Pay 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.”

24. The Defendant's Policy, 'HR41101 Pay: CVD – Approved Organisations' sets out a list of organisations in respect of which subscriptions can be deducted. This includes, amongst charities, savings associations and other unions, express reference to the "PCS Union".
25. That was the context in which each of the Claimant's union subscriptions were paid by way of check-off until 2014.

Withdrawal of Check-Off

26. 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 went on to request that Departments review their check-off arrangements. On 16 January 2014, the PCS asked the Home Office for an update on the review and was informed, by way of a response from the Home Office dated 23 January 2014, that the review was still at an early stage and that it would contact PCS to arrange a consultation and meeting if it was minded to remove check-off. It was not until 21 July 2014 that the Home Office confirmed that it was minded to remove check-off. I mention this part of the chronology as it is suggested in the Defence (at [4]) that the "The Defendant and PCS had been in discussions about the withdrawal of check-off since 23 January 2014". It is somewhat unrealistic to describe the absence of any correspondence about the matter between 23 January and 21 July 2014 as indicative of being "in discussion" throughout that period.

27. There was a single consultation meeting on 7 August 2014 at which the PCS stated that its members paying check-off should be treated as having ‘reserved rights’ to continue doing so. In an email from PCS to the Home Office dated 18 August 2014, the PCS emphasised that its members were clear that they had a contractual right to check-off.
28. On 1 September 2014, Ms Gooch, Head of Employee Relations, Reward, HR Policy, Health Safety & Wellbeing at the Home Office, informed Mr Jones of PCS that check-off would be removed as of 1 December 2014.
29. Check-off arrangements in the Defendant’s department ceased as from 1 December 2014, and on 5 December 2014 PCS lodged a collective grievance against the cessation. The grievance does not appear to have been progressed by the Defendant because of her insistence, in line with her collective grievance process, that the grievance be brought by or on behalf of named individuals.
30. Meanwhile, in an attempt to maintain the flow of subscriptions affected by the proposed withdrawal of check-off, the PCS had commenced a campaign to encourage members to move to direct debit payment of subscriptions. This was described by Mr Jones as an “existential” matter for the union. As at November 2014, just prior to the withdrawal of check-off, PCS had 13,584 members in the Home Office paying subscriptions by check-off; of these, 5,816 members had not signed a direct debit mandate in favour of the union by the time check-off ceased. This represented a 43% loss of subscription income for PCS from members in the Home Office. That position was somewhat further mitigated over subsequent months, but, as at 1 March 2015, there were approximately 3000 members whose subscriptions had been lost.

The decisions in *Hickey* and *Cavanagh*.

31. This is not the first occasion on which PCS and/or its members have sought to challenge the withdrawal of check-off. Two previous decisions of this Court have dealt with similar issues, albeit involving different Government Departments. The first is *Hickey & another v Secretary of State for Communities & Local Government* [2013] EWHC 3163 (QB). In that case, the relevant staff handbook contained a provision as to check-off in the following terms:

‘12.5.9 If you are a member of one of the officially recognised trade unions, one method by which your union subscriptions can be paid is for you to ask the department to deduct all or part of the subscription from your pay and to transfer this to the appropriate trade union (the system known as “check-off”) – your trade union can provide a suitable application form. In the event of industrial action, and for the duration of that action, the department may decide to withdraw – in whole or in part – from this arrangement in respect of those trade unions with members officially involved in industrial action. In that event, you will be advised of the decision in writing.’
32. For the purposes of clarity, these and certain other provisions in the handbook had been highlighted by agreement between the Department and the union as conferring enforceable contractual rights incorporated into individual staff contracts of employment. In 2013, the Department informally notified the relevant trade unions that it intended to terminate check-off arrangements. The Claimants sought interim relief by way of speedy trial. Popplewell J (as he then was) held that the employees did have a contractual right to require the Department to continue to pay their union dues by way of check-off. In doing so, Popplewell J considered that the check-off provisions were apt to have

contractual effect, particularly given the express agreement that they should have such effect. At paragraph 11 and 12 Popplewell J held as follows:

“11 Against that background, the natural meaning of the words ‘subscriptions can be paid’ is that they confer a contractual entitlement to pay the subscriptions in the way described. The words ‘can be paid’ mean that the employee is entitled to pay in that way if he asks to do so. If the department were entitled to discontinue the arrangement and to refuse to operate check-off, the position would be that contrary to that language, the employee cannot pay in that way.

12 This construction is, in my view, supported by the second part of the paragraph. The second part of the paragraph permits withdrawal from such an arrangement in defined and circumscribed circumstances. The natural inference is that those are the only circumstances in which withdrawal from such an arrangement is permitted. The language and structure of the clause is that it imposes an obligation on the department, if so requested by the employee to act in a defined way subject to a limited exception, which is set out in the second part of the paragraph.”

33. These withdrawal provisions were those that permitted check-off to be withdrawn in the event of industrial action. At [20] and [21], there was further analysis of the language used and whether it was that of contractual obligation:

“20 What was intended by para. 12.5.9 depends upon its own particular language. The language of the first sentence of para. 12.5.9 does not make the entitlement conditional on whatever the department has agreed with the unions. It provides unequivocally that union subscriptions can be paid in a certain way. That is the language of unqualified entitlement.

21 Moreover, the second half of the paragraph would be deprived of meaningful content if Mr Eadie QC’s primary constructions were correct. It provides that the department may withdraw from particular arrangements with trade unions in particular and circumscribed circumstances. It is, in my view, inconsistent with an unfettered discretion to modify or withdraw from such an arrangement in any circumstances.”

34. Popplewell J rejected an argument that there was anything inherently improbable or contrary to policy for a government department to undertake, as a contractual obligation, to deduct union subscriptions by way of check-off: see [23]; and further held that there was a “real benefit” to employees in the administrative convenience of not having to make their own arrangements for payment each month, or having to set up a direct debit or standing order and then change it or replace it from time to time as may be necessary. The check-off arrangements ensured that “[e]ach member benefits from the efficient and secure collection of dues from other members and check-off benefits each member in that way”: see [24].

35. The second case is *Cavanagh and others v Secretary of State for Work and Pensions* [2016] EWHC 1136 (QB). The relevant provisions in that case were contained in the SSWP’s Salary Policy, amongst other documents. The key provisions were described by Laing J (as she then was) as follows (with Laing J’s emphasis):

‘Part-year Appointments Policy: If you have a Part Year contract you can choose to have your salary paid either on an averaged basis or a paid for attendance basis.

Deductions from Salary Policy – Compulsory and Voluntary: You can choose to have voluntary deductions made for subscriptions and premiums to certain Treasury approved organisations, for example, Trade Union subscriptions, repayment of loans from benevolent funds, and charitable donations. Compulsory deductions will be made for income tax, national insurance, superannuation, Child Support Agency Deduction of Earnings Orders and for any execution of debts.

Advances from Salary Policy: You can request an advance of salary for a range of purchases or situations.

Recoveries From Pay Policy: Overpayments will be recovered from your pay.’

36. Check-off was ended by the SSWP as from May 2015. The issue for Laing J was whether the check-off provisions imposed a contractual obligation. Having considered the provisions of the CSPCSC and CSMC described above, she said this:

“60 The question whether the check-off provision imposes a contractual obligation on the defendant depends, ultimately, on what the salary policy means, in its context. To understand what it means involves discovering what inferences can be drawn, from the available contractual and non-contractual materials, about whether the parties jointly intended the salary policy to have contractual effect. In the context of this case, I am not impressed by the defendant’s argument that it is significant that the staff intranet is not referred to in Mr Cavanagh’s and Ms Williams’s contractual documents as a potential source of contractual terms. First, the parties could not have foreseen when those documents were signed that there would ever be such a thing as a staff intranet. Second, it is clear from [*Alexander v Standard Telephones & Cables Ltd* [1991] IRLR 286] and from [*Hussain v Surrey & Sussex Healthcare NHS Trust* [2011] EWHC 1670 (QB)] that a document may have contractual effect even if it is not part of the materials to which the parties have expressly attached the label ‘contractual’. Third, the staff intranet is referred to in the current standard written particulars of employment as such a source, and those documents do not refer to staff handbooks and the like as such a source.

61 There are two main pointers to the correct interpretation of the relevant provisions. They are the historic contextual material about the check-off provision, and the decision in *Hickey*, which is a helpful guide to what the words of the salary policy might mean.”

37. As to the CSMC in particular, it was stated as follows at [64] to [66]:

“64 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’.

65 Whether or not my theory about the transition from the Code to the staff intranet is correct, I consider that, applying the approach of Hobhouse J in *Alexander* and of Andrew Smith J in *Hussain*, there is nothing incongruous in finding that the staff intranet is a potential source of contractual terms. It is the obvious place for an employee to look for detailed terms and conditions if his written particulars expressly refer to it. But, in addition, given that none of the documents referred to in the contractual documents signed by Ms Williams or Mr Cavanagh is any longer available to be consulted, it is also the obvious place for them to look. They cannot be expected to engage in extensive if not impossible archival research in order to find out what their detailed terms and conditions are.

66 If, by whichever route, the staff intranet is a potential source of contractual terms, the next question is what the relevant parts of the salary policy mean. In ascertaining their meaning, I consider that 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 Code 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. I also consider that Popplewell J’s analysis in *Hickey* supports this view. I appreciate that the parties in *Hickey* had expressly agreed that the relevant provisions were contractual, and the defendant had conceded as

much. However it is perfectly clear from the two construction arguments which were advanced by the Department in that case that that concession was more apparent than real. Those two constructions aimed to deprive the provision of any binding effect. That was the context in which Popplewell J's observations about the language of the provisions, and his conclusion that the provisions did impose real obligations on the Department, were made and reached. That is why they help me to construe the salary policy."

38. Laing J went on to construe the check-off provisions and concluded that it could safely be inferred from the available material that they were intended to bind the defendant and that the defendant was obliged to continue to provide the check-off arrangements to the claimants: see [71] of *Cavanagh*. It is also relevant to note that Laing J rejected an argument that the check-off arrangements were determinable on reasonable notice (see [72]) and held that the PCS was entitled to enforce the check-off arrangements as a third party against the Department pursuant to the 1999 Act (see [73]).
39. It is clear that these decisions are highly relevant in this context given that the historic position is similar to that which pertained and was considered by Laing J in *Cavanagh* and the language used in the check-off provisions in both *Hickey* and *Cavanagh* bears some comparison to that used in the present case. I shall say more about the relevance of these decisions in the discussion below of the issues to be determined.

The Issues to be Determined

40. The parties have helpfully agreed a list of issues to be determined. These are as follows:

"Individual Claimants

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.
2. Whether it was an implied term that check off could be removed by the Defendant giving reasonable notice.
3. Whether the Defendant breached the Individual Claimants' contracts by (a) removing check off on 1 December 2014 and/or (b) without reasonable notice.
4. Whether the Individual Claimants affirmed the contracts and waived any breach through ongoing performance under the contracts.
5. If the Fourth Claimant had a contractual entitlement to check off with HMPO (which is denied) was that entitlement removed when she assimilated onto the Defendant's standard terms and conditions on 1 August 2015.

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

6. Did the term confer a benefit on the PCS as per s 1(1)(b) of the 1999 Act. This is admitted by the Defendant.
 7. 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?
 8. Which, if any, of the Individual Claimants entered into contracts on or after 11 May 2000.”
41. I shall deal with each of these issues in turn.

Issue 1 – Was there a contractual entitlement to check-off?

42. Mr Segal QC (who appears for the Claimants with Mr Patel of Counsel) submits that the provisions as to check-off, whilst not set out in the Summary, are clearly referred to in documents identified in the Summary as containing the relevant terms and conditions of service. In other words, the check-off provisions are contained in policy documents and are incorporated into the contract. Furthermore, the relevant provisions are apt for incorporation given that the language used in them, which broadly mirrors that considered by the Court in *Hickey* and *Cavanagh*, is that of legal obligation. The entitlement to check-off was one that had existed for many years, having been included in the CSPCSC and maintained with the advent of CSMC. As stated by Laing J, those Codes, which are the “common root” for present provisions are an “important pointer” to the correct interpretation of them. The specific and limited circumstances (namely industrial action) in which check-off may be withdrawn confirms that it may not otherwise be withdrawn: see *Hickey* at [21]. This is consistent with the general stipulation at paragraph 6 of CSMC that “existing rights cannot be altered arbitrarily”. The fact that voluntary deductions can be made in respect of other organisations and charities does not undermine the contractual nature of the obligation.
43. Mr Sheldon QC (who appears for the Defendant with Mr Feeny of Counsel) submits that the decisions in *Hickey* and *Cavanagh* are not binding on the Court and can be no more than “pointers” given the different facts involved. In particular, the relevant provision in *Hickey* was expressly highlighted to be contractual, which is clearly not the case here. The policy documents here were not intended to have contractual effect; at best, they might, if not reflected in the terms and conditions, give rise to a public law challenge for failure to implement. The language used in the relevant provisions has to be seen in light of the statutory requirement that any deductions from wages must be expressly authorised; the language is that of authorisation and process, and not the language of contractual entitlement. The provisions cannot be apt for incorporation because if they were then so too must be those relating to deductions for the lottery and HOSSA. It is absurd to suggest that there should be any contractual right in respect of such deductions. The passages dealing with withdrawal do no more than provide sensible notice to employees that they may, if they engage in official industrial action, fall behind on their subscriptions; they are not to be interpreted as meaning that those are the only circumstances in which withdrawal might apply. To that extent, Mr Sheldon submits that Popplewell J’s and Laing J’s construction should not be followed. Had the intention been to create any contractual obligation, the provisions could readily have been drafted to make that clear or could, as in *Hickey*, be identified by the parties as having that effect.

Discussion – Issue 1

44. In my judgment, Mr Segal’s submissions are to be preferred.
45. The principles applicable when considering whether provisions contained in policy documents are apt to be incorporated in the contract of employment are well-established. They were explained by Hobhouse J in *Alexander v Standard Telephones & Cables Ltd* [1991] IRLR 286 as follows:

“31. The principles to be applied can therefore be summarised. 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.”

46. In *Keeley v Fosroc International* [2006] EWCA Civ 1277, the Court of Appeal (Auld LJ) held as follows:

“33 Equally, here, the fact that the staff handbook was presented as a collection of ‘policies’ does not preclude their having contractual effect if, by their nature and language they are apt to be contractual terms, as clearly many were in the ‘Employee benefits and rights’ part of the handbook, incorporating in that way by reference what was not expressly referred to or detailed in the statement of employment terms.

34 Highly relevant, in any consideration, contextual or otherwise, of an ‘incorporated’ provision in an employment contract, is the importance of the provision to the overall bargain, here, the employee’s remuneration package – what he undertook to work for. A provision of that sort, even if couched in terms of information or explanation, or expressed in discretionary terms, may be still be apt for construction as a term of his contract (providing it is not in conflict with other contractual provisions); see eg Horkulak; and cf. *Briscoe v Lubrizol* [2002] IRLR 607, per Potter LJ at paragraph 14, as he then was, and with whom on this point Ward LJ and Bodey J agreed...

35 Equally, if not more important, is the wording of a provision under question in an incorporated document containing contractual terms. If put in clear terms of entitlement, it may have a life of its own, not to be snubbed out by context immediate or distant in the document of which it forms part. Where the wording of the provision, read on its own, is clearly of a contractual nature and not contradicted by any other provision in the documentary material constituting the contract, context is not all.

47. In *Hussain v Surrey and Sussex Healthcare NHS Trust* [2011] EWHC 1670 (QB), Andrew Smith J, in considering whether the terms of a disciplinary procedure were contractual, held as follows:

“167 There is no single test as to whether an employer and employee intended to agree that provisions of an agreement such as the Practitioners Disciplinary Procedure should be contractual between them (rather than advisory or hortatory or an expression of aspiration), and if so which provisions. The indicia that a provision is to be taken to have contractual status which are, I think, of some relevance to this case include these:

i) **The importance of the provision to the contractual working relationship between the employer and the employee and its relationship to the contractual arrangements between them:** as I understand it, it is common ground in this case that, because parts of the Practitioners Disciplinary Procedure are contractual, in some circumstances the Trust might exclude Dr Hussain or bring disciplinary proceedings for misconduct against her. The implication of this, as it seems to me, is that provisions important to implementing the agreement about exclusion and about conduct hearings are also apt to be contractual: the more important the provision to the structure of the procedures, the more likely it is that the parties intended it to be contractual.

As Auld LJ said in *Keeley v Fosroc International Ltd*, [2006] IRLR 961 (which concerned whether provisions relating to enhanced redundancy payments in a Staff Handbook were enforceable as part of individual contracts of employment),

“Highly relevant in any consideration, contextual or otherwise, of an “incorporated” provision in an employment contract, is the importance of the provision to the over-all bargain, here, the employee’s remuneration package – what he undertook to work for. A provision of that sort, even if couched in terms of information or explanation, or expressed in discretionary terms, may still be apt for construction as a terms of his contract”

(at para 34).

ii) **The level of detail prescribed by the provision:** as Penry-Davey J said in *Kulkarni v Milton Keynes Hospital NHS Trust*, [2008] IRLR 949 at para 25, the courts should not “become involved in the micro-management of conduct hearings”, and the parties to the contract of employment are not to be taken to have intended that they should be. (In the Court of Appeal in *Kulkarni*, (loc cit) at para 22, Smith LJ endorsed this observation of Penry-Davis J.)

iii) **The certainty of what the provision requires:** as Swift J observed (in *Hameed* (loc cit) at para 68), if a provision is vague or discursive, it is the less apt to have contractual status.

iv) **The context of the provision:** a provision included amongst other provisions that are contractual is itself more likely to have been intended to have contractual status than one included among other provisions which provide guidance or are otherwise not apt to be contractual.

v) **Whether the provision is workable, or would be if it were taken to have contractual status;** the parties are not to be taken to have intended to introduce into their contract of employment terms which, if enforced, not be workable or make business sense: see *Malone v British Airways*, [2010] EWCA Civ 1225 at para 62.”

48. In common with many civil service employees who commenced employment in the decades that the Individual Claimants did, a single, comprehensive document purporting to be the contract of employment and containing all provisions in one location is not generally to be found. Instead, the terms and conditions of service are indicated in the Summary (provided to comply with the requirements of ss.1-7 of the *Employment Rights Act 1996* that employees be provided with a statement of the terms and conditions of their employment) and the other policy documents to which reference is made. The Summary in the present case, which is in similar terms for all of the Individual Claimants, unequivocally states that the “Details of civil servants’ conditions of service” are in the Codes and in the staff handbooks. The Home Office Handbook (version extant as at 19 August 2014) provides (at 1.2.1) that as a Crown employee working within the Home Office, the terms and conditions of employment are those set out in the letter of appointment, the Home Office Handbook and the Civil Service Code (amongst other sources). The fact that these documents may not themselves be contractual does not preclude them from being incorporated if that intention is shown as between the employer and the employee: *Alexander* at [31]. One can therefore legitimately look to those documents to ascertain what was intended. I reject Mr Sheldon’s argument that because

the ultimate source of the check-off provisions was an unenforceable collective bargaining agreement reached many decades ago no contractual intent as between the employer and employee can be derived from them. To take that approach would be to go against well-established principles as to the incorporation of terms contained in external documents, the intentions behind which do not dictate the intentions governing the relationship between the employer and individual employee: see *Hooper v British Railways Board* [1988] IRLR 517.

49. As to whether or not the check-off provisions are apt to form part of the individual contract, one must consider the specific language used. If the language used is not that of contractual obligation then it may not be correct to infer that the parties intended the provisions to have that effect. I begin with the root documents, the CSPCSC and the CSMC. Of course, the fact that the introduction to the CSPCSC refers to the “Rules and guidance” issued thereunder as being “mandatory”, does not mean that all of its provisions must therefore be contractual: whether or not any particular part of the CSPCSC is contractual will depend on whether that part itself contains the language of legal obligation.
50. The passages in paragraphs 4051 and 4100 of the CSPCSC and paragraphs 2, 6 and 7.3 of the CSMC were analysed by Laing J in *Cavanagh*: see [5], [6], [16] and [17]. As held by Laing J in that case, the “common root” for the current contractual arrangements in that case appears to be the CSPCSC, 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*. Given that important historical status of the CSPCSC, “[i]t 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”. I respectfully agree with that analysis as to the effect of the Codes.
51. Similarly, the analysis of Popplewell J is relevant as the same provision for the withdrawal of check-off in the event of industrial action exists in all the documents dealing with check-off, both historic (at least since the amendment introduced by HON 107/1987) and current. As stated there, the provision for withdrawal in such tightly defined circumstances is 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).
52. In the face of this highly relevant authority, Mr Sheldon seeks to persuade me that the analysis in those cases is not strictly binding on this Court as the circumstances are different. However, it seems to me that, at least in so far as the historic position of the Codes is concerned, the circumstances are not different at all; in fact the pre-1996 position is identical across all departments. Popplewell J’s analysis of the withdrawal provision would continue to apply given that the industrial action justification continues to be the sole reason for withdrawal even in the Defendant’s staff handbook: see paragraph 5.6 of the 1997 handbook. Even if not strictly binding on this Court, the decisions in those cases, in respect of the “common root” documents, should be followed by this Court unless convinced they were wrong: see *Halsbury’s Laws*, Vol 11 para 32.
53. Mr Sheldon submits that I should not interpret paragraphs 4051 and 4100 (read with Annex 1 to the Code) as they have been in *Cavanagh* because to do so would lead to the absurdity that the department may be contractually obliged to make deductions in respect

of a host of other bodies, including a lottery and the “Hospital Saturday Fund”.¹ However, there is nothing objectionable in principle in the employer agreeing to make such deductions for the employee’s benefit. An employee cannot seek deductions in respect of any arbitrary or inappropriate third party: deductions may only be authorised in respect of those organisations that are expressly approved. Furthermore, when one considers the list in Annex 1 of the CSPCSC, it is apparent that the approved organisations: are connected with employment with the Civil Service; manage a benefit that is so connected; and/or are charitable in nature. Thus, for example, deductions may be authorised for the Civil Service Save as You Earn Scheme, or Departmental Benevolent Funds. Even those entities, such as the Hospital Saturday Fund (or in later documents, such as the handbook, the “HOSSA lottery”) which might at first glance seem more frivolous, appear in fact to be for charitable work-related purposes. There is no reason why an employee should not be able, if he or she so wishes, to authorise deductions in respect of such organisations, and for the employer to undertake to make them. Such an arrangement might appear more unusual in the 21st century where charitable giving or regular savings can be set up with a few clicks on a mobile device; however, the huge administrative convenience that such arrangements presented just a few years ago can readily be seen as a real benefit that ought not to be capable of withdrawal on the employer’s unilateral say-so. It is noteworthy in this context that the Defendant’s later HR41100 Pay Policy document in dealing with “Consolidated Voluntary Deductions from your Pay” states that giving to charity directly from pay “is a very effective means of giving as the donation reduces your taxable income”.

54. It was also suggested that the language itself is not that of obligation but that of authorisation and process. In my judgment, the language is that of obligation. The first two or three sentences of paragraph 4051 of the CSPCSC, if taken in isolation, could (as Mr Segal accepted) tenably be said to deal with authorisation alone. However, the next three sentences, which state that “Deductions *will* be made...”, that “Notice of termination” is required before payments cease and that the payment may be withdrawn in a particular defined scenario (i.e. that of industrial action), all strongly militate towards this provision being intended to be contractual.
55. Similarly, the language used in paragraph 7.3.3 of the CSMC is that of obligation. The fact that paragraph 7.3.3 commences with the words, “Where departments and agencies offer arrangements for deducting subscriptions...” does not mean that such arrangements are entirely discretionary. If there is an offer of such arrangements (as there was here) and it is taken up (as it also was here) then there is an obligation to continue making them until withdrawn in accordance with the right to do so in the event of official industrial action. The industrial action exclusion is even more circumscribed in the CSMC in that withdrawal is subject to Cabinet Office Approval. Mr Sheldon argued that the only reason for that stipulation is that the Cabinet Office, as the guardian of the employer’s side during industrial action, would have an interest in overseeing any arrangements that could have a bearing on such action, and that one cannot infer from the need for such approval that this is the only situation in which check-off may be withdrawn. However, it seems to me that, if anything, the need for Cabinet Office Approval, which is cast in mandatory terms, underlines both the importance of check-off to the parties and the existence of the obligation not to terminate the facility otherwise. If the Cabinet Office

¹ I am told that this argument was raised by the relevant department in *Cavanagh*, but it was not addressed in the judgment. One cannot say whether that was because the argument was not pursued with any vigour or was one not considered worthy of consideration.

were concerned about retaining oversight over matters that could upset industrial relations, then it is difficult to see why it would countenance withdrawal of the facility without its approval at other times.

56. It was also argued that Popplewell J's interpretation of the withdrawal provisions is wrong in that these do no more than provide notice to employees of circumstances that may give rise to a shortfall in their subscriptions. I do not accept that submission. The withdrawal provisions make no reference at all to the possibility of a shortfall. In any event, a withdrawal of check-off for any other reason would also lead to a shortfall, and no reason was given as to why it would not be appropriate or sensible, if the Defendant is correct, to give notice to the affected employees in those circumstances as well.
57. For these reasons, I do not consider the decisions in *Hickey* and *Cavanagh* to be wrong. As such, there is no reason to depart from the conclusions reached therein as to the construction of the check-off provisions in the Codes and their role in interpreting present documents.
58. The trajectory of the documents since 1996 is, if anything, heading towards an even clearer statement of contractual obligation than that contained in the Codes. Thus, we see, for example in the HMPO Handbook, that the "SSC *will*, if you so authorise, make deductions from your salary..." and that "Once the authorisation has been accepted SSC *will* forward the contributions due ... and continue to make payments on this basis as instructed until you wish to cease making payments". Mr Sheldon accepted that the terms of the HMPO Handbook were a "stronger pointer" to a contractual obligation but contended that this is still intrinsically a provision about authorisation and process and not apt to create a contractual obligation. I cannot accept that submission. Not only is the language unequivocally that of obligation, it is also relevant that the provisions immediately preceding and following the section on Voluntary Deductions from pay use similar language – "the SSC *will* arrange for the outstanding balance to be paid to you" – and/or are clearly concerned with legal obligations in the context of deductions from salary pursuant to an attachment of earnings order. It would be odd if similar wording were to be treated as imposing an obligation in one section but not in one immediately adjacent to it.
59. I accept that the HMPO Handbook applies only to the Passport Office. However, no reason has been put forward as to why a radically different approach should be taken to check-off in respect of employees in other sections within the Defendant's department, particularly where the same union and the same Minister having overall authority over terms and conditions for the department are involved.
60. A final point raised by Mr Sheldon was that check-off was not understood by any party to be contractual prior to its withdrawal, and that, at best, it was considered to be a matter of "custom and practice". However, it will be apparent from the background set out above, that not only did PCS "reserve its rights" at the consultation meeting, but it also expressly stated in an email dated 18 August 2014 that its members considered check-off to be contractual. Furthermore, the belief expressed by some members that check-off was a matter of custom and practice is not necessarily inconsistent with the belief that it gave rise to a legal entitlement. The factual premise of the submission appears therefore to be incorrect. Even it were correct, it would be of limited significance given the limited role to be played by subjective intentions in determining contractual intent. Of course, the parties could have taken the step taken in *Hickey* and expressly identified those

provisions agreed to have contractual effect. However, the fact that that was not done does not mean that the check-off provisions were not intended to be contractual. As stated by Popplewell J in *Hickey*:

“18 ... It is often of little assistance, when there is a disputed question of construction, to observe that if the parties intended the provision to mean one thing, they could have said so more clearly. That is so in the present dispute. The point can be made with equal force on each side that the other side’s construction could have been achieved by expressing the paragraph in language which was different and clearer.”

61. In conclusion, in respect of Issue 1, it is my view that the check-off provisions are apt for incorporation into the Individual Claimants’ contracts of employment. Check-off is an important facility of real benefit to the employees and the Union; the wording is of a contractual nature and does not conflict with any other provision in the documentary material; there is sufficient detail and certainty to render the provisions workable without more (and it has not been suggested otherwise); and the provisions are contained in documents that contain (often in close proximity) other legal obligations.

Issue 2 – Is there an implied term that check-off could be removed on reasonable notice?

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].

Issue 3 – Did the Defendant breach the Individual Claimants’ contracts by removing check off?

63. It follows from my conclusion under Issue 1 that the removal of check-off did amount to a breach of their contracts.

Issue 4 – Did the Individual Claimants waive the breach and/or acquiesce in it by continuing to perform under the contracts?

64. A number of points are made in support of the argument that if there was a breach, it was waived by the Individual Claimants:
 - 64.1. The Individual Claimants continued to work after the check-off was withdrawn. The change was one of immediate application and continued working was inconsistent with a refusal to accept that change;

- 64.2. They acted inconsistently with maintaining any objection to the removal of check-off in that they set up alternative direct debit arrangements to ensure the payment of their subscriptions. This was an “unequivocal act implying acceptance” of the changed contractual position: see *Farnsworth v Lacy* [2012] EWHC 2830 (Ch) at [20].
- 64.3. Although a collective grievance was lodged, it was not pursued properly by naming individual complainants;
- 64.4. They allowed more than five years to elapse before issuing a letter before action, shortly before the expiry of the limitation period, on 3 December 2019. It is no excuse to say that the outcome of ‘test litigation’ in *Cavanagh* was awaited as the letter before action came a further 3.5 years after judgment on liability was handed down in that case.
65. Whilst the Defendant’s written argument was put on the basis of waiver/acquiescence, Mr Sheldon’s oral submissions, and the authorities relied upon by both sides under this issue, approach the issue principally by reference to the question of whether an employee has by his or her conduct indicated acceptance of a variation to the contract of employment. The relevant principles were most recently summarised by Underhill LJ in *Abrahall v Nottingham City Council* [2018] EWCA Civ 796, where one issue was whether a contractual pay cut had been accepted by the affected employees continuing to work:
- “86. ...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 Soletron case [Soletron Scotland Ltd v Roper [2004] IRLR 4] 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 Soletron 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 discomfited 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.”**
66. On the facts in *Abrahall*, Underhill LJ concluded as follows:

“101. ... I have not found this part of the appeal entirely easy. It is a great pity that neither the unions nor their members stated unequivocally at the moment of implementation that they did not accept the proposed cut and that their continuing to work was without prejudice to that position. In the end, however, I believe that the judge's decision was one to which he was entitled to come. There are three points that seem to me particularly important.

102. First, the proposed variation was wholly disadvantageous to the employees. Sometimes pay cuts are proposed as part of a package of measures some of which are (at least arguably) to the employees' benefit. If the employees continue to work without protest following implementation, taking the good parts as well as the bad, it is usually easy to infer that they have accepted the package in its entirety. But where that is not the case it is more difficult to say that they are not simply putting up with a breach of contract because they are not prepared to take positive steps to remedy it, whether by taking industrial action or by bringing proceedings. Mr Laddie would say that this was, in substance, a package case because the employees were relieved of the risk of redundancy. But that is not the same: the council was not asked to, and did not, make any contractual promise not to make redundancies.

103. Secondly, the matter was not, on the employment tribunal's findings, put to the employees as something on which their agreement was required. Indeed, given that pay was negotiated collectively, it was not something on which employees would normally be expected to take individual decisions: although that route had had to be resorted to for the introduction of single status it was wholly exceptional. No doubt when the freeze was first proposed the council tried to get the unions' consent; but when that was not forthcoming it was imposed unilaterally, and the council's position was that it was contractually entitled to take that course. That is in my view important: see para 99 above. Although I have been critical of the unions for not stating their position explicitly, or encouraging their members to do so, the same criticism can be advanced of the council. It would have been open to it to tell the employees in terms that if they continued to work after 1 April 2011 they would be taken to have agreed to the proposed freeze (without prejudice to whether their agreement was legally required): I do not say that continuing to work in the face of a *1456 unilateral ultimatum of that kind would automatically have constituted acceptance, but it would have made the council's position clear and made the argument for an acceptance by conduct much stronger. There was equivocality on both sides.

104. Thirdly, there was strenuous protest on the part of the unions not only up to but beyond the date of the implementation of the freeze on 1 April 2011: see para 70.2 of the employment tribunal's reasons. At that date they were in the course, or on the cusp, of consulting their members about the possibility of industrial action, and the results of that consultation did not become known until about the middle of the month: see paras 70.5 and 70.6. Mr Laddie confirmed in his oral submissions that it was his case that the variation took effect from the first pay-day after 1 April 2011: I did not understand him to rule out the possibility that it took effect at some later date, but he did not propose any such alternative or advance any argument about how it might be identified. We do not know precisely when during the month the pay-day fell; but even assuming in the council's favour that it was at the end of the month, after the results of the ballot were known, I find it hard to see how the claimants' continuing to work as from that date could be taken as an unequivocal acceptance of a variation which might have been the subject of industrial action until days before. A decision not to take industrial action is not the same as a decision to accept a variation (as is illustrated by the facts of *Rigby v Ferodo Ltd* —see para 71 above), and there is no suggestion that the unions made it clear that they would take no further steps, still less that they would now reluctantly agree to the freeze— ...”

67. The application of the principles, summarised in [65] above, to the facts of the present case lead, in my judgment, to the conclusion that the Individual Claimants had not accepted the withdrawal of the check-off. This is so for a number of reasons.
68. First, the continuation of work here does not unequivocally give rise to the inference that the Individual Claimants had accepted the change in check-off. The evidence of the Claimants is clear that in matters of pay, including check-off, the expectation was that the PCS would take the lead in dealing with management. As such, the employees had

relied on their union to advance the protest about the removal of check-off on their behalf, which it had done, and the continuation of work in these circumstances is not, therefore, an act that is only referable to an acceptance of the removal; it is an act equally consistent with leaving the task of registering an objection to the union on their behalf. This was not a case where, for example, the check-off (the removal of which was detrimental to the employees) was proposed to be removed in conjunction with the conferring of any beneficial terms, in which case continuing to work and accepting the other benefits might give rise to the inference that the changes had been accepted. As stated by Underhill LJ in *Abrahall* (at [102]), that inference is more difficult to draw where the change is entirely detrimental.

69. Second, there was protest at the collective level. That was sufficient, in the circumstances of this case, to negate any inference based on a continuation of work, even if the employees raised no individual protest: see *Abrahall* at [88]. Mr Sheldon contended that these protests were inadequate and highlights the fact that PCS did not pursue grievances properly by identifying named individuals. However, there is equally nothing to suggest that PCS had ever withdrawn its objection. PCS could undoubtedly have made its position clearer by stating that any continuation of work was under protest or that the PCS reserved its position until the outcome of test cases. Similarly, the Defendant could have informed the employees that continuing to work after the removal of check-off would be viewed as acceptance. It could therefore be said that there was equivocality on both sides. Mr Parr in his evidence for the Defendant acknowledges that PCS initiated the proceedings in *Cavanagh* shortly after the proposal was made to remove check-off within the Defendant's department. 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.
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.
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.

72. Finally, the fact that the Defendant changed its system for making voluntary deductions in the meantime did not amount to a change in position on the part of the Defendant in reliance upon any act on the part of the employees and/or PCS. The change appears to have affected only the mechanism for making deductions and the number of organisations in respect of which such deductions could be made. It is stated to be a change made for technical reasons and not because of any implied acceptance of the removal of check-off.
73. For all of these reasons, it is my judgment that the Individual Claimants had not, by their conduct, accepted the withdrawal of check-off.

PCS's claim under the 1999 Act

Issue 7: Were the provisions as to check-off enforceable by the PCS pursuant to s.1(2) of the 1999 Act?

74. Section 1(2) 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...

75. The Defendant accepts that the check-off provisions confer a benefit on PCS (Issue 6). 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.
76. Mr Segal submits 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.

77. Mr Sheldon submits that in construing the intention 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. 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*. Mr Sheldon sought to rely on an extract from Labour Law, Ewing Collins and McColgan (2nd ed), where, having referred to Laing J's conclusion in *Cavanagh* that the union could enforce check-off as a third party, the authors commented as follows:

"If [the source of the check-off] was a collective agreement, it is not clear why the union's claim [in *Cavanagh*] could succeed in the light of TULRCA 1992, section 179 (collective agreements presumed not to be legal binding unless expressly rebutted), having regard to the *Contracts (Rights of Third Parties) Act 1999*, section 1(2) (no third party right where evidence of intention that the parties did not intend the term to be enforceable by a third party)."

78. In those circumstances, submits Mr Sheldon, it is not open to the Individual Claimants to contend that check off was intended to be anything other than unenforceable by PCS, thereby disapplying s.1(2)(b) of the 1999 Act. This is reinforced by the statutory regime for the deduction of trade union subscriptions which provides that a worker's authorisation of such deductions shall not give rise to any obligation on the part of the employer to maintain or continue with such arrangements. Furthermore, the condition (set out in para 7.3.3(b) of CSMC) that the costs of providing check-off would be recovered from the trade unions conferred on PCS an ability to enforce check-off directly. That ability militates against the presumption of third-party enforcement under the contracts between the employees and the Defendant: *Royal Bank of Scotland plc v McCarthy* [2015] EWHC 3626 (QB) at [142]. Finally, it was submitted that it would be absurd to infer that there was any intention that other organisations which benefit from deductions would have been able to enforce the right to recover them directly, and the same should apply in respect of check-off.

Discussion of claim under the 1999 Act.

79. For the Defendant to succeed on this point, I would need to be satisfied that on the proper construction of the contract, the parties (that is to say the Individual Claimants and the Defendant) intended that the check-off provisions should *not* be enforceable by PCS. Mr Sheldon's principal argument is based on the contention that the absence of any intention to enforce at the collective level must lead one to infer that there was no such intention at the level of individual contracts. Although it is well-established that 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 of no relevance to the construction of that term (see *Harvey on Industrial Relations and Employment Law*, AII at [62] and *Hooper v BRB* [1988] IRLR 517, CA), Mr Sheldon contends that the express intention disavowing enforceability at collective level (supported by the statutory presumption against enforceability) is a matter to be taken into account in construing the individual contracts. Simply put, the argument (as I understand it) is that the parties to the individual contracts cannot contend that check-off was enforceable by PCS when PCS itself did not contend that it was enforceable.

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*.
 - 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 organisations² 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

² I heard no argument as to whether some of these "organisations" would amount to a "third party" within the meaning of the 1999 Act. That remains unclear given that some appear directly bound up with the Defendant's department.

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].

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.

Issue 8: Which, if any, of the Individual Claimants entered into contracts on or after 11 May 2000.

82. Section 10 of the 1999 Act deals with its commencement. So far as relevant, it provides:

“10.— Short title, commencement and extent.

(1) This Act may be cited as the Contracts (Rights of Third Parties) Act 1999.

(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.

...”

83. The 1999 Act came into force on 11 November 1999. Accordingly, by s.10(2) of the 1999 Act, it does not apply to contracts “entered into” before 11 May 2000. The Second and Fourth Claimants commenced employment before that date. Mr Segal argues that there were substantial variations to their contracts after that date which amounted to the ‘entering into’ of a contract within the meaning of s.10(2) of the 1999 Act so that its provisions do apply. In particular, I was referred to a letter dated 23 March 2004 sent to the Second Claimant which confirmed his transfer to another unit accompanied by changes to salary. It was expressly stated that all other terms remain unchanged. In 2014, the Second Claimant was moved to annualised hours working. The Fourth Claimant benefited from a temporary promotion in February 2005 accompanied by a temporary cover allowance. There were further changes to hours, status and pay in subsequent years, particularly in 2010 when her request to change to full time working was authorised. Each of these changes was accompanied by an express statement that all other terms remained unchanged. Mr Segal submits that these were fundamental changes to the contract of employment, amounting, in legal terms, to the entering into of a new contract, as opposed to minor variations which would not.

84. Mr Segal relies upon the authority of *Mulchrome v Swiss Life (UK) plc* [2005] EWHC 1808 (Comm) in which the essential issue was whether the Claimant could establish that a cause of action for benefits payable in respect of disablement had accrued under a contract of insurance entered into between her employer and the insurer after 11 May 2000; only if a contract had been so entered would she have the right as a third party to make any claim for benefits against the insurer in her own right. The Deputy Judge drew a distinction between minor variations, which would not amount to entering into a new

contract and “fundamental” changes, which generally would. At [44] the Deputy Judge stated:

“44. I also cannot accept Mr. Broatch’s submission that a fresh contract of insurance was entered into on 31st August 2000 within the meaning of the Contracts (Rights of Third Parties) Act 1999. All that then happened was the re-issuance of the policy Table showing a correction of the renewal date to reflect what had been originally agreed both in January and also, in so far as relevant, March/April 2000; and an alteration to the benefit escalation rate. The latter was at most a minor variation to the contract entered into on 19th January 2000 (alternatively 10th March 2000). It was not the entering into of a new or fresh contract of insurance. A different analysis might apply if the alteration to the original contract of insurance were fundamental in some way. However, the alteration effected on 31st August 2000 was extremely minor and it would, in my judgment, be wrong to think that an amendment (if such it was) of that nature to an existing contract was intended by parliament to constitute the entering into of a new contract for the purposes of the Contracts (Rights of Third Parties) Act 1999.”

85. At [50], the Deputy Judge concluded as follows:

“50... I consider that, in the relevant period in 2000, they were equating renewal with the beginning of a new Policy Year under an existing and continuing contract of insurance, and that they were not thinking in terms of the entering into of a new contract. This is in contrast with the position on renewal in October 2001 when a rate review took place; a new unit rate was quoted by Swiss Life and guaranteed for two years from 1st October 2001; and Norton Rose expressly notified Swiss Life through Mercer that it had decided to remain insured with Swiss Life. What happened in 2001 was redolent of a fresh contract being entered into. What happened in October 2000 was not.”

86. Mr Sheldon submits that there must be a new or fresh contract entered into after 11 May 2000 in order for the 1999 Act to apply and that a variation to an existing contract does not suffice. That is the only means by which there would be certainty in relation to the introduction of this important right for third parties. He submits that the Deputy Judge was wrong to conclude that a fundamental variation to an existing contract is enough to amount to entering into a contract. In the alternative, if the *Mulchrone* distinction between fundamental and minor variations is correct, it is submitted that the kind of changes relied upon by the Second and Fourth Claimants, such as changes in pay, or location, or even temporary promotions, are not enough.

Discussion – Issue 8

87. The reference in s.10(2) of the 1999 Act to the need for a contract to be “entered into” after 11 May 2000, does signify a new contract: an existing contract that was merely the subject of a minor variation would not amount to the “entering into” of a contract. The question, however, is whether a more fundamental variation can also amount to the entering into of a new contract, even though there is no interruption to the pre-existing contractual relationship. It is perhaps surprising that Counsel’s researches only produced one authority on the topic. However, *Mulchrone* deals with a similar issue to that which arises in the present case, and is a decision of a Court of coordinate jurisdiction. For reasons set out above at [52], this Court should follow it unless convinced it is wrong. In my judgment, the decision in *Mulchrone* is not wrong; on the contrary, it accords with general principles relevant to the distinction between the mere variation of a contract and its replacement with a new contract. A variation that seeks to change one of the fundamental terms of the relationship will in legal terms amount to the entering into of a new contract; see *Farnsworth v Lacy* at [71]. I respectfully agree with the analysis of the Deputy Judge at [44] and [50] of *Mulchrone*.

88. Applying that distinction, between variations which are fundamental (and which could amount to the entering of a new contract) and those which are not, to the present case, it is my clear view that the changes relied upon by Mr Segal are fundamental in nature. Mr Sheldon accepted in the course of oral submissions that a promotion to a new role would amount to a new contract, but maintained that a temporary promotion would not suffice. In my judgment, a promotion that is effective for any significant length of time would ordinarily amount to a fundamental variation of the contract and therefore the entering into of a new contract. A promotion involves a change in the level of responsibility associated with the role and usually an increase in salary. Those are two important aspects of the contractual basis for employment, any significant change to which could be described as “fundamental”. Whilst a mere transfer to another unit might not necessarily amount to a fundamental change, much will depend on the particular circumstances. A change in the nature of the duties involved, accompanied by a change in pay, could amount to a fundamental variation and the entering into of a new contract. On any view, a change to an entirely new basis for calculating working hours (such as annualised hours working) or a shift from part-time to full-time working (with the attendant changes in pay) would be likely to involve a fundamental change to the terms of the contract.
89. For these reasons, I consider that the Second and Fourth Claimants did enter into new contracts upon the occurrence of the changes post-11 May 2000 that are identified above. Accordingly, the terms of the 1999 Act do apply to their contracts.
90. Both parties asked that the Court avoids confining its decision on this issue to the Second and Fourth Claimants alone. It is, however, very difficult, without knowing the particular circumstances of individual contracts, to give any general guidance as to when it can be said that a new contract has been entered into for the purposes of s.10(2) of the 1999 Act. That said, it seems to me highly unlikely that an employee whose employment commenced before 11 May 2000 and whose employment subsequently changed in any of the ways that the second and fourth Claimants’ employment did, would not be able to say that they too had entered into a new contract upon such changes taking effect.

Conclusion

91. For the reasons set out above, the agreed issues are determined in favour of the Claimants. It just remains for me to thank all Counsel for their helpful and skilfully developed written and oral submissions.