RM

EMPLOYMENT TRIBUNALS

Claimant: Mrs S Weaver & Others

Respondent: London Borough of Havering

Heard at: East London Hearing Centre

On: 8 & 9 June 2017

Before: Employment Judge Brown

Representation

Claimants: Mr A Wills (Counsel)

Respondent: Mr R Roberts (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimants were employed by the Respondent as drivers and their normal hours of work as drivers were those set out in their written contracts of employment – save for Mr Cowen, whose normal hours of work as a driver were impliedly varied by conduct and or custom and practice.

2. Apart from Mr Cowen, the Claimants' driver contracts were not varied to include a term that they work additional hours as drivers, nor were their driver contracts varied so that they had no normal hours

3. The Claimants (apart from Mr Cowen) worked additional hours as drivers, but these hours were not fixed and obligatory on both sides. The Claimants (apart from Mr Cowen) were, therefore, not entitled to be paid redundancy payments taking into account the additional hours they worked beyond the hours stated in their contracts of employment, for their driver work.

4. Mr Cowen's contract was impliedly varied by conduct and/or custom and practice, so that his normal working hours as a driver included the additional hours he worked as a driver on Monday and Tuesday each week.

5. Insofar as the Respondent failed to pay a redundancy payment to Mr Cowen which included his additional hours on Monday and Tuesday as part of his normal hours for the calculation of a week's pay, the Respondent failed to pay Mr Cowen his correct redundancy pay.

6. The Respondent also employed the Claimants to work as picker packers. The Claimants were not employed as drivers when they did the picker packer work.

7. The Claimants, apart from Mrs Webster, did not have normal working hours in their picker packer roles.

8. Insofar as the Respondent did not make redundancy payments to those Claimants for their picker packer work, separately from their driver work, calculated on the basis that they did not have normal hours of work for their picker packer roles, the Respondent failed to pay those Claimants redundancy payments for their picker packer work, which they were due.

9. A remedy hearing will be listed, for 1 day.

REASONS

1 The Claimants brings claims for correctly calculated redundancy pay against the Respondent, their former employer. The Claimants were each employed part-time as drivers and/or picker packers with the Respondent's Meals on Wheels Service. On 11 April 2016 the Respondent dismissed all of the Claimants by reason of redundancy. Their effective date of termination was 4 July 2016.

<u>Mrs S Weaver</u>

2 Mrs Weaver was employed by the Respondent from 8 November 2004. She was employed as a delivery driver. Her letter of appointment dated 5 January 2005 said that Mrs Weaver was employed as a Home Delivery Service Driver with effect from 8 November 2004. The letter of appointment said that her hours of work were 16 ¼ hours over five days a week, pages 507 – 508.

3 The Respondent's Meals on Wheels service employed both drivers and picker packers. Mrs Weaver told the Tribunal that permanent staff had a written contract, whether for weekends, weekdays, or both, for either driving, or picking and packing work. Mrs Weaver told the Tribunal that she also worked as a picker packer on a casual basis. Picker packer work involved ensuring that meals were correctly loaded into vans' ovens, ensuring meals were cooked to the correct temperature and, during monthly stocktaking, recording figures into relevant sheets, as well as receiving and checking deliveries from supplier. Picker packer work also involved making up tea time snack bags at weekends and placing them into cool bags for the delivery staff. Driving work involved completing vehicle checks, carrying out monitoring and recording temperatures of meals and driving

to addresses in Havering, or Barking and Dagenham, to deliver cooked meals to the Service's clients. The drivers also completed paperwork and checked on the welfare of clients.

4 Mrs Weaver told the Tribunal that, in 2012, she began undertaking picker packer work, because of continuous long term sickness and maternity leave. She undertook this work on, both, weekdays and weekends.

5 On 2 December 2015 Mrs Weaver was issued with an amendment to her contract as an existing employee. The amendment said that Mrs Weaver was employed on a casual contract as a picker packer from 1 December 2015, page 512. The amendment document simply recorded Mrs Weaver's details and the fact that she has a casual contract as a picker packer. The boxes in the form recording, "Hours per Week," and, "Days per Week," were left blank. The box in the form recording, "Contract Status," said, "Change of Role."

6 Mrs Weaver said that she worked as a picker packer, on a regular basis, for a number of years, along with Mrs Batchelor. Mrs Weaver also worked additional hours as a delivery driver at weekends, to cover sickness, annual leave and other staff absence. She said that she worked an extra 6.5 hours a week, on average, as a delivery driver and 15 hours a week as a packer. Ms Weaver said that she was asked to do additional hours by managers.

7 In 2014 the Respondents held a meeting to discuss absence and additional packing work. After this meeting, the Respondents decided to introduce an overtime sheet, so that people could indicate when they were available for work as a picker packers or drivers.

8 In 2015 the Respondent started to allocate the overtime work to permanent staff, rather than casual staff. When Mrs Weaver worked additional hours, she would complete a time sheet, which would be signed by a manager. The time sheet would record that the Claimant had worked "additional hours." The Claimant was told by managers not to record the additional hours as overtime. When Mrs Weaver was made redundant, the Respondent told her that her redundancy pay would be calculated on the basis of the hours set out in her letter of appointment as a driver.

9 The Respondent also announced that employees who were employed on casual contracts would receive redundancy payments, calculated on the number of the hours they worked.

10 Mrs Weaver agreed, in evidence, that the additional hours that she worked were not compulsory; she had a choice as to whether she worked them.

<u>Mr Cowen</u>

11 Mr Cowen was employed by the Respondent from 16 May 2009 as a part time Meals on Wheels driver. His letter of appointment dated 9 June 2009 states, "Your normal hours of duty as a part-time employee will not normally exceed 6.5 per week. You will be required to work 3.25 hours on Saturday and Sunday each week. It may be necessary to

vary the days and/or hours on occasions having regard to the needs of the service and any variation to this working pattern will be agreed in advance with your line manager." Page 308 – 310.

12 Mr Cowen told the Tribunal that, from 2010, he worked on Mondays and Tuesdays as a driver, covering driver shortfall on a particular route. Over a period of time, he accepted that working the additional hours became part of his normal working week.

13 After overtime sign up sheets were introduced in 2014, Mr Cowen did record, on a weekly basis, that he was available for work on Monday and Tuesday. However, he had, in fact, been working Monday and Tuesday regularly before the introduction of the sign up sheets.

14 Mr Cowen told the Tribunal that he would only tell his managers if he was not available to work on Mondays and Tuesdays, but that the only times when he did not work on Mondays and Tuesdays were when he had requested annual leave. He said that managers assumed that he would work on Mondays and Tuesdays until the closure of the service in 2016. Mr Cowen said that there was never an occasion on which the Respondent said to him that he was not required to work on Mondays and Tuesdays.

15 Mr Cowen agreed, in cross-examination, that he was not obliged to work the hours, but, later, he said that this operated in the same way as if he took annual leave. He said that it never happened that managers told him that he was not required to work on Mondays and Tuesdays. Mr Cowen said that his contract was for weekend work, but that he committed himself to work Mondays and Tuesdays.

Mrs Lall

16 Mrs Lall was employed by the Respondent from January 2000 as a cook in the Respondent's catering department, on a casual basis. A letter of appointment dated 12 March 2002 confirmed that she was employed as a casual cook, page 408.

17 Shortly after starting work as a cook, the Respondent's central staffing department asked Mrs Lall if she could help the Meals on Wheels Service. Thereafter, Mrs Lall started to work for the Meals and Wheels Service as a driver on a continuous basis and did not return to work as a cook.

18 Mrs Lall was later appointed as a permanent employee. On 26 May 2005 the Respondent wrote to Mrs Lall, saying that she had been appointed as a Home Delivery Service Driver from 3 May 2005. The letter of appointment said, "Your hours of work is 6 ½ worked 3 ¼ per day over 2 days per week (sic) ", page 410.

19 Mrs Lall told the Tribunal that, in early 2000, she began doing picker packer work as a causal member of staff, covering annual leave, sick leave or shortage of staff. Mrs Lall said that sometimes there would be a shortage of drivers and sometimes there would be a shortage of picker packers. Mrs Lall said that people would sign up to show they were available to do additional hours. She agreed, in cross-examination, that management could not tell employees that they had to do the work. Mrs Lall agreed that, if more workers signed up as being available to do the additional hours than were required,

then management had a choice as to who they would pick to work.

20 There were a number of changes to the contracted hours which Mrs Lall worked as a driver. On 28 August 2009, the Respondent wrote to Mrs Lall, saying that her hours of work as a Meals on Wheels Driver would be 11.37 hours per week, p 412. On 12 February 2013, the Respondent wrote to the Claimant saying that her normal hours of work as a Meals on Wheels Driver were 9.7 hours, p 413. On 13 June 2013 the Respondent wrote to Mrs Lall, saying that it had been agreed that from 2 August 2012 the Claimant had a revised working pattern in her existing post of Meals on Wheels Driver, of 9.75 hours per week pages 412 – 415.

Julie Batchelor

21 Julie Batchelor was employed as a Home Delivery Service Driver by the Respondent from 9 July 2007, page 213. Her letter of appointment said she had been appointed as a Home Delivery Service Driver. The letter said, “Your hours of work are 13 worked 3 ¼ per day over 4 days per week”.

22 Mrs Batchelor told the Tribunal that, in 2007, she began doing picker packer work, because of long term sickness and she was asked to provided cover for this work on a regular basis. Mr Batchelor told the Tribunal that she was also asked to work additional hours as a driver. Mrs Batchelor had a week day contract and a weekend contract as a driver and her contracted hours added up to 19.5 in her driver role, page 260. She was also paid as a picker packer, although she had no contracted hours in that role. Her pay slips recorded her pay as “Casual HDS Driver”, “Cook” and “Picker Packer” separately. The pay slips recorded that Mrs Bachelor did have contracted hours as a Driver, but as a Picker Packer, her contracted hours were recorded as “0”, page 261.

Lorraine O’Riordan

23 Lorraine O’Riordan was employed by the Respondent as a Home Delivery Service Driver on a casual basis from 2003. On 8 April 2009 the Respondent wrote to Ms O’Riordan, confirming that she was employed as a part-time Meals on Wheels Driver, with effect from 6 April 2009. The letter said, “Your normal hours of duty as a part-time employee will not normally exceed 6.5 per week. You will be required to work 3 hours and 15 minutes on Saturday and Sunday each week”, pp 469 – 471. Ms O’Riordan told the Tribunal that she also worked as a picker packer in the mornings. She said that a colleague had gone off work on long term sickness, a manager had asked Ms O’Riordan whether she would like to do the picker packer work and she had said yes. Ms O’Riordan told the Tribunal that she covered exactly the shift the person had worked previously, from 8.30am to 11.00am, three to four days a week. Ms O’Riordan told the Tribunal that she was given a redundancy payment which covered those hours as picker packer.

24 Ms O’Riordan told the Tribunal she was given separate redundancy payments for her picker packer casual contract, page 475 and her driver contract, page 477. She told the Tribunal, however, that she worked additional hours, both as a picker packer and as a driver, but was not paid a redundancy payment which reflected those additional hours. She said that she signed on the sheets on a regular basis for both packing and driving. She signed separate sheets for both.

Natalie Lassman

25 Ms Lassman was appointed as a Meals on Wheels Driver (Weekends and Bank Holidays) from 26 November 2011, page 436. Her letter of appointment said:

> "Your normal hours of duty as a part-time employee will not normally exceed 6.5 hours per week. You will be required to work 3 hours and 15 minutes on Saturday and Sunday of each week and submit time sheets for bank holidays worked. It may be necessary to vary the hours on occasions having regard to the needs of the service and any variation to this working pattern will be agreed in advance with her line manager."

26 Ms Lassman told the Tribunal that her contract was for weekend driving work. She said that she was always requested to do additional hours during weekdays, in addition to her normal contracted days, by her managers. Ms Lassman said that, once she had worked the additional hours, she would complete a time sheet to be signed by a manager. She worked approximately an extra 10 – 13 hours, every week, on average. She said that she was claiming for additional hours as a driver. The claim was for hours she worked as a driver in the week. Ms Lassman said that she had a picker packer contract for weekends and a driver contract for weekends. She said that she did not have a contract for her driver role in the week.

Michelle Webster

27 Michelle Webster began working for the Respondent's Meals on Wheels Service in October 2008. Mrs Webster told the Tribunal that she was employed as a driver, for 6.5 hours each weekend. From the documents, it appears that she was given a contract for the post of picker packer from 5 December 2009, page 548. The contract stated that Ms Webster's normal hours of work as a picker packer would not normally exceed 6 per week. Mrs Webster told the Tribunal that, in the end, she was the only contracted picker packer.

28 Mrs Webster told the Tribunal that she was always requested to work additional work by management, who would say that they were desperate and needed the work to be covered. She said that the Meals of Wheels Service could not have operated if the weekend staff had not also worked during the week.

Amanda Kelly

29 Amanda Kelly was employed by the Respondent as a driver from 16 April 2011. Her contract stated that her normal hours of work as a part time employee would not normally exceed 6.5 hours per week.

30 In 2014 Ms Kelly started undertaking picker packer work, when a member of staff went off work. Ms Kelly told the ET that management asked her to cover the hours of the ill staff member and Ms Kelly agreed. She was also asked to work additional hours by management. Ms Kelly asked to be given a contract to reflect the additional hours she was working but she was told that she did not need one.

General Contractual Terms

31 The parties agreed that the Claimants contracts of employment were comprised of their letters of appointment for their permanent roles. The relevant parts of the National Agreement on Pay and Conditions of Service (The Green Book), pages 668 – 672 and a contractual Organisational Change and Redundancy Policy and Procedure, pages 578 – 632. The contractual Redundancy Policy states that redundancy payments are calculated on the same basis as statutory redundancy pay, with the exception that an actual week's pay is used (i.e. the statutory maximum weeks pay is not applied).

32 Two of the Claimants, Mrs Weaver and Batchelor, had letters of appointment which merely stated that their hours of work were: 13, in the case of Mrs Batchelor, page 213; and 16 ¼, in the case of Mrs Weaver, page 507. All other Claimants had letters of appointment which said, "Your normal hours of duty as a part-time employee will not normally exceed … per week." In most of the letters, this clause was followed by, "… you will be required to work "x" hours per day on "y" days each week."

33 All the letters of appointment included the following provision, "It may be necessary to vary your days and/or hours on occasions having regard to the needs of the service and any variation to this working pattern will be agreed in advance with your line manager."

34 All the Claimants told the Tribunal that they regularly worked in excess of the hours set out in their contracts of employment. They told the Tribunal that they agreed to work those hours.

35 It was agreed between the parties that, when the Meals on Wheels Service was discontinued, the Claimants, who had contracts which stated their hours of work, were given redundancy payments calculated on the basis of the hours set out in their contracts of employment.

36 The parties agreed that, during the redundancy process, the Respondent announced that it would make redundancy payments to the casual employees and would not seek to argue that they were not employees and not entitled to redundancy payments. The Respondent made redundancy payments to employees who had casual contracts calculated using the average of their hours over the 12 weeks prior to the calculation date. As a result, those "casual" employees potentially ended up receiving more generous redundancy payments than the Claimants who had "permanent" contracts.

37 It is not in dispute that, over many years, all the Claimants worked significantly more hours than the number of hours indicated in their letters of appointment. Mr Hughes, the Respondent's witness, accepted in evidence that the hours worked weekly by the permanent employees normally exceeded the number of hours in their contracts.

38 A number of the employees asked to amend their contractual terms to reflect the fact that they were working additional hours. Ms Kelly asked to have a contract which reflected the additional hours that she was working. Mr Hughes did not dispute, in evidence, that he told her that this was not necessary. Ms Webster told the Tribunal that, when she asked to be provided with an additional contract for the additional hours she

worked, her manager refused to do this.

39 In 2015 the Respondent placed an advert for casual delivery drivers, page 100. Mrs Weaver asked her manager, Mr Hughes, if she should apply. She told the Tribunal that Mr Hughes said that she should not, because she already had a Driver contract and would always take priority over casual staff.

40 The Claimants were always told to complete the time sheets recording the additional hours as "additional hours," but not overtime. This is because "overtime" had a particular meaning under the Claimants' terms and conditions. Overtime was paid at premium rates, which varied depending on the days and times when overtime was worked. Additional hours worked during ordinary working days were not "overtime" according to the standard terms and conditions.

41 The parties agreed that paragraph 3.53 of the Respondent's Organisational Change and Redundancy Policy was incorporated as a term of the Claimants contracts of employment. It was agreed that the statutory approach to calculating redundancy was incorporated into the Claimants contracts.

42 The parties agreed that the questions for the Tribunal were:

(i) Did the Claimants have normal working hours within the meaning of Part XIV Chapter 2 Employment Rights Act 1996?

(ii) If they did, were the normal working hours those set out in the contractual documentation?

(iii) If the normal working hours had not been varied should any additional hours that the Claimants worked be treated as overtime for the purposes of the statutory approach calculating redundancy pay.

43 The Claimants contended that, if they did have normal working hours, the hours were not those specified in the contractual documentation.

44 I raised, during closing submissions, the question of the Respondent's agreement to pay workers employed on casual contracts redundancy payments calculated on the basis of average hours worked in the previous 12 weeks. I asked whether this agreement was relevant to the Claimants' cases. I asked the parties whether the Claimants' casual hours had been treated in this way. The Respondent argued that the Claimants' casual hours should not be taken into account in calculating their redundancy payments, because casual workers had no normal working hours, whereas the Claimant did. The Respondents said that normal working hours should be used to calculate redundancy payments. Only where there were no normal working hours should an average of hours worked in the previous 12 weeks be used. In the case of the Claimants, therefore, their normal working hours should be used for the redundancy payment calculation, not any additional casual hours worked.

Relevant Law

45 *s162 ERA 1996* provides for calculation of redundancy payments,

“(1) The amount of a redundancy payment shall be calculated by—

(a) determining the period, ending with the relevant date, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means—

(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for each year of employment not within paragraph (a) or (b).

46 A week's pay for statutory purposes, is defined in *ERA 1996 ss 220–229*.

47 By *s221*,

“ (1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week”.

48 *s234 ERA* determines whether the employee does, or does not, have normal working hours. The Court of Appeal in *Bamsey v Albon Engineering and Manufacturing plc [2004]* IRLR 457 held that *s 234* applies to the definition of a week's pay as incorporated into the Working Time Regulations for the purpose of calculating the rate of statutory holiday pay, albeit that this was later held to be incompatible with the requirements of the Working Time Directive as to holiday pay.

49 By *s234*, “(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case.

(2) Subject to subsection (3), the normal working hours in such a case are the

fixed number of hours".

50 *Sub-s (2)* enacts the general principle that the only exception (ie where overtime can be counted) as part of normal working hours is where the overtime is obligatory on both sides, *Tarmac Roadstone Holdings Ltd v Peacock* [1973] IRLR 157, [1973] ICR 273, CA.

51 Overtime hours can be included as normal working hours if they are part of the fixed minimum working hours. This will be so if, but only if, they are compulsory (for the employee) and guaranteed (by the employer): *Tarmac Roadstone Holdings Ltd v Peacock* [1973] ICR 273, [1973] 2 All ER 485, CA; *Gascol Conversions Ltd v Mercer* [1974] IRLR 155, [1974] ICR 420, CA. In *Gascol* Lord Denning MR, said, "Redundancy payments are based on 'normal working hours'. This Court recently considered how these are to be calculated. It was in the case of *Tarmac Roadstone Holdings Ltd v Peacock* [1973] IRLR 157, (1973) 1 WLR 594. It shows this: if a man is obliged to work a fixed number of hours overtime and his employers are bound to provide him with that fixed amount of overtime, then those fixed hours of overtime are added to his basic hours. The total becomes his 'normal working hours'. It is obligatory on both sides. The employers have to provide it and the man to do it. It becomes part of his work and part of his 'normal working hours'. But in no other case does overtime count as part of his 'normal working hours'. It may be voluntary overtime on both sides. It may be voluntary on the employer's side but compulsory on the man's side. That is to say, he is bound to do the overtime if required, but the employer is not bound to provide it. In neither of those cases does the overtime count as part of his 'normal working hours'. It only counts when it is obligatory on both sides. That is, when it is 'guaranteed overtime'".

52 In *Refrigeration Norwest (Chester) Ltd v Unwin* UKEAT/0394/04/RN the EAT said at paragraph [6], ".. the expression "normal working hours" in the redundancy legislation has acquired a technical meaning. In *Tarmac Roadstone Ltd v Peacock* [1973] I WLR 594 the Court of Appeal held that normal working hours means hours which are fixed and obligatory on both sides."

53 In *Beattie v Age Concern* UKEAT/0580/06/LA the EAT construed the Claimant's contract in order to calculate the Claimant's contractual entitlement to sick pay. The contract, in that case, provided that hours of work were "a guaranteed minimum of 15 hours per week, hours flexible to be agreed but will primarily involve weekend, evening and Bank Holiday work." The EAT decided that the contractual wording left open the question of what the hours of work would actually be. The EAT decided that the contract did, ".. not say how many hours will normally be expected to be worked in order to fulfil the job duties."

54 In *Johnson v Unisys Limited* [2001] ICR 480, the House of Lords held that implied terms can supplement the express terms of a contract, but cannot contradict them.

55 Terms may be implied into contracts if the Tribunal can conclude that it would have been the intention of the parties to include it in the contract. The Tribunal looks at the presumed intention of the parties at the time the contract was made. A term may be implied to give business efficacy to a contract, where the implied term is necessary to make the whole agreement workable, *Scally v Southern Health and Social Services Board* [1991] IRLR 522. Terms may also be implied if it is the custom and practice to adopt such

terms in a particular industry or by the particular employer, if the terms are "reasonable, notorious and certain", *Devonald v Rosser and Sons* [1906] 2 KB 728, CA. Employees may be contractually entitled to benefits such as enhanced redundancy payments through custom and practice, *Albion Automotive Ltd v Walker* [2002] EWCA Civ 946. A single incident will not be enough to establish an implied term on the basis of custom and practice, *Waine v Oliver (plant Hire) Ltd* [1977] IRLR 434.

56 Terms may also be implied by the conduct of the parties, so that the Tribunal concludes, from the way in which the contact has been performed, that the parties agreed on a particular term, even though they did not expressly state it.

57 Lastly, a term may be implied pursuant to the "officious bystander" test: a term is implied where it is so obvious that the term goes without saying. A term is implied where "if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, "oh, of course", *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206.

58 A contract can be varied by agreement between the parties. Collective agreements with a Trade Union or staff association can vary an employee's contract where there is an express or implied term in the employee's contract incorporating agreements made between the employer and the union. An implied term incorporating a collective agreement will arise where there is a custom or practice that collective agreements are incorporated, or that it is obvious that they must be.

59 A contract can also be varied by express or other implied agreement. Implied agreement to a change in terms and conditions may be found where the change in terms has immediate practical effect and the employee continues to perform the contract, *Jones v Associated Tunnelling Co Limited* [1981] IRLR 477, *Lee v GEC Plessey Telecommunications [1993] IRLR 383*. However in, *Selectron Scotland v Roper* [2004] IRLR 4, the EAT held that employees should not be found to have accepted by conduct new redundancy terms replacing the BT terms because they continued to work without any complaint and without raising any objection. Where the employer purports unilaterally to change terms of the contract which do not immediately impinge on the employee at all, such as redundancy terms, the fact that the employee continues to work knowing that the employer is asserting that this is the term for compensation for redundancies, does not mean that the employee can be taken to have accepted that variation in the contract. In such a case, the employee's conduct, by continuing to work, is not only referable to his having accepted the new terms imposed by the employer. Where the alleged variation does not require any response from the employee at all, if the employee does nothing, his conduct is entirely consistent with the original contract continuing. Accordingly, he cannot be taken to have accepted the variation by conduct.

60 In *Quinn v Calder Industrial Materials Ltd* [1996] IRLR 126 the EAT considered a case where a group of companies introduced a policy document containing guidelines on additional redundancy payments for group companies. The introduction was unilateral and not the product of negotiation. The enhanced redundancy terms were applied in four instances between 1987 and 1994 but not automatically—a decision by senior management was a feature on each occasion. In *Duke v Reliance Systems* [1982] IRLR 347, EAT, Brown-Wilkinson J said that regard should be had to whether the relevant policy has been drawn to the attention of the employees by the employer or has been

followed without exception for a substantial period. On the facts of these two cases, these requirements were not satisfied.

61 However, in *Albion Automotive Ltd v Walker* ([2002] EWCA Civ 946, the Court of Appeal held that, where enhanced redundancy terms had initially been agreed with a union and then applied on six occasions automatically, had been viewed by the workforce as an expectation and had been communicated by the employer in a manner consistent with an entitlement, the redundancy terms were legally enforceable. In LJ Peter Gibson said in *Albion Automotive*;

62 **"**[15] Mr Brennan submitted that in the light of *Duke* and *Quinn* there are likely to be a number of factors important in assessing whether a policy originally produced by management unilaterally has acquired contractual status. He suggests that in the present case the relevant factors included:

(a) whether the policy was drawn to the attention of employees;

(b) whether it was followed without exception for a substantial period;

(c) the number of occasions on which it was followed;

(d) whether payments were made automatically;

(e) whether the nature of communication of the policy supported the inference that the employers intended to be contractually bound;

(f) whether the policy was adopted by agreement;

(g) whether employees had a reasonable expectation that the enhanced payment would be made;

(h) whether terms were incorporated in a written agreement;

(i) whether the terms were consistently applied.

… [18] I have set out Mr Brennan's helpful arguments in some detail because I am in agreement with them".

Discussion and Decision

63 Applying the law to the facts, I have concluded that:

63.1 The Claimants were employed as drivers and that their normal hours of work as drivers were those set out in their written contracts of employment – save for Mr Cowen, whose normal hours of work as a driver were varied by conduct and or custom and practice.

63.2 The Claimants (apart from Mr Cowen) worked additional hours as drivers, but these hours were not fixed and obligatory on both sides. The Claimants agreed that they could not be required to work these additional hours as drivers, and that they worked these hours voluntarily.

63.3 The Claimants (apart from Mr Cowen) were, therefore, not entitled to be paid redundancy payments taking into account the additional hours they worked beyond the hours stated in their contracts of employment, for their driver work.

63.4 Apart from Mr Cowen, the Claimants driver contracts were not varied to include a term that they work additional hours as drivers, nor were their driver contracts varied so that they had no normal hours.

63.5 Mr Cowen's contract was impliedly varied by conduct and/or custom and practice so that his normal working hours as a driver included the additional hours he worked as a driver on Monday and Tuesday each week.

63.6 Insofar as the Respondent failed to pay a redundancy payment to Mr Cowen which included his additional hours on Monday and Tuesday as part of his normal hours for the calculation of a week's pay, the Respondent failed to pay Mr Cowen his correct redundancy pay.

63.7 However, the Respondent also asked the Claimants, and the Claimants agreed, to work as picker packers. The Claimants were not employed as drivers when they did the picker packer work.

63.8 There was evidence that the picker packer work was treated separately on payslips, for example, Mrs Bachelor's payslip p 261. Mrs Bachelor was paid separately for her work as a driver, her work as a cook, and her work as a picker packer. Mrs Weaver was given an "Amendment" to her contract which said that she was employed as a casual picker packer. The box in the form recording, "Contract Status," said, "Change of Role."

63.9 When the Claimants were working as picker packers, apart from Mrs Webster, they did not have normal hours of work. The boxes in the Amendment to Mrs Weaver's contract, "Hours per Week," and, "Days per Week," for her picker packer role, were left blank. On Mrs Bachelor's pay slip, her contracted hours as a picker packer were recorded as "0", page 261.

63.10 Mrs Webster did have normal hours of work as a picker packer because she had a written contract setting out her hours of work as a picker packer – 6 hours per week.

63.11 The other Claimants worked various hours as picker packers, which were not fixed.

63.12 As with other casual employees, the Claimants were entitled to

redundancy payments when they were dismissed from their picker packer roles, which were separate from their driver roles. Apart from Mrs Webster, they did not have normal hours in their picker packer roles and their redundancy payments for their picker packer roles should, therefore, have been paid based on their earnings in their picker packer roles for the previous 12 weeks.

64 On the facts of this case, I decided that the Claimants were employed as drivers by the Respondent, but that the Respondent also asked the Claimants, and the Claimants agreed, to work as picker packers.

65 The law relating to the calculation of redundancy payments is clear. Redundancy payments are calculated using the employee's week's pay *s162 ERA 1996.* The definition of a week's pay is contained in *ERA 1996 ss 220–229*. By *s221*,

" (1) This section and sections 222 and 223 apply where there are normal working hours for the employee when employed under the contract of employment in force on the calculation date.

(2) Subject to section 222, if the employee's remuneration for employment in normal working hours (whether by the hour or week or other period) does not vary with the amount of work done in the period, the amount of a week's pay is the amount which is payable by the employer under the contract of employment in force on the calculation date if the employee works throughout his normal working hours in a week".

66 By *s234*, "(1) Where an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week or other period, there are for the purposes of this Act normal working hours in his case. (2) Subject to subsection (3), the normal working hours in such a case are the fixed number of hours".

67 *S234(2)* enacts the general principle that overtime can only be counted as part of normal working hours where the overtime is obligatory on both sides, *Tarmac Roadstone Holdings Ltd v Peacock* [1973] IRLR 157, [1973] ICR 273, CA.

68 Overtime hours can be included as normal working hours if they are part of the fixed minimum working hours. This will be so if, but only if, they are compulsory (for the employee) and guaranteed (by the employer): *Tarmac Roadstone Holdings Ltd v Peacock* [1973] ICR 273, [1973] 2 All ER 485, CA; *Gascol Conversions Ltd v Mercer* [1974] IRLR 155, [1974] ICR 420, CA.

69 With regard to the Claimants' roles as drivers, then (save for Mr Cowen, whose case I shall deal with below), the Claimants had normal working hours which were the fixed number of hours set out in their contracts of employment for their driver roles. On the facts, the additional hours the Claimants worked as drivers were not obligatory; the Claimants signed sheets to indicate when they were available for additional hours each week. They agreed, in evidence, that they were not required to work the additional hours. There was no obligation on the Respondent to provide a specified number of additional hours to the Claimants in their driver roles.

70 Those additional hours were not compulsory (for the employee) and guaranteed (by the employer). They could not, therefore, be included in the Claimants' normal working hours for the purposes of calculation of a week's pay, in their redundancy payments from their driver roles.

71 I also decided that the Claimants' contracts (save for Mr Cowen's) had not been varied, expressly or impliedly, to change the normal working hours.

72 I decided that Mr Cowen was asked by the Respondent, and he agreed, to work on Mondays and Tuesdays as a driver, covering driver shortfall on a particular route. On the facts, I decided that, over a period of time, Mr Cowen accepted that working the additional hours became part of his normal working week. On the facts, I decided that the Respondent required Mr Cowen to work these days; he did so without change between 2010 and 2014, and without being required to indicate specific agreement to working these hours. On both sides, Mr Cowen's and the Respondent's, the Respondent expected Mr Cowen to work the hours and Mr Cowen knew that he was required to work the hours, and specifically to inform the Respondent when he could not. While Mr Cowen started singing availability sheets in 2014, I found that his contract had already been impliedly varied, by conduct and/or by custom and practice, before 2014, so that his normal working hours as a driver included his work on Mondays and Tuesdays as a driver.

73 I found that there was an implied variation to Mr Cowen's working hours, to include his Monday and Tuesday hours as a driver, as part of his normal working hours, before 2014, because: Mr Cowen worked those hours, weekly, without exception (apart from when he took agreed holidays) for at least 3 years; both Mr Cowen and the Respondent expected him to work those hours and Mr Cowen did not specifically indicate his willingness to work the additional hours from one week to the next, before 2014; the hours were clear and consistent and did not change from week to week; even after 2014 they did not change.

74 Insofar as the Respondent failed to pay a redundancy payment to Mr Cowen which included his additional hours on Monday and Tuesday as part of his normal hours for the calculation of a week's pay, the Respondent failed to pay Mr Cowen his correct redundancy pay.

75 I did not find that the other Claimants' driver contracts were impliedly varied to change their normal hours. There was no equivalent regular pattern worked by the other Claimants, for their additional driver hours. The other Claimants agreed that they were not required to work the additional driver hours. I did not hear evidence that the other Claimants worked as drivers on particulars days, on an unchanging pattern, without exception, over a number of years.

76 I did not find that those Claimants' contracts failed to reflect the reality of the agreement between the Respondent and those Claimants. Those Claimants' additional hours were worked on a voluntary basis, they all acknowledged that there was no compulsion on them to work the additional hours.

77 However, I also decided that the Claimants were also employed as picker packers. They were not employed as drivers when they did the picker packer work.

78 There was evidence that the picker packer work was treated separately on payslips; for example, Mrs Bachelor's payslip p 261. Mrs Bachelor was paid separately for her work as a driver, her work as a cook, and her work as a picker packer. Mrs Weaver was given an "Amendment" to her contract which said that she was employed as a casual picker packer. The box in the form recording, "Contract Status," said, "Change of Role."

79 When the Claimants were working as picker packers, they did not have normal hours of work, apart from Mrs Webster who did have a contract setting out normal working hours.

80 The boxes in the Amendment to Mrs Weaver's contract, "Hours per Week," and, "Days per Week," for her picker packer role, were left blank. On Mrs Bachelor's pay slip, her contracted hours as a picker packer were recorded as "0", page 261.

81 The other Claimants did not have regular picker packer hours. I concluded that the Claimants also were employed as picker packers, but that this was not pursuant to the contract of employment as drivers. They were employed on a "casual" basis to do the picker packer work, with no normal hours, like other wholly "casual" employees.

82 I therefore concluded that the Claimants were entitled to redundancy payments from their separate picker packer roles, which were also made redundant on the closure of the Meals on Wheels Service. The picker packer redundancy payments should have been calculated on the basis of actual number of hours they had worked as picker packers during the previous 12 weeks, pursuant to these casual picker packer contracts with no normal hours.

83 Insofar as the Respondent did not make redundancy payments to the Claimants for their picker packer work, separately from their driver work, calculated on the basis that they did not have normal hours of work for their picker packer roles, the Respondent failed to pay the Claimants redundancy payments which they were due.

84 A remedy hearing will be listed, for 1 day.

ORDER

85 The parties shall write to the Employment Tribunal by 4pm on 16 August 2017, giving their dates for avoid for a 1 day remedy hearing.

Employment Judge Brown

1 August 2017