Appeal No. UKEAT/0276/14/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 15 December 2014

Before

HIS HONOUR JUDGE HAND QC

MS P TATLOW

MISS S M WILSON CBE

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(1) MRS C J NORMAN
(2) MR R DOUGLAS
APPELLANTS

NATIONAL AUDIT OFFICE
RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellants	MR CHRISTOPHER EDWARDS (of Counsel) Instructed by: Thompsons Solicitors Congress House Great Russell Street London WC1B 3LW
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SUMMARY

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

The Employment Tribunal had erred in concluding that a term in the letters of appointment of the Claimants enabled the employer to vary the contract unilaterally; the term was unclear and probably ambiguous - **Wandsworth London Borough Council v D'Silva** [1998] IRLR 193 and **Security and Facilities Division v Hayes** [2001] IRLR 81 considered and **Bateman v Asda Stores Limited** [2010] IRLR 370 distinguished. Alternatively, even if the term fell to be construed together with the HR manual and even if that provided for variation in specific circumstances, those circumstances had not been relied upon by the employer when purporting to make the variation and had not been advanced at the Employment Tribunal. Appeal allowed and particulars substituted pursuant to section 12 of the **Employment Rights Act 1996**.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal against the Judgment of Employment Judge Sharma, sitting at London (Central) on 13 February 2014, the Written Reasons having been sent to the parties on 25 April 2014. By those reasons she rejected the Appellant's contention in a matter that came before the Employment Tribunal as a reference pursuant to sections 11 and 12 of the **Employment Rights Act 1996** ("the Act"). Today the Appellants have been represented by Mr Edwards of Counsel and the Respondent by Miss Motraghi of Counsel, both of whom also appeared at the Employment Tribunal. This Tribunal is indebted to them for their clear, concise and helpful submissions.

2. The Appellants, the Claimants below, submitted ET1 forms complaining of breach of contract (see paragraph 5.2 of Mrs Norman's claim at pages 6 and 7 of the appeal bundle). In those forms the claims were described as "test cases", and we understand that another 80 or so employees are also affected. The breach of contract comprises unilateral and non-consensual variations to the contracts of employment. These relate to the reduction of the extent of paid sick leave and a reduction in privilege leave.

3. In the Grounds of Resistance attached to the Respondent's ET3 form, it was asserted that the Employment Tribunal did not have jurisdiction to entertain a breach of contract claim and that there should be a strike out hearing. The Appellants and their colleagues enjoy the support of their trade union, the Public and Commercial Services Union ("the PCS"), and in a letter from their trade union representative, Mr Khakhria, dated 28 June 2013, under the heading "Details of claim" the claims are described as "section 11 ERA claims" and the Employment

Tribunal was asked to substitute the wording that appears under the heading "Details of claim" for the wording at paragraph 5.2 of the ET1 form.

4. Paragraph 9, under the heading "Details of claim", seeks a remedy described in the following terms:

> **"The Claimants seek a declaration, in the light of the inconsistent statements made as set out above that they are entitled to the following particulars of employment:**
>
> > **(1) Sick pay at the rate of six months full pay and six months half pay, on completing six months service;**
> >
> > **(2) An entitlement to two full privilege days and one half privilege day, to be taken on set days, in addition to the usual bank holidays and annual leave."**

In other words, by this clarification the Appellants were seeking to assert that their existing terms and conditions relating to paid sick leave and privilege holidays remain the same and had not been affected by change.

5. That substitution having been made, the Respondent, very sensibly, did not pursue the threatened strike out hearing and the matter proceeded to a hearing before Employment Judge Sharma and she determined it pursuant to section 12 of the **Act**. In the Judgment itself (see pages 1 and 2 of the appeal bundle) Employment Judge Sharma makes a declaration:

> **"… pursuant to Section 12, Employment Rights Act 1996, that the following particulars are incorporated into the Claimants' contracts of employment …"**

6. She then sets out the particulars which she declared to be part of their contract of employment. These can be summarised by saying that privilege leave is stated to be two days with effect from 1 November 2013, the other half day having been "brought out with a one off payment made to the Claimants in their April 2013 pay", and sick pay is stated to be payable at the full rate of pay for five months in any 12-month period and thereafter payable at half the rate of pay for five months in any 12-month period, all subject to a maximum of ten months'

pay for sickness absence in any four-year period. Also part of her declaration was, in effect, a statement as to transitional provisions whereby existing staff would remain on the six-month paid sick leave entitlement until 2017.

7. In order to understand how this declaration fits into the statutory regime provided for by sections 11 and 12 of the **Act**, we need to set out a little of the background.

The Facts as found by the Tribunal

8. Each Appellant received a letter of appointment before commencing work for the Respondent. Each letter (see pages 63 to 70 of the appeal bundle) contained the following at clause 2:

> **"The following paragraphs summarise the main current terms and conditions of your employment in the NAO. Detailed particulars of conditions of service are to be found in the relevant sections of the HR Manual of the NAO. They are subject to amendment; any significant changes affecting staff in general will be notified by Management Circulars (MCs), Policy Circulars (PCs) or by General Orders (GOs), while changes affecting your particular terms and conditions will be notified separately to you. The HR Manual is available for reference on the NAO Intranet (Merlin) and in Human Resources (HR) at NAO Headquarters."**

9. I take this quotation from Mrs Norman's appointment letter. This dates from 2011, but Mr Douglas was appointed 5½ years earlier in 2005 and the last sentence of his clause 2 reads:

> **"Copies of the NAO Personnel Manual will be available for reference either at your work place or in Central HR, NAO Headquarters."**

Employment Judge Sharma noted this difference at paragraph 8 of the Judgment but no further mention is made of it. Plainly she did not regard it as a significant difference, and Counsel tell us that it was never suggested that anything turned on it.

10. Later in the letter under a subheading "Salary", there is clause 13, which reads as follows:

> **"The NAO reserves the right at any time during your employment or in any event on termination to deduct from salary any overpayments and/or monies owed to the NAO by you**

> **including but not limited to any excess holiday, outstanding loans, advances, expenses and the cost of repairing any damage or loss to the NAO's property caused by you but deductions will not be made from any sums or benefits due to you by virtue of your membership of the Principal Civil Service Pension Scheme."**

11. As Employment Judge Sharma records at paragraph 12 of her Judgment, at section 12.2(iii) of the HR manual, it states that the terms and conditions relating to privilege leave are two and a half days and relating to paid sick leave are six months' full pay followed by six months' half pay.

12. At paragraphs 12A to 19 of her Judgment, she explains the sequence of events from 2012 when the Respondent commenced a review of existing terms and conditions continuing until March and April 2013 when the Claimants were informed by letter and policy circular of the reductions in privilege leave to two days and the changes to sick pay by shortening the period of payment to five months.

13. One of those letters, that to Mr Douglas dated 27 May 2013, appears in the appeal bundle at pages 79 to 81. At paragraph 1 it informs the reader in the last sentence:

> **"In these circumstances we have decided to implement our pay offer and the changes to staff benefits without union support."**

It then goes on under several headings to give details of the course of events. In paragraph 3 it talks about the fact that the Respondent has always worked "extremely closely with the NAO branch of the PCS Union". It details later the course of the negotiations. It refers at paragraph 7 and paragraph 8 to the fact that there had been a strike but nevertheless negotiations had continued and it gives details of changes made both, no doubt, to the advantage of the Appellants and some, like privilege leave and paid sick pay, to their disadvantage. It is worth reading the conclusion at paragraph 9:

"We have taken the decision to proceed with implementing the 2013-14 pay award and changes in response to the NAO Branch's refusal to put this offer to its members. We are keen to implement our pay award in line with our agreed timetable. We are confident that the offer is fair and reasonable in the context of the wider environment in which we operate."

14. Although Employment Judge Sharma does not quote from the letter verbatim, at paragraph 15 of her Judgment she clearly recognised that the ultimate position was, despite extensive consultations and negotiations having taken place, the PCS had never consented to the changes that were now being imposed. She makes no express finding about consent or lack of consent at an individual level, but clearly the Appellants' whole case is based on the fact that they never gave their specific individual consent to the changes and, we assume, neither did any of the 80 or so others who are said to be affected. Although, we should observe that some may have since signed a document in connection with their acceptance of the compensation paid in respect of the alterations; but that is not part of this case and we are not concerned with it.

The HR Manual

15. It is clear that, during the course of the case, Employment Judge Sharma was referred to the NAO HR manual. This appears at pages 82 to 90 of the appeal bundle in its February 2012 iteration. In his Skeleton Argument, Mr Edwards submitted that the HR manual post-dated the letters of appointment of both Appellants. But during the course of the hearing, it was made clear by the Respondent and accepted by Mr Edwards that, at the time of appointment of Mr Douglas and Mrs Norman, there would have been an earlier version in force. It is now agreed that the wording of that earlier iteration was the same or so similar to that of the document we have in the appeal bundle as to make no difference, and so nothing any longer turns on that point.

16. I should make it clear that we do not have the full manual. We have a series of extracts from it. One of the extracts at page 83 relates to sickness absence and pay and sets out the general terms about paid sick leave. The extract at page 84 deals with public and privilege holidays. It sets out the position that obtained until the changes were imposed, namely that there were two-and-a-half privilege days. Both of these are, of course, examples of the cross-reference in clause 2 in the second sentence, i.e.:

> **"Detailed particulars of conditions of service are to be found in the relevant sections of the HR Manual of the NAO."**

17. From page 85 onwards in the appeal bundle, however, the HR manual is dealing in what is called chapter 17 with a sub-heading of "Communications and Staff Involvement". Chapter 17.1 sets out a policy statement and chapter 17.2 gives a summary of the topics that are covered in the following pages. It is a relatively long document, and we do not propose to take time reciting all of it. In our view it is clearly a collective bargain. Collective bargains are agreements between and employer and a trade union about mechanisms for consultation about and the negotiation of terms and conditions of employment. Chapter 17 encourages staff to join the National Audit Office branch of the PCS. The machinery by which union and employer proposed to operate is set out together with various statements about negotiation and consultation, union recognition and so on.

18. This is what is said about the negotiation and consultation machinery:

> **"The NAO consults and co-operates closely with the Trades Union Side (TUS) over staff matters and the development of personnel policy. Wherever possible, consultation and negotiation are taken forward on an informal basis.**
>
> **Both NAO management and the TU Side do, however, have the option to consult and negotiate through a Joint Negotiating and Consultative Committee (JNCC), supported through Sub-Committees.**
>
> **Such formal machinery is, however, used infrequently and is relevant only to issues of key concern/dispute between the two parties."**

19. Consistent with section 179 of the **Trade Union and Labour Relations (Consolidation) Act 1992**, it is stated that the agreement is not legally enforceable. The current law provides that any such collective bargaining agreement is not intended to be legally binding unless it is in writing and states that it is to be legally enforceable. This agreement contains the contrary clause, that is to say, it expresses that it is not a legally enforceable collection agreement and is binding in honour only.

20. It also says under the heading "Negotiation and consultation agreement":

> **"The provisions of this agreement shall in no way affect the rights and obligations in law of the C&AG [Controller and Auditor General] or any NAO employee, arising from any contract of employment between them."**

21. Much has been said about the harmonious nature of relations between the NAO and the PCS, and Miss Motraghi was at pains to point out that, until relatively recently, the relationship between employer and trade union had been very positive. At page 88, the following passage appears under the subheading "Settlement of disputes":

> **"Every effort will be made to resolve disputes between management and staff at the lowest level, but where this is not possible, the machinery of the JNCC may be established. Where there is failure to reach agreement on pay and other terms and conditions of staff, the matter may be referred to the Advisory Conciliation and Arbitration Service (ACAS) for conciliation or mediation. Either side may request this, but it requires the consent of both to be effected. Neither side will be bound by any resulting recommendation.**
>
> **Wherever possible, management and the TUS will try to reach agreement before implementing any changes which affect staff. Changes to working practises or terms and conditions will not be implemented whilst negotiations are taking place, or whilst the issue is under referral to ACAS, unless management considers this essential to the operation of the NAO."**

The Requirement for a Written Statement

22. By section 4 of the **Act**, where a written statement of particulars of employment given to an employee pursuant to section 1 of the **Act** is changed, the employer is required to give the employee affected "a written statement containing particulars of the change". Although Employment Judge Sharma does not articulate this, it seems to us that she has treated the letters

referred to at paragraph 18 of her Judgment and the policy circular referred to at paragraph 19 of her Judgment, as being "a written statement containing particulars of the change as defined by section 4", giving rise under section 11(2)(b) to a question:

> **"… as to the particulars which ought to have been included or referred to in the statement so as to comply with the requirements of this Part …"**

So the question was whether the change of particulars of:

> **"… terms and conditions relating to … entitlement to holidays … [and] … provision for sick pay (section 1(4)(d)(i) and (ii) of the Act) replaced the previous terms and conditions and now constituted the terms and conditions of employment or whether they had not been effective to do so."**

This, of course, depends on whether there had been a lawful unilateral variation on the part of the Respondent.

23. The Respondent contended at the Employment Tribunal that the contractual agreement between the parties included the right of the Respondent as one party to alter or vary the terms of the agreement irrespective as to whether the other party agreed to such an alteration or variation or not, i.e. a power or right of unilateral variation. No such right is to be found in any express wording of the letter of appointment and the only potential express wording is that quoted above from the settlement of disputes provision of chapter 17 of the HR manual.

24. The submission that was addressed to Employment Judge Sharma and found favour with her was that the words in the third sentence of clause 2 of the appointment letter, "They are subject to amendment", were, as a matter of construction, to be understood as indicating that a power of unilateral variation reposed in the Respondent, and when the employee signed to acknowledge acceptance of those terms, he or she agreed to be subject to that right of unilateral variation.

25. Employment Judge Sharma distilled the issue at paragraph 6 of her Judgment (see page 4 of the appeal bundle) as follows:

> **"The parties and the Tribunal agreed that the issue for determination was whether the Respondent was contractually entitled to vary the terms and conditions by virtue of clause 2 of the appointment letters of both Mrs Norman (pages 41-44) and Mr Douglas (pages 50-53) dated 25 July 2011 and 8 December 2005, respectively. …"**

The Case-Law

26. Employment Judge Sharma considered the Judgments of the Court of Appeal in the cases of **Wandsworth London Borough Council v D'Silva** [1998] IRLR 193 and **Security and Facilities Division v Hayes** [2001] IRLR 81 and also the Judgment of this Tribunal in **Bateman v Asda Stores Limited** [2010] IRLR 370. Having done so, she directed herself to adopt "an objective interpretation to clause 2" and in order to construe any wording as giving rise to a power of unilateral variation, she accepted it would have to be "very clear in its meaning" (see paragraphs 21 and 22 of the Judgment). In her view, clause 2 was clear in its meaning. It could not (see paragraph 23 of the Judgment):

> **"… mean anything but reserving for the Respondent the right to change the terms of an employee's contract of employment …"**

and that was so even though the wording said nothing about the employer reserving to itself the right to amend, something which she acknowledged distinguished the instant case from the decision of this Tribunal in **Bateman v Asda** where the words were:

> **"The company reserves the right to review, revise, amend or replace the content of this handbook …"**

Those words were decisive in that case in the interpretation of the contract as granting to the employer a right of universal variation.

27. In Employment Judge Sharma's view, the absence of any specific attribution of the power of amendment in any of the documents relevant to this contract was counterbalanced by the wording of clause 2 that comes after the semicolon, namely that changes would be notified by management circulars, et cetera, and that changes to the individual's particular terms and conditions would be separately notified to the individual. She regarded this as reinforced by the terms of the HR manual, saying at paragraphs 26 and 27 of her Judgment:

> **"26. The word "notified" was consistent with the Respondent's HR manual requiring the Respondent's [sic] to consult [Tribunal's emphasis] with the union. The manual did not specify that there was a requirement to agree changes.**
>
> **27. Further, it was only the Respondent who could issue Management [Circulars], Policy Circulars and General Orders. Further, it was only the Respondent who could notify the employees of changes to terms and conditions individually. Thus, clause 2 allowed only the Respondent to make changes."**

Therefore, she concluded at paragraph 29 that:

> **"… clause 2 could not be interpreted in any other way than meaning a reservation for the Respondent to unilaterally make changes."**

And she took the view that its clarity was not reduced by the absence of any express reservation of such a power because only the Respondent could issue notification by management circulars, policy circulars, letters to staff, et cetera (see paragraph 30).

28. She went on, however, to discuss the question as to whether the Respondent's right to make unilateral changes "was subject to the implied term of mutual trust and confidence" and "had to be exercised in such a way so as not to breach this implied term" (see paragraph 31 of the Judgment). She accepted that the right was subject to the implied term but it (the term) had not been breached because there had been "extensive negotiations" in "numerous meetings with the CPS" and when "agreement could not be reached, then the changes were notified to employees." Moreover, she regarded compensation for the loss of the half day of privilege leave as being more than generous than that initially proposed and took account of the

transitional provisions in respect of reduced sick pay for existing employees (see paragraphs 32 and 33 of the Judgment).

The Appellant's Case

29. Mr Edwards submitted that clear and unambiguous language must be used to create the right to vary a contract unilaterally. He relied upon paragraph 31 of the Judgment of Lord Woolf MR in the **Wandsworth** case. There Lord Woolf said this:

> **"The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort. In addition, the court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which that party is required to comply. If, therefore, the provisions of the code which the council were seeking to amend in this case were of a contractual nature, then they could well be capable of unilateral variation as the counsel contends. In relation to the provisions as to appeals the position would be likely to be different. To apply a power of unilateral variation to the rights which an employee is given under this part of the code could produce an unreasonable result and the courts in construing a contract of employment will seek to avoid such a result."**

30. He also pointed out that in the **Security and Facilities** case at paragraph 45 of the Judgment, Peter Gibson LJ had said something to a similar effect. We think it is better to quote all of paragraphs 44 to 46 of the Judgment in order to understand the significance of the passage at paragraph 45:

> **"44. It is a strong thing to imply a term into a contract of employment when that term allows the unilateral variation of the contract. That is all the more so when there are established means for reaching consensual variations to the contract through the Whitley Council procedures. No authority was cited to us in support of Mr Samek's submission; and it seems to me inherently improbable that the right to make a unilateral variation in the terms of the subsistence allowances was intended by the parties. I do not see how it satisfies the test of necessity for the implication of such a term.**
>
> **45. In *Alexander Macdonald v Lord Advocate*, an unreported decision given on 20 January 1999 by Lord Maclean in the Outer House of the Court of Session, the Forestry Commission unilaterally reduced a night subsistence allowance. The pursuer, like the claimants in the present case, claimed to be entitled to an allowance at the previously published rate. The conditions of service included a provision that allowances would be paid in accordance with the rules laid down in the Civil Service Pay and Conditions of Service Code and in a particular agreement. It was argued by the Crown for the employer that a right to vary the allowance rate should be implied. Lord Maclean rejected that argument, saying this:**
>
> > **'I also agree with [counsel for the pursuer] that there is no valid, legal distinction between pay and hours on the one hand, and allowances on the other. It seems to me that there would have to be a clear provision in the pursuer's contract of employment permitting his employers to change a particular provision unilaterally, where the**

> **terms of that agreement had been reached as a result of negotiation which resulted in a joint agreement.'**
>
> **46. I respectfully agree with the approach of Lord Maclean. Had the parties intended a provision allowing the unilateral variation of the rate of the allowances, in my judgment the contractual terms would have had to provide unambiguously for that."**

Two observations needed to be made, submitted Mr Edwards, about the passage from Lord Woolf's Judgment. Firstly, he regarded the right to vary unilaterally as being, as he put it, an unusual power. He had stated the general position in the first sentence of paragraph 31. Secondly, he had drawn a distinction in paragraph 31 between certain types of contractual provision and other matters where it might be arguable that, if an unreasonable result might be produced by applying a power of unilateral variation as a matter of construction, courts would seek to avoid such a result.

31. That is to be understood, submitted Mr Edwards, in the context of the dispute as to terms and conditions in the **Wandsworth** case. At paragraph 5 of the Judgment, the rubric of the particular terms and conditions is set out and Mr Edwards drew attention to one part of it, that part relating to variations. It reads:

> **"From time to time variations in your terms and conditions of employment will occur, and these will be separately notified to you or otherwise incorporated in the documents to which you have reference."**

32. In fact, in the **Wandsworth** case, the Court of Appeal had concluded that the relevant provisions were not contractually binding. So what is said in general at paragraph 31 must be *obiter dictum*. Nevertheless, Mr Edwards pointed out that, in the clause at issue in **Wandsworth**, the verb used was "notify", thus giving that case some similarity to the instant case. The conclusion, again *obiter dictum*, is to be found at paragraph 34 of the Judgment. It was that wording of that kind was not giving a contractual right of unilateral variation.

33. So far as paragraphs 44 to 46 of the **Security and Facilities Division** case is concerned, Peter Gibson LJ also emphasised the fact that unilateral variation is an unusual state of affairs. The first sentence of paragraph 44 states that it is "a strong thing to imply a term into a contract of employment when that term allows the unilateral variation of the contract". The case apparently involved Whitley Council procedures, something which he also mentions at paragraph 44 saying that it is all the more so when there is such an established means for reaching consensual variations.

34. He approves at paragraph 45 Lord Maclean's remarks in the case of **Macdonald v Lord Advocate** (unreported, 20 January 1999, Court of Session) that there has to be a clear provision and that paragraph 46 states that the contractual terms have to provide "unambiguously" for such a power.

35. Mr Edwards' main submission was that clause 2 was neither clear nor unambiguous. It gives no express right, and the wording in this case should be contrasted with that in the case of **Bateman v Asda Stores** [2010] IRLR 370 where there was a clear reservation of the right of unilateral variation.

36. During the course of argument, Mr Edwards accepted Miss Wilson's suggestion that a contrast might be made between the words used at clause 2 (see page 63 of the bundle) and those used at clause 13 (see page 64) where an express right of reservation is to be found in a different context. Ambiguity, Mr Edwards submitted, exists where words are capable of bearing more than one meaning. His submission to the Employment Tribunal had been that the words were either more consistent with, or at least equally consistent with, simply specifying an agreed method by which any agreed variation might be incorporated. He also suggested that

the words might define an agreed method by which changes could be notified. That might or might not involve a compliance with the requirements of section 4 in relation to changes to existing terms and conditions. Another possible meaning was that the clause might be referring to a method by which non-contractual changes could be notified.

37. Mr Edwards submitted that, if any of his alternative readings of the clause had substance, then it was obvious that the words were ambiguous. Therefore, the reasoning at paragraphs 22 to 27 of the Judgment could not stand up to scrutiny. He also complained that Employment Judge Sharma had not addressed his arguments as to the alternative meaning of the clause, nor had she given any answer to his submissions that the so-called *contra proferentem* rule of construction should have been applied to clause 2. Therefore, her Judgment was inadequately reasoned.

38. Thirdly, he complained that Employment Judge Sharma, in looking at chapter 17 of the HR manual, had failed to grasp its significance as an explanation and definition of the collective bargaining process, importantly expressed to be non-contractual.

39. At first, Mr Edwards submitted in the course of his oral submissions that it ought not to have been taken into account. But we understood his ultimate position to be that, if it was relevant and if, in particular, its reference to not implementing changes whilst negotiations are taking place unless management considered the changes to be essential to the operation of the NAO, and if those were applicable to the construction of clause 2, then it had never been put forward that in this case those changes had been essential to the operation of the NAO.

40. His primary submission had been that this part of the HR manual was non-contractual. If he was wrong as to that, then it had never been considered by the Employment Tribunal whether such a change might be lawful or could not be made because the condition of being essential to the operation of the NAO had not been established. In any event, this was plainly not a matter considered by Employment Judge Sharma.

41. Fourthly, he submitted that Employment Judge Sharma had adopted a subjective interpretation. He referred to paragraphs 10 and 11 and 35 of the Judgment. A distinction might be drawn between the questions that were asked of the Appellants as to what they thought of the wording of clause 2 and an argument about whether the Appellants had any right of unilateral variation themselves. Paragraph 10 clearly deals with the evidence. Paragraph 11 may deal with argument and paragraph 35 may deal with argument. Mr Edwards made it clear that it was not his argument that the employees had a right to unilateral variation.

42. He also relied upon the fact that the Employment Judge Sharma had devoted some part of her Judgment, namely paragraphs 31 to 34, to a discussion about whether or not there might have been a breach of the implied term as to trust and confidence. He accepted that this may well have arisen from discussion in the Judgment of the division of this Tribunal presided over by Silber J at paragraphs 24 to 26 where a submission addressed to him by Mr John Hendy QC about trust and confidence is discussed and, in effect, disposed of. That is perhaps an explanation as to why Employment Judge Sharma felt it necessary to discuss the issue of trust and confidence.

43. In answer to questions from myself, he accepted that it might just be possible that she was striving to decide whether what had happened was reasonable, and that had been

influenced by the last sentence of paragraph 31 of the Judgment of Lord Woolf in the **Wandsworth** case. He did not think that was very likely and, on reflection, neither do we. But, one way or another, this discussion of the way the Respondent had conducted extensive negotiations and held numerous meetings and had offered compensation in excess of the value and had the value of what might be regarded as having been lost in terms of privilege leave and had provided transitional provisions in respect of sick leave impacted upon the point at issue. Mr Edwards submitted that all of this was an indication that, despite her clear self-direction and her clear statement that she was adopting an objective approach, Employment Judge Sharma had considered irrelevant matters, showing that her approach was rather more subjective than objective.

The Respondent's Case

44. Miss Motraghi opened her submissions by referring us to Mr McCann's witness statement and by submitting that in essence, if chapter 17 of the HR manual requires the changes to be "essential to the operation of the NAO" then there was evidence to that effect before the Employment Tribunal. She accepted that no explicit finding of that kind had been made, but she submitted that the material was there and must be taken to have influenced the conclusion reached by Employment Judge Sharma.

45. Otherwise Employment Judge Sharma had clearly not misdirected herself. She had adopted an objective interpretation (see paragraph 21 of the Judgment) and she had considered the relevant authorities and concluded that the words of the clause needed to be very clear in its meaning (see paragraph 22 of the Judgment). She commended the Employment Judge's analysis at paragraphs 22 to 27 as clearly reasoned and she submitted it was obviously correct. Her analysis of clause 2 was that the words "subject to amendment" being separated from the

succeeding words only by a semicolon was clearly to be construed by a reference to that wording.

46. There was in her Judgment great significance in the fact that the verb used was "notify" and the concept was that of notification. That had been the verb used by Lord Woolf in the **Wandsworth v D'Silva** case and that use of the word simply emphasised that, although it could be argued that the words "by the management unilaterally" or "which the management reserves the right to make unilaterally", following the word "subject to amend", would have made the position clear, because only the Respondent could notify by circular or notify the individual, the Employment Judge was entirely right to regard the meaning as clear. She accepted that Employment Judge Sharma was correct to have considered the terms of the HR manual and she pointed to the wording that appears under the heading "Settlement of disputes" at page 88, which she submitted gives the right to impose a unilateral change and, in the circumstances, if it was in any way qualified, as might be suggested by page 88, then the evidence supported the contention that here it had been essential to the operation of the NAO to make the changes.

47. She did not accept that section 4 provided any sort of alternative reading for clause 2 and she submitted that the problem with the construction being put forward by the Appellants was that it left no useful meaning to the wording after the semicolon. Indeed, we understood her submission to go further and it to be that it gave no useful meaning to the words "subject to amendment". The clause starts by making it clear that the terms are the current terms and, in the nature of things, these change from time to time. So, unless the wording of clause 2 is to have no meaning at all, it must be taken to mean that the employer has the right to unilaterally vary the terms and then notify that that has happened, either where the terms are general and

significant through the circulars or where the terms are individual and less significant directly with the employee affected.

48. Further to that, she pointed to two authorities in support of her contention that the courts lean against any construction that renders words meaningless. She referred us to **Jerram Falkus Construction Limited v Fenice Investments Inc** [2011] EWHC 1935, a Judgment of Coulson J in which, amongst a number of other points, he had referred at page 24 to "one of the canons of contractual interpretation", something he derived from the 4th Edition of *Lewison on the Interpretation of Contracts* at 7.03. It was a canon of contractual interpretation that a construction which left a clause as mere verbiage without any consequence or effect should not be adopted.

49. Similarly, she was able to point to a passage in the Judgment of the Court of Appeal in the case of **Singapore Airlines v Buck Consultants** [2011] EWCA Civ 1542, given by Arden LJ where, at paragraph 43, she had accepted the same proposition saying that she accepted:

> **"… the fact that one interpretation of a provision renders that provision otiose is a strong indication that that interpretation is not the correct one. …"**

50. She submitted that the instant Judgment was clearly reasoned. Employment Judge Sharma had no need in accepting one interpretation to set out any competing interpretation. She argued that, where a clause is not ambiguous, then the *contra proferentem* rule cannot apply and she pointed out that in *Halsbury* it is said to be a rule of last resort. She rejected the argument that the Employment Judge had interpreted the clause subjectively. Paragraphs 10, 11 and 35 might have been left out of the Judgment because they added not very much to it save perhaps for the obvious point that, if the employees were not able to vary the contract unilaterally, that might make it more likely that any amendment would come from the

employer. But we understood her in the end to accept that it probably did not need any specific reference in the Judgment to establish such a proposition, and certainly that the questions posed to the employees could not have helped Employment Judge Sharma in her task of construction. Likewise, whilst paragraphs 31 to 34 might be matters that she did not need to address, her discussion did not affect the purity of her construction.

Conclusions

51. The task that faces us is a matter of pure construction as to whether clause 2 clearly and unambiguously provides for or identifies a right in the Respondent to vary the contract unilaterally in the manner in which it has done. In our judgment, the wording of clause 2 comes nowhere near being clear and unambiguous. We accept Miss Motraghi's point that, because the employer uses clear words in one part of a letter of appointment, i.e. at clause 13 where a right is plainly reserved, that is not a conclusive answer to the construction of clause 2. But it does not seem to us that clause 2 is in its language clearly reserving the right to amend unilaterally. We do not think that the use of the verb "notify" has anything like the significance attributed to it by Miss Motraghi. Taken in isolation and looking at the language itself, the third sentence of clause 2 does no more, in our judgment, than simply point out that the clauses can be amended and that, if they are amended, and the changes are significant and of general effect, they will be notified by broadcast methods such as circulars or orders and, if they are in an individual context and of less significance, by specific notification or information. In our judgment, the verb "notify" is no more than stipulating that the employee will be informed of any changes. Nor do we regard it as significant that the employer will notify the employee of such changes. We accept that that is almost inevitably the case, but it does not, in our judgment, establish that the employer is therefore establishing the right to make the changes unilaterally and without the consent of the employee.

52. Moreover, we take the view that the words "They are subject to amendment" and the words that follow the semicolon as to methods of notification establish nothing more than the fact of amendment and the need for notification. They do not in any way establish what the mechanism of amendment might be. In that sense that part of the clause might be regarded as capable of having more than one meaning, although looking at the matter rigorously, we think that it has the meaning that there may be amendments and that they will be notified, but that it does not have by implication any further or deeper meaning. There is nothing in the language, in our judgment, that explains what the mechanism of amendment might be. The fact that it explains the method of notification and that that explanation suggests that the notification will come from the employer is, in our view, not anything like as significant as Employment Judge Sharma believed it to be or as Miss Motraghi has submitted it is.

53. Where an individual employee discusses a matter with the employer or where, on a collective basis, the trade union discusses a matter with the employer, it might be quite usual for any change that had been agreed as a result of that process to be publicised, broadcast and disseminated by the employer. But that tells us nothing as to whether the employer has the right to vary without the consent of the individual employee or of the trade union as a result of negotiation.

54. What has caused us most difficulty is as to whether that part of chapter 17 of the HR manual that deals with the settlement of disputes, namely page 88 which we have quoted above, is incorporated into the individual contracts of employment. In our judgment, this matter can be looked at in the alternative. We favour the view that it has not been incorporated because it is not a particular of conditions of service. As we pointed out earlier in this Judgment, some parts of the HR manual do relate to particulars of service, but this part of the HR manual is

setting out the details of a collective bargaining structure and machinery. That of itself is not the stuff of terms and conditions of the individual's contract of employment.

55. The alternative view of this is that, whilst much of the detail of the collective bargain is not part of the individual terms and conditions of employment, where a right arises under that negotiating machinery to implement changes in advance of the negotiations having been concluded and without agreement having been reached, the right to implement does become part of the individual's contract of employment. As we say, that is not a construction that we favour, but even if we are wrong as to that and there was a limited or qualified right to vary unilaterally, being part of the terms and conditions by cross-reference from the letter of appointment to the HR manual, there are two reasons why the Respondent cannot succeed.

56. Firstly, that is a matter that we do not think was ever evidentially explored. As Miss Taplow pointed out, the letter at pages 79 to 81, and in particular the conclusion at page 81, it does not state that the reason for the variation was that it was essential to the operation of the NAO. The conclusion at paragraph 9 is that the decision had been taken in response to the NAO branch's refusal to put this offer to its members. That would indicate that it was as a result of frustration or an impasse in relation to the negotiations that these changes were implemented. It would not fall within the contractual right, if such exists, to vary unilaterally in some circumstances. Secondly, we do not think that point was ever argued before Employment Judge Sharma. It was not suggested that Mr McCann had ever advanced the argument that the changes were essential to the functioning of the NAO.

57. In those circumstances, even if we are wrong that the clause does not come into the individual's contract of employment by the cross-reference between clause 2 of the letter of

appointment and the HR manual, in the factual circumstances of this case there was no right on the part of the Respondent to vary the terms and conditions in the circumstances.

58. Accordingly this appeal must be allowed. We have heard no submissions as to how we should dispose of the matter and I will now invite Counsel to address us on that issue.

Disposal

59. What is said to be a declaration by Employment Judge Sharma should be the exercise contemplated by section 12(2)(c) of the **Act**:

> **"On determining a reference … relating to a statement purporting to be a statement under section … 4, an [employment tribunal] may substitute other particulars for them."**

60. I think the wording ought to be "For the particulars set out in the letter, the following particulars be substituted …". So we would allow the appeal, and quash the declaration made by Employment Judge Sharma and, pursuant to section 12(2)(c) of the **Employment Rights Act 1996**, substitute for the particulars relating to privileged leave and occupational sick pay set out in the letters of 27 March 2013 sent by the Respondent to each Appellant (see pages 76 to 81 of the appeal bundle) the following particulars:

> **"*SICKNESS ABSENCE AND PAY***
>
> **…**
>
> **Employees who have been employed for at least six months will be entitled to the following rates of sick leave pay:**
>
> - **Full pay: up to a total of six months' absence in any rolling period of 12 months. [Thereafter] NAO sick pay will be reduced to half pay from 183rd calendar day of absence;**
>
> - **Half pay: any absence in excess of six months in any rolling period of 12 months;**
>
> - **There is a total limit of 12 months' pay for sickness absence in any period of up to four years. When a member of staff has exceeded 365 calendar days' sickness absence in a rolling four-year period, their NAO sick pay will be reduced to nil;**
>
> **…**

PUBLIC AND PRIVILEGE HOLIDAYS

In addition to annual leave, staff will be granted public and privilege holidays on which they are not required to attend work.

Full-time staff entitlement

For full-time staff, the entitlement is as follows:

…

Two full privilege days and one half privilege day	**- In honour of the Queen's birthday, either the Friday before the Spring Bank holiday, OR the Tuesday after - An additional day over the Christmas break (Date announced on Merlin) - Maundy Thursday afternoon**

The two and a half days Privilege leave stated above should be taken on the mandatory days. However, where this is not possible and you need to make alternative arrangements approval must be sought via your Manager through E-Absence. Privilege leave must be taken in the leave year to which it relates and cannot be carried over to the following leave year."