Case Numbers: 3329121/2107; 3329123/2017; 3329268/2017

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
(1) Mr N Egbayelo (2) Mrs A Egbayelo	v	Ocado Central Services Limited

Heard at: Watford **On**: 2 May 2018

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimants: In person; not represented
For the Respondent: Mr Anthony Sendall, of Counsel

RESERVED JUDGMENT

The claimants' contracts of employment incorporate the changes to their pay and holiday entitlements agreed collectively with USDAW which took effect on 1 September 2017.

REASONS

Introduction; the claims and the issue which I had to determine

1 The claimants, who are married, work as Personal Shoppers for the respondent, which is the well-known online grocery supplier. Mr Egbayelo works a 40-hour week. Mrs Egbayelo works 30 hours per week. In these proceedings they seek a statement of their entitlements to pay and to holidays. They do so under section 11 of the Employment Rights Act 1996. The reason why they do so is that they

are in dispute with the respondent about the validity of a change in their terms and conditions relating to holidays which was imposed on them with effect from 1 September 2017. It is the respondent's case that that change was empowered by the terms of the claimants' contracts of employment. It is the claimants' case that it was not so empowered.

A procedural history

2 I started to hear the case on 2 May 2018, but, for the reasons stated in the case management summary sent to the parties on 5 May 2018, I adjourned it to resume on 3 September 2018. Paragraphs 2-4, 12, 13 and 16 of my case management summary sent to the parties on 5 May 2018 show on what basis the hearing resumed on 3 September 2018:

> '2. The claimants attended without witness statements. The respondent attended with a detailed witness statement, made by Mrs Georgina Kingsland, the Head of Human Resources at the base where the claimants work for the respondent, which is the well-known online grocery supplier. Mr Egbayelo works a 40-hour week. Mrs Egbayelo works 30 hours per week. They both work as Personal Shoppers. Mrs Egbayelo was employed by the respondent from 6 December 2010 onwards. Mr Egbayelo was employed by the respondent from 12 March 2012. There was in Mrs Egbayelo's statement of terms and conditions (at pages 71-73 of the bundle; any reference below to a page is to a page of that bundle) a provision (paragraph 21) in these terms:
>
> > "Changes to your Terms and Conditions: We reserve the right to make reasonable changes to any of your terms and conditions of employment and you will be notified of minor changes of detail by way of a general notice to all employees or an email or letter (addressed to you and sent to the address we hold for you or delivered to you at work) and any such changes will take effect from the date of the notice."
>
> 3 Mr Egbayelo had the same provision in his statement of terms and conditions (paragraph 22 on page 79), but he had in addition in that statement this paragraph (numbered 21) on page 78:
>
> > "Collective Agreements: Ocado will consult with representatives in the Ocado Council on working arrangements relating to your employment. In relation to certain aspects of your pay (basic pay, shift premia, service premia and overtime premia); hours (the number of hours and shifts worked per week) and holidays (holiday entitlement), Ocado has recognised Usdaw for the purpose of allowing its representatives to conduct collective bargaining on behalf of all hourly paid employees employed by Ocado at its sites at Bristol, Coventry, Dartford, Hatfield, Leeds, Manchester, Oxford,

Southampton, Weybridge, White City and Wimbledon and as part of the consultative process within the Ocado Council."

4 Mrs Kingsland's evidence in her witness statement was that Mrs Egbayelo had had that provision incorporated in her contract of employment by reason of it being stated to her in 2011 (including by a "pop-up" message/page on the screen from which she received her work instructions, dated 22 December 2011, of which there was a copy at page 75).

...

12 Mr Egbayelo indicated, after discussing the matter with Mrs Egbayelo, that he accepted the factual assertions in Mrs Kingsland's witness statement, such as whether or not he and Mrs Egbayelo had been given documents such as the statements of their terms and conditions in the bundle, but they disputed that Mrs Egbayelo had seen the "pop-up" at page 75.

13 The claimants' case was essentially that they could not be bound by changes to their contracts of employment to which they had not in person consented. I said that that was not correct, and that the case law to which I had now had my attention drawn showed that it was possible for a contract of employment to be altered by means of a change to a collective agreement (i.e. if that agreement, or at least its relevant individual parts, were incorporated in the contract of employment), or sometimes by reason of an express power in the contract. Here, there was arguably an express power to change the claimants' contractual terms, but it was arguable (in particular given the reasoning in the decision of the Employment Appeal Tribunal in *Norman v National Audit Office*, and given what Lord Woolf MR had said in *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193) that that express power did not permit the respondent to impose the changes which it had imposed on the claimants after they were collectively agreed with Usdaw. Mr Sendall indicated that he relied primarily on the express clause numbered 21 in Mr Egbayelo's statement of terms and conditions, and the incorporation of that provision in Mrs Egbayelo's contract of employment by means of for example the pop-up at page 75. Mr Sendall said that as a secondary argument, he also relied on the proposition that it was now implied by custom and practice that Mrs Egbayelo's contractual terms could be affected by the collective bargaining process referred to in paragraph 21 of Mr Egbayelo's statement of terms and conditions, set out in paragraph 3 above. Mr Sendall mentioned *Henry v London General Transport Services Ltd* [2002] ICR 910, at which I looked online. I then mentioned, and referred to, the decision of the Court of Appeal in *Abrahall v Nottingham City Council* [2018] EWCA Civ 796.

...

16 I now record that at the resumed hearing it will be necessary for the respondent to satisfy me that the paragraph numbered 21 in Mr Egbayelo's statement of terms and conditions, at page 78, was incorporated in Mrs Egbayelo's contract of employment by reason of any or all of the factors stated in paragraph 3 of Mrs Kingsland's witness statement and/or custom and practice. I record also that if that paragraph was not so incorporated, then I will need to decide whether the paragraph numbered 21 in Mrs Egbayelo's statement of terms and conditions and numbered 22 in Mr Egbayelo's statement of terms and conditions empowered the imposition by the respondent of the change to which the claimants object. In doing so, I will need to take into account what was said by Lord Woolf in *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193.'

3 *Norman v National Audit Office* is reported at [2015] IRLR 634. *Abrahall v Nottingham City Council* is now reported at [2018] IRLR 628.

4 Mr Egbayelo did not attend the resumed hearing because, Mrs Egbayelo told me, he was taking an examination as part of a training programme to become an accountant. He had sought an adjournment on 20 July 2018 in an email of which he did not send a copy to the respondent. He did so on the basis that he had "professional exams" (the nature of which was not stated in the email) on 3 and 4 September 2018. Mr Egbayelo first informed the respondent of his application for an adjournment on 6 August 2018. The respondent had suspected that Mr Egbayelo might not have sent to the respondent a copy of any correspondence sent to the tribunal, and contacted the tribunal on 26 July 2018. The tribunal then sent the respondent a copy of Mr Egbayelo's email of 20 July 2018. On 6 August 2018, the respondent wrote that it opposed the request for an adjournment.

5 Mr Egbayelo then, on 15 August 2018, sent a strike-out application to the tribunal, the reason being that the respondent had, he wrote, "no real prospect of successfully defending our claim as disclosed in the letter dated 25 June 2018 and 5 July 2018". In his application he alleged "Fraud and collusion between the respondent and USDAW to defraud staff". With his strike-out application, Mr Egbayelo enclosed correspondence between him and the respondent concerning the costs of the case. On 25 June 2018, Mr Egbayelo wrote (all textual errors in the quotations below are in the originals):

> "I write to respond to your letter dated 18 June 2018 in which you threatened us to drop this case as there is no prospect of success in it.
>
> We did not request for the adjournment of this case but your legal representative, Mr Sendall was the one who requested for this case to be adjourned I remember that Mr Sendall claimed this case is strange and the

> Learned Judge even asked him if he has ever come across this similar case before and he responded he has not seen such a case before.
>
> The issue of OCADO incuring costs should be directed to Mr Sendall and not to me. Both Claimants have incured cost especially child care cost for our 3 children in the first hearing and we'll incur another cost for the adjourned case."

6 The respondent responded to that application on 22 August 2018, asking that I rejected the application to strike out the response, and that I "allow this matter to proceed to the resumed final hearing on 3 September 2018."

7 I was sent a copy of the applications to strike out the response and in the alternative for an adjournment on 15 August 2018. I was abroad at the time. I responded by email to the applications on 23 August 2018, declining to grant Mr Egbayelo's application for the adjournment of the hearing or to determine the application to strike out the claim. My reasons for doing so were not sent to the parties until 30 August. My reasons were these:

> "If Mr Egbayelo cannot attend the hearing because he has a professional examination on that day, then he can make submissions in writing instead of orally. Any oral evidence which may be relevant was in any event going to be given by Mrs Egbayelo and not Mr Egbayelo.
>
> As for the application of Mr Egbayelo to strike out the response to the claim, it would not be in the interests of justice to consider that application without giving the respondent an opportunity to respond to it, and given the proximity of the hearing, the only just way to proceed is to resume the hearing and determine the claims in the usual way."

8 On 29 August 2018, Mr Egbayelo wrote:

> "to direct your attention to the fact that I have three kids who are still at home for holidays and they will be resuming back to school on 5 September 2018 and based on this we will be facing child care issue if the case will still be heard on the 3 September as I will be going for my exam on the same day. Exam booking for 3 September has already been sent to the tribunal. The 2nd claimant will be with the kids.
>
> Its either the tribunal strike out this case against the respondent on the basis that they do not have prospect of success in this case or adjourn this case for child care reason and to allow me the first claimant to go for my exam."

9 As I say above, my response to the application for an adjournment was sent to the parties on 30 August. Having received it, the claimant wrote again, starting his letter:

> 'I refuse to agree with the tribunal judgement dated 30 August 2018 that refuses to adjourn this case on grounds that Mrs Egbayelo should appear to give oral evidence.
>
> I wrote an email titled "child care issue" yesterday at 7:52 in which I said the second claimant would be at home with my three children as they have not yet resumed back to school, and I will be going for exams. How could the second claimant come to the tribunal to give oral evidence with three children? If the Tribunal Judge believes there is justice in this, the second claimant has agreed to bring in the 3 children to the tribunal on Monday.'

10 I declined to change my decision that the case should resume on 3 September. I did so on the basis that there was no material change in the circumstances which could justify me reconsidering my decision that the hearing should resume on 3 September, and that I was in any event of the view that the interests of justice would best be served by the resumption of the hearing on that date. I added that "the issues which require determination at the resumed hearing are likely to be best determined in the light of careful written submissions, so that both parties' interests are likely to be best served by them bringing to the hearing (and if possible exchanging in advance of the start of the hearing) copies of such written submissions."

11 Mr Sendall attended on 3 September 2018 with a detailed skeleton argument. He had not had time to send it to Mr and Mrs Egbayelo before the start of the hearing, however. Nevertheless, before starting the hearing, I spent 50 minutes reading that skeleton argument and the case law and documentary evidence to which it referred (including an amended witness statement of Mrs Kingsland), and a witness statement that Mrs Egbayelo had signed on 23 May 2018. Thus, Mrs Egbayelo was able to read the skeleton argument in advance of the resumption of the hearing.

12 I then started the resumed hearing at 10:52. Mrs Egbayelo attended with her three sons, the youngest of whom was aged 4 and the oldest of whom was aged 12. Mrs Egbayelo and I had a discussion about the resumption of the hearing. I did not understand her to be repeating the application to postpone the hearing, but in case she was, and in any event because I could see that having young children present in the hearing room might be problematic, I asked her about the availability of childcare. In answer, she said that she and her husband never had their children looked after by anyone else. I was told that the tribunal staff had offered to make a room available in which the three boys could sit while the hearing took place, but Mrs Egbayelo had declined the offer, on the basis that if left to themselves, the boys would fight.

13 I could see no alternative to resuming the hearing with the claimants' sons in the hearing room, which I did. While at times their presence was problematic, by the end of the hearing, they were silent. Certainly, I gave Mrs Egbayelo as much time as she needed to be able to respond to questions and to ask them in cross-

examination. I also discussed with her at length the issues and her evidence.

14 I heard oral evidence from Mrs Kingsland. She put before me (i.e. there were in the bundle) a number of new documents, i.e. documents that had not been in the bundle as it stood at the time of the hearing of 2 May 2018.

15 Mrs Egbayelo put before me a further document, entitled "Written Submission". It had been written by Mr Egbayelo, whom she described as her representative. It started: "Anonymity order direction requested". I explained to Mrs Egbayelo the established importance of open, i.e. public, justice, which resulted in hearings being held in public and an unwillingness on the part of courts and tribunals to anonymise judgments unless there was good reason to protect the privacy of a litigant, and asked her why she was seeking an anonymity order. She was unable to say why she was. I could not see any reason why I should make such an order, and I therefore declined to make one.

16 I read the "Written Submission". It included the following paragraphs:

> "6. The Collective agreement in the employment contract of the 1st Claimant is vague and as such cant be binding on me as such terms lack sufficient precision to enable them to be enforced as contractual obligations (see National Coal Board Vs Galley [1958], Lee Vs GEC Plessey Telecommunications [1993] IRLR 383 and Norman & ORS Vs National Audit UKEAT/0276/14/BA)
>
> *MRS A EGBAYELO'S CONTRACT*
>
> 7. The second claimant's employment contract does not include any collective agreement terms and she has no knowledge if any information being sent to her via miOcado as noted in her witness statement dated 23 May 2018.
>
> 8. Terms can only be incorporated impliedly or expressly in a contractual document and as such not binding on the second claimant.
>
> 9. The screenshot is not signed by the second claimant and only signed document is binding on the party that signed it and the screenshot is an ordinary piece of paper with no legal backing and as such not binding on the second claimant.
>
> *FINAL SUBMISSION*
>
> 10. The Collective agreement term is unfair and fraudulent as it improves the condition of the respondent and impair working conditions of the staff."

17 The rest of the document referred to that alleged unfairness and fraud. That was

the subject also of part of the document entitled "Skeleton argument in support of the main claim" which was put before me on 2 May 2018. Both documents relied on the proposition that the increase in pay for affected employees was £0.11 per hour (and no more).

18 After hearing evidence, I invited the parties to make oral submissions. Both Mr Sendall and Mrs Egbayelo had nothing to add to their respective written submissions.

19 In his skeleton argument, Mr Sendall had written that the respondent sought its costs in the event of the success of the respondent's case. After discussion with me and having taken instructions, he withdrew that application for costs.

20 I then, with the parties' agreement, reserved my judgment. I do not, below, refer to every argument advanced by the parties. I nevertheless took them all into account.

The factual issues which I needed to determine

21 By the end of the hearing on 3 September 2018, the factual issues which I had to determine where

21.1 whether or not Mrs Egbayelo had had her attention drawn to the terms set out in paragraph 21 on page 78 of the bundle, or at least to a document stating the effect of that paragraph;

21.2 whether or not she had accepted changes made to her terms and conditions which had, since 2011, been made as a result of agreement reached collectively, after negotiations carried out by USDAW with the respondent; and

21.3 whether or not the effect of the imposed change concerning holiday entitlements was detrimental to the claimants (or either of them).

22 Having heard the evidence to which I refer above, and read the documents to which I was referred, I considered the following evidence and made the following findings of fact on the material issues.

The evidence which I considered and my factual conclusions

23 The "pop up" at page 75 was in these terms:

> '22 December 2011
> As you may be aware Ocado has recently signed an agreement with USDAW (Union of Shop, Distributive and Allied Workers) to formally recognise them as a trade union. As of the 1st December 2011 we have agreed that USDAW will integrate with the existing Ocado Council and

undertake collective bargaining on pay hours and holiday (the "Working Arrangements") on behalf of those who receive their pay via the weekly payroll.
I am therefore writing to confirm that the following clause should now be read in conjunction with your existing terms and conditions of employment:
Collective Agreements: Ocado will consult with representatives in the Ocado Council on working arrangement relating to your employment in relation to certain aspects of your pay (basic pay, shift premia, service premia and overtime premia); hours (the number of hours and shifts worked per week) and holidays (holiday entitlement). Ocado has recognised Usdaw for the purposes of allowing its representatives to conduct collective bargaining on behalf of all hourly paid employees employed by Ocado at its sites at Bristol, Coventry, Dartford, Hatfield, Leeds, Manchester, Southampton, Weybridge, White City and Wimbledon as part of the consultative process within the Ocado Council.
All other terms and conditions will remain the same.

Yours sincerely
Gina Kingsland
Human Resources Manager.'

24 It was Mrs Kingsland's evidence that that "pop-up" would remain on the MiOcado screen until the user had clicked through to the end of the screen pages (of which there were three) of which it formed part, and then clicked to continue onto the usual starting screen for the user. Thus, she said, no person who used the MiOcado screen after the "pop-up" was put on it could not have seen the "pop-up".

25 Mrs Egbayelo's evidence was that she did not often, if at all, use the respondent's MiOcado system. Mrs Kingsland's evidence was that that system (1) showed what holiday dates were available for individual employees, (2) enabled them to book those holidays, (3) enabled them to swap working sessions with their colleagues, and (4) showed the employee's individual working sessions as planned, weeks in advance.

26 Mrs Egbayelo said that she received communications from the respondent about holidays via text, and that she booked her holidays using her mobile telephone only. She said that otherwise she left it to her husband to log onto the MiOcado screen for her, if it needed to be logged onto. She acknowledged, however, that her husband did not work for the respondent when the pop-up at page 75 was claimed by the respondent to have been on her MiOcado screen.

27 Mrs Kingsland's evidence was that if Mrs Egbayelo did not see the MiOcado system pop-up at page 75, then she would not have been able to use the respondent's graphical user interface ("GUI") by means of which she was given the information which she had to have in order to be able to do her job, without seeing words to the same effect as the pop-up at page 75. That is because, Mrs

Kingsland said, the pop-up was put on the GUIs of personal shoppers such as the claimants at the same time as the pop-up was put on employees' MiOcado screens, and left on the GUIs for between 3 and 6 months after the pop-up at page 75 was put on employees' MiOcado screens.

28 Mrs Egbayelo accepted that the GUI was personal to her when she was using it. She accepted that there are, and have at all material times (i.e. from 2010 to the present day) been, at every place called a "picking station" at which personal shoppers work for the respondent, GUIs, which are screens on which the respondent's instructions to the individual personal shopper are given. The employee logs onto the GUI by using a swipe card and a number password, and if the employee goes to another picking station with another GUI, then that will be because the employee is told by a message on the first GUI to do so, and when he or she then gets there, he or she is automatically logged onto that GUI.

29 Mrs Kingsland said that any message (such as one in terms like those at page 75) would be displayed if after a period of time there were no instructions to the GUI user logged on. That could happen for short periods of time, she said.

30 Mrs Kingsland's evidence was to the effect that one could not escape the message that USDAW were now the recognised trade union and that a change to an employee's terms and conditions could be made as a result of an agreement made between the respondent and USDAW about that change.

31 I concluded that Mrs Egbayelo did either see on her MiOcado screen when she logged in (at some point after December 2011) a message in the terms set out in paragraph 23 above, or she saw a message in like terms on one or more GUI screens when she was doing her job in the first half of 2012. At no time did she express any objection to that change.

32 Mrs Egbayelo accepted that she had received pay increases since 2011. It was Mrs Kingsland's evidence (which I accepted) that all such pay increases had been negotiated by USDAW with the respondent.

33 As for the change to holiday entitlements made in 2017, Mrs Kingsland's evidence was that it had been the subject of much communication with staff, including by her in person at what she called "town hall briefing room" sessions. The claimant said that she was aware of the planned change, but that she did not understand how it was going to work, that she asked her manager about it, and that he had said to her that he did not understand it either. The change took the form of removing 24 hours' annual leave (i.e. 3 days if one worked an 8-hour shift) but at the same time (1) increasing the affected employees' pay and (2) allowing them to "buy back" that holiday. The change took effect as from the start of the 2017-18 holiday year. The respondent's holiday year starts on 1 September. Mrs Kingsland said that, in addition to pay increases, there were tax benefits from the changes if employees bought back their holiday entitlement. Mrs Kingsland was unable to explain what the tax benefits were, but she was

sure that there tax advantages to employees resulting from the changes, even if they bought back their holidays. This was because the means used to buy back the holiday was classed as a salary sacrifice which, she said, attracted income tax advantages. In addition, an employee could buy back up to 3 shifts of holiday, which in the case of the claimants, who worked 10-hour shifts, meant that they could buy back 10, 20 or 30 hours of holiday, and thereby increase their holiday entitlement, in return for a salary sacrifice.

34 It was Mrs Kingsland's evidence that the respondent and USDAW in the period before 1 April 2017 agreed to change the pay arrangements for the sections of the workforce including that of which the claimants formed a part as from 1 April 2017, and that as from 1 September 2017, there would be the new holiday and pay arrangements which were the subject of these claims. I accepted that evidence.

35 On page 88, in a document signed by Mr Daniel Adams, National Officer of USDAW and Mr Brian McClory, the respondent's Fulfilment Operations Director, it was said that for a person working 40 hours per week (including breaks, evidently), the increase in pay conferred in return for giving up 24 hours of holiday entitlement was an increase in the hourly rate of pay £0.11 plus "an increase of 1.3% on all premiums (rounded up to the nearest 1p)".

36 In the case of the claimants, given what was said in the information booklet of which there was a copy at pages 80-87, at page 84, there was, in addition to an increase in hourly pay of £0.11, an increase of £0.01 per hour. That was because the claimants received a "service premium" for having been employed by the respondent for 5 years or more, and because that service premium (as payable after 1 April 2017) was increased by £0.01 per hour (from £0.58 to £0.59). That was borne out by the figures on pages 104 and 110 which Mrs Kingsland said reflected the reality for both claimants.

37 The documents at page 104 and 110 showed that after 1 April 2017 and up to 31 August 2017, the claimants' pay (including their 5-year service premia) was £8.92 per hour. After 31 August 2017, it went up to £9.04 per hour. Thus, for them, the change consisted in an increase of £0.12 and not £0.11 per hour.

38 There was in 2016, as shown by letters dated 18 March 2016 at pages 79A and 79B to the claimants, a change to the manner in which their working hours were paid. It showed that as from 28 March 2016, if they worked 40 hours per week then they would be paid for 36 hours, on the basis that during that period of 40 hours they would have had 4 hours of unpaid breaks. However, their pay would remain the same.

39 So, a full-time employee in the position of Mr Egbayelo would on 1 August 2017 be paid per week 36 times £8.92, which is £321.12. As from 1 September 2017, the pay would be 36 times £9.04, which is £325.44. Annually (dividing those sums by 7 and multiplying by 365), those pay rates are £16,744.11 and

£16,969.37. There was therefore as from 1 September 2017 an increase in Mr Egbayelo's pay of £225.26. The pay after 1 September 2017 for 24 hours will have been 24 times £9.04, which is £216.96. Thus, there would have been an annual increase in the rate of pay for Mr Egbayelo of £8.30 if he had bought back 24 hours of holiday. If he received an additional tax benefit if he bought back the 24 hours (in fact, he could not do that, since, as stated above, he could increase his holiday entitlement only by 10, 20 or 30 hours, but that is not relevant to this calculations), then he would be even better off.

40 There could not be any difference in the case of Mrs Egbayelo, since her pay was pro-rated to that of Mr Egbayelo or any other comparable employee who worked 40 hours per week.

41 Thus, the change to which I refer in paragraph 33 above did not affect the claimants negatively. However, both claimants objected to the loss of their holiday entitlements. They did so in the letters dated 23 and 24 August 2017 respectively (one from Mrs Egbayelo and one from Mr Egbayelo) at pages 134-137 of the bundle. Nevertheless, the claimants purported in those letters to accept the increases in their pay which the new holiday arrangements involved.

The applicable law

42 *Henry v London General Transport Services Ltd* [2002] ICR 910 shows that it is possible for an employee to become bound by a term of a contract by custom and practice within a particular workplace. However, it was said by Pill LJ (with whose judgment Longmore LJ and Sir Martin Nourse agreed) in paragraph 26 of his judgment that

> "Clear evidence of practice is, however, required to establish something as potentially nebulous as custom and practice, and there should be a scrutiny commensurate with the particular circumstances."

43 Mr Sendall, in paragraphs 6 and 7 of his helpful skeleton argument, said this:

> "6 In *Abrahall-v- Nottingham City Council* [2018] IRLR 628, the Court of Appeal reviewed the authorities on agreement to contractual variations imposed by an employer. Many of the authorities referred to by Underhill LJ in his judgment referred to situations where the proposed amendments were disadvantageous to the employees and often in circumstances where the imposition of the clause had no immediate impact on the relationship. In such circumstances, it is clear that the courts are comparatively slow to hold that acceptance has taken place. However, as Elias LJ pointed out in his judgment, acceptance of a favourable term by conduct will be readily inferred where the term is either wholly favourable to the employee or where it has both favourable and unfavourable aspects to it - see para 107 of the report where he refers to *Attrill-v- Dresdner Kleinwort Ltd* [2013] IRLR 548 and *FH*

Farnsworth Ltd-v- Lacy [2013] IRLR 198. Ryder LJ agreed with the judgments of both Underhill LJ and Elias LJ.

7. In *FH Farnsworth Ltd-v- Lacy* Hildyard J held that it is important to consider whether or not the acts relied upon as acceptance were referable only to an acceptance of the variation relied upon. He also made it clear that Mr Lacy could not 'cherry pick' the parts of the variation that he wanted to accept and reject those he did not want. Accordingly, if he wanted to take advantage of the benefits under the new contract, he had to accept the disadvantageous terms too."

44 I agree with that passage: it is in my view an accurate description of the effect of the case law to which it refers.

45 As for the possibility of a collective agreement, Mr Sendall's submissions contained this paragraph:

"4. It is settled law that collective agreements (even if not contractually enforceable between the employer and the trade union) can be incorporated into individual contracts of employment and that when changes are made to the collective agreements those changes will be reflected in the individual contracts - see *Robertson & Anr -v- British Gas Corpn* [1983) IRLR 302 and *Marley-v-Forward Trust Group Ltd* [1986] IRLR 369."

46 That was clearly also a correct statement of the law. I noted that in paragraphs AII[51]-[52] of *Harvey on Industrial Relations and Employment Law*, this was said:

"**[51]**

In *Marley v Forward Trust Group Ltd* [1986] IRLR 43, [1986] ICR 115, EAT; revsd [1986] IRLR 369, [1986] ICR 891, CA, the EAT, swimming against the current of previous case law and widespread industrial practice, suggested that if the collective agreement from which the individual contractual term is derived expressly stipulates (as many do) that it is not intended to be legally enforceable and is binding in honour only, then a term derived from it will, correspondingly, be legally unenforceable. On appeal, the Court of Appeal reversed this and in doing so followed *Robertson and Jackson v British Gas Corpn* [1983] IRLR 302, [1983] ICR 351, in which the Court of Appeal had decided that the terms in collective agreements could be incorporated into contracts of personal service and that when they were, such terms were legally enforceable. The Court of Appeal had no hesitation in finding that the terms relating to the redundancy situation arising in *Marley* were so incorporated and, more to the point, were legally enforceable as well.

(iv) Effect of union membership

> **[52]**
>
> If there is an agreement, express or implied, to incorporate terms from a collective agreement, it is quite immaterial whether the employee is or is not a member of the union which negotiated those terms, or indeed whether he is a member of any union at all. He is bound, not because the union in any sense represents him in the negotiations, but simply because he has agreed to adopt the terms (*Young v Canadian Northern Rly Co* [1931] AC 83, PC)."

47 In my judgment that passage is an accurate statement of the effect of the relevant case law. Although the relevant comments made by the Privy Council in *Young* (they are at the top of page 87 of the report) were obiter, i.e. not an essential step in the reasoning of the Privy Council since the Privy Council dismissed the appeal on another basis, they have not been doubted since, and the judgment in *Robertson v British Gas* was clearly to the same effect.

My conclusions

48 Given the above case law, and in particular *Young v Canadian Northern Rly,* Mr Egbayelo's position was straightforward. Paragraph 21 on page 78 (which I have set out in paragraph 2 above, in the paragraph 3 set out in that paragraph) had the effect of incorporating in his contract of employment the changes concerning holidays and pay which took effect on 1 September 2017 and to which he objected in these proceedings.

49 Mrs Egbayelo's position was not so straightforward. However, in my judgment she also was bound by those changes. That was for the following reasons:

49.1 Paragraph 21 at the bottom of page 73 (which I have set out in paragraph 2 above, in the numbered paragraph 2 set out in that paragraph) empowered the imposition of a term to the effect of paragraph 21 on page 78. That is because the latter paragraph was a reasonable change to Mrs Egbayelo's terms and conditions of employment.

49.2 If that change was not a "minor change of detail" such as to entitle the respondent to make it by means of "a general notice to all employees", then it was incorporated in Mrs Egbayelo's contract of employment by custom and practice, or alternatively it was accepted by her as a result of her acceptance without objection of pay increases negotiated and implemented after 2011 until April 2017.

49.3 If that was wrong, then the imposition of the new holiday and pay entitlements which took effect on 1 September 2017 was empowered by paragraph 21 on page 73, since the new entitlements did not affect Mrs Egbayelo detrimentally.

49.4 If that was wrong, then Mrs Egbayelo had accepted the new holiday and pay arrangements which took effect on 1 September 2017, since she had accepted the pay increase which was a part of those arrangements, and she could not "cherry-pick" by accepting the benefit of the increase in pay without also accepting a reduction (unless she "bought it back") in her entitlement to holidays.

50 For the above reasons, the claimants' contracts of employment fall to be read as including the holiday and pay entitlements introduced by the respondent with effect from 1 September 2017, i.e. as described in outline in paragraph 33 above.

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Employment Judge

Date: ……11.09.18……..

Sent to the parties on: .21.09.18.....

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For the Tribunal Office