Appeal No. UKEAT/0261/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 March 2019
Judgment handed down on 23 May 2019

Before

MRS JUSTICE ELISABETH LAING DBE

MR D JENKINS OBE

MR T STANWORTH

MR J LOZAIQUE APPELLANT

TESCO STORES LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DANNY AH-TIME (Representative) 5 Princes Road Ashford TW15 2LT
For the Respondent	MR ORLANDO AIDAN HOLLOWAY (of Counsel) Instructed by: Squire Patton Boggs (UK) LLP 6 Wellington Place Leeds LS1 4AP

SUMMARY

CONTRACT OF EMPLOYMENT – Incorporation into contract

UNLAWFUL DEDUCTION FROM WAGES

The Appellant appealed against a decision of the Employment Tribunal dismissing his claim for unlawful deduction of wages. He contended that his contract of employment required him to do 20 hours of overtime per week for which he was entitled to be paid at time and a half. The Respondent argued that a collective agreement was incorporated in the Appellant's contract of employment, and that, as a result of negotiations between the Respondent and the relevant trade union, the rate for 12 hours of that overtime had been reduced from time and a half to single time.

The Employment Appeal Tribunal held that while the collective agreement was expressly incorporated in the Appellant's contract of employment, the revised term about overtime premiums was not apt for incorporation. It allowed the appeal.

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MRS JUSTICE ELISABETH LAING DBE

1. This is an appeal from a judgment of the Employment Tribunal ('the ET') sitting at Watford. The ET consisted of Employment Judge Skehan ('the EJ'). In a judgment sent to the parties on 10 July 2018 the ET dismissed the Claimant's claim for unlawful deduction of wages.

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2. We will refer to the parties as they were below. Paragraph references are to the ET's judgment unless we say otherwise.

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3. The Claimant was represented by Mr Ah-Time. The Respondent was represented by Mr Holloway of counsel. We are grateful to the representatives for their written and oral arguments.

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The dispute in outline

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4. The Claimant was employed by the Respondent from 19 November 2001 as a store security man at 2017 Addlestone. On 26 October 2005, he was offered a new job by the Respondent as CCTV operator at Hayes Extra 2642, by a letter of that date ('the 2005 letter'). He still works there.

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5. In 2016, the Respondent negotiated a new agreement with the Union of Shop, Distributive and Allied Workers ('USDAW'). That agreement included a reduction in premiums for overtime worked other than on Sundays. The relevant premiums have been and are expressed as a multiplier of the applicable hourly rate: '1.5' and '2'. In a nutshell, the Claimant did not accept that that part of the agreement applied to him. He contended that in accordance with the October 2005 appointment letter, he was guaranteed 20 hours of overtime a

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week, and was entitled to be paid a premium of 1.5 multiplied by the applicable hourly rate for each hour of overtime which he worked. He has continued to work 20 hours of overtime a week in accordance with that appointment letter. The Respondent has not, since the new agreement with USDAW in 2016, paid that premium for 12 of those hours. The Claimant then brought an unsuccessful claim in the ET for unlawful deduction of wages, which is the subject of this appeal.

The relevant documents

C's 'terms and conditions of employment' (2001)

6. On 31 December 2001, the Claimant and a representative of the Respondent signed a document headed 'Terms and Conditions of Employment'. Under that heading, the document said: "This statement sets out the main particulars of the terms and conditions of employment' between the Respondent and the Claimant. The Claimant's job title was 'Store Security". He could be required to carry out other duties that might reasonably be required of him in other departments. He was to be based at Addlestone, but he could be required to work at another place which was within reasonable travelling distance.

7. His 'normal, paid working hours' were 36.5 per week. The details of the working week would be as set out in the offer letter (a document which we have not seen) or 'those agreed with your immediate boss'. The Claimant might 'be expected to work additional hours if necessary'. If he worked fewer than 36.5 hours, he could be expected to 'co-operate in extending [his] normal working week, at short notice, in special circumstances'. If he was contracted to work on Sundays, he should refer to 'the Sunday Working Hours Addendum' for his rights. We have not seen that document.

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8. His pay was £250.65 per week. How that sum was made up could be found in his offer letter or on his itemised pay slip. We have not seen any payslips from this, or from any other, period.

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9. Under the heading 'Joint Agreements – Retail Division Parts one and two' the statement said, 'Your terms and conditions include those contained in the Joint Agreements, Retail Division Parts One and Two negotiated between [R] and USDAW. These apply whether or not you are a member of USDAW'.

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10. As well as the offer letter, and the Sunday Working Hours Addendum, the Terms and Conditions of Employment incorporated by express reference of the Claimant's 'Staff Handbook' for details about sickness, 'the Addendum to this statement' for details about holidays and notice periods, 'Members Guides' for details about pensions, 'the Staff Notice Board' for details about disciplinary procedures and further stage grievances, and 'the Grievance and Disciplinary Procedures booklet' for further stage grievances.

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11. Any changes to the details provided in the particulars would be communicated to the Claimant personally, in writing, within one month after the change. If the Respondent needed to change the contract, it would always consult for a month, and give notice of any change.

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12. Under the heading 'Summary' the document said, 'This statement, together with the Addendum and the documents referred to, form part of your terms and conditions of employment'. Above the signatures was a declaration, 'I understand and accept the terms and conditions as outlined above and confirm that I have received my Staff Handbook'.

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The letter dated 26 October 2005

13. On 26 October 2005, Mr Mike Collins, a, or the, 'Shrink Manager' wrote to the Claimant on the Respondent's headed notepaper. He said:

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> **" I am pleased to offer you the role of CCTV Operator at Hayes Extra 2642. You contract will be 36.5 hours and we will guarantee you at least 12 hours of overtime each week (which will be agreed on a weekly basis) and an 8-hour Sunday shift paid at a rate of 1.5."**

We were told that Hayes is about 12 miles from Addlestone. Mr Ah-Time also described the

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circumstances in which this offer was made, but the ET made no findings about those in its decision.

C's 'terms and conditions of employment' (2012)

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14. In October 2012, the Respondent signed a further set of particulars. The Claimant's total pay by then had increased to £364.75 per week. Many provisions were the same as, or very similar to, the provisions in the 2001 particulars. The provision about hours was the same

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as the provision in the 2001 particulars; and was inconsistent with the terms of the letter dated 26 October 2005 as interpreted by the ET in 2013 (and as interpreted by the ET in this case). The ET did not refer to the 2012 particulars in its judgment

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15. The only additional documents referred to in this set of particulars are the Staff Handbook (for terms about sickness, holidays, pensions, notice periods, discipline, grievances

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and appeals). A further document, the Solving Problems booklet, is also referred to in the latter context. The summary said, 'This statement, together with your Offer Letter, Staff Handbook and any other documents referred to, forms part of your terms and conditions of employment. These terms and conditions replace those in any previous document you may have received'.

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16. There was a provision headed 'Collective Partnership Agreement'. It said, 'Your terms and conditions include those contained in the Partnership Agreements, Retail Division, Parts One and Two negotiated between [Respondent] and USDAW'.

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The 2013 ET judgment

17. The Respondent stopped providing the Claimant with overtime in early 2013. The Claimant brought an unlawful deduction of wages claim against the Respondent. In a judgment sent to the parties on 22 July 2013 the ET sitting at Watford (consisting of Employment Judge Heal) declared that that complaint was well founded. The Claimant was 'contractually entitled to work and be paid 20 hours per week guaranteed overtime for which he was not paid from 7 January 2013 to 20 May 2013'.

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The Handbook

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18. There is an extract from an unsigned copy of the Handbook in the bundle. Page 9 says that the rate of pay is in the employee's offer letter. It refers to various different components of pay, but not to overtime. A 'personal rate' is paid 'Where a colleague moves to another role as a result of …a move at the company's request…. Further details were available in another document. A further page (the number is illegible in our copy) deals with overtime. It says, 'If you opt to work overtime or it is in your contract to work premium hours you may be entitled to an additional payment'. The same page also says that pay rates are subject to annual review 'through consultation with USDAW for all colleagues…' The table of rates for additional hours worked in 2013 is set out. It is all but illegible. Doing the best we can, we think that the table sets out, among other things, premiums for work on Sunday, and for overtime for hours of work over 36.5 hours for one week from Sunday to Saturday inclusive other than Sunday and Bank Holiday. The premiums for each vary according to the date when an employee joined the

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Respondent. There are two premiums for Sunday working, double time and time and a half. There are five rates for overtime worked on other days of the week, ranging from time and a half to single time.

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The Manager's Briefing Guide 2016-17.

19. This document is, as its title indicates, a document addressed to managers, telling them what to say to brief their 'colleagues on the outcome of our pay and benefits review'. It is suggested that each briefing should last 30 minutes. Colleagues should be handed a booklet headed 'Your Pay and Benefits Guide 2016-17', which is a different document from the Manager's Briefing Guide. Managers are told to explain the main changes (an increase in hourly pay and some reductions in premium rates) and the reasons for them.

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Your Pay and Benefits Guide 2016-17

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20. The introduction explains that the Respondent and USDAW have reached a 'new pay deal'. There will be one approach to premiums for everybody and the main hourly rate would increase by 3.1%. Page 4 deals with changes to overtime premiums (excluding Sundays and Bank Holidays: 'All hourly paid colleagues working overtime will be paid at single time'. A further document headed 'Pay Review 2016-17 How the changes affect you' gives further details. The document in the bundle is a generic document, but its terms suggest that it was intended that individual employees would each be given a bespoke version.

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Working Together in Partnership

21. There are extracts from this in the bundle. The table of contents suggests that Booklets 1-7 contain terms that are not obviously apt for incorporation in a contract of employment, as they apparently cover arrangements for such matters as collective bargaining and

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representation. They describe, in other words, the 'partnership' between the Respondent and USDAW. Booklet 8, however, is entitled 'Terms and Conditions'.

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22. Booklet 8 is said to give 'information on a number of terms and conditions'. It lists eight contract types, which are then described on the following pages. No description fits the Claimant's case. He does not have a 'Permanent contract – full-time…', because while he may have fixed core hours, the additional hours he works as overtime are not done 'entirely voluntar[il]y'. Nor does he have an 'inclusive' contract, as described. He has not agreed to work a minimum of 13 Sundays, but rather, every Sunday (other than when he is ill or on leave). It is provided that additional Sundays worked 'over and above the inclusive contract are voluntary and paid as overtime'. That does not describe his case. His contract is not a 'flexible contract' as defined.

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23. Page 6 of booklet 6 deals with pay. It describes various potential components of pay. None, apart from basic pay, obviously applies to the Claimant. Page 8 is headed 'Premiums'. Premiums are described on page 8 under the headings 'Sundays', 'Bank Holidays', and 'Overtime (for hours worked over 36.5 hours in one week from Sunday to Saturday inclusive) other than Sundays and Bank Holidays'. Under the table is the following text 'Any overtime worked is voluntary and all hours worked should be paid at the colleague's contractual premium rate…'

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24. A further extract is headed 'Pay Review'. It recites that the pay package is reviewed annually 'and changed in agreement with USDAW'. The negotiation process is then described.

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The ET's reasons

25. The ET heard evidence from the Claimant and from Ms Powell.

26. The ET found that the Claimant's terms and conditions were in a contract of employment dated 31 December 2001 (paragraph 6). As we have already said, the EJ did not refer to the 2012 particulars. The EJ referred to the provision about joint agreements which we have quoted above. The EJ said that the contract made various references to the Staff Handbook. In fact, as we have indicated, there are two such references in the 2001 particulars. The EJ said (paragraph 6) that the Staff Handbook 'is said to be expressly incorporated into [The Claimant's] contract of employment'. We will return to this topic; but we note that the 2001 particulars did not say that, though the 2012 particulars do. The EJ also said, 'Within the handbook, I was referred to a partnership agreement between [the Respondent] and USDAW'.

27. In paragraph 7, the EJ said that the Claimant 'was entitled to work is [sic] normal hours, guaranteed overtime, and additional overtime'. The EJ did not identify the source of that entitlement, or further explain it. The EJ said that an entitlement to guaranteed overtime was unusual. Ms Powell said that the Claimant was the only employee in her section of 7,500 employees who had guaranteed overtime. The EJ described the 2013 judgment (which we have already quoted) as stating that the Claimant 'was entitled to 20 hours a week of guaranteed overtime'. She added that the letter of 26 October 2005 set out 'this entitlement' and 'confirm[ed] that the pay for this guaranteed overtime was 1.5 of normal salary'. The overtime could be broken down into 8-hour Sunday shifts and 12 hours additional guaranteed overtime. The EJ said that the Claimant 'was entitled to accept or refuse such additional overtime as may be offered to him by [the Respondent]'.

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28. In paragraph 8, the EJ said that the Claimant's Sunday overtime was not affected by 'the changes contained in the collective agreement'. The EJ continued, 'The collective agreement only purports to affect [the Claimant's] 12 hours of non-Sunday guaranteed overtime each week'. The EJ recorded C's evidence that he was entitled to guaranteed overtime. He only knew about his own position. He considered that R could not change his guaranteed entitlement to overtime or the hourly rate of 1.5. He accepted that USDAW could negotiate overtime pay and that the agreement reached by USDAW applied to him to the extent that it related to, and amended, the pay rate for his additional voluntary overtime (any amount over the guaranteed 20 hours). He did not accept that the USDAW 'deal applied to his guaranteed overtime entitlement'.

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29. The EJ described, in paragraph 9, a meeting between the Claimant and the Respondent in June 2016 to discuss 'the changes to his contract which would be imposed by the USDAW agreement'. The EJ had been referred to 'a generic copy of the booklet that was provided to [the Claimant] by [the Respondent] explaining the changes to his contract. This document sets out [the Respondent's] changes to premiums'. All employees would continue to be paid at 1.5 per hour for Sundays and Bank Holidays. Other overtime premiums would be paid at single time. The booklet said that if the Claimant suffered a net reduction in take-home pay, he would be supported by a lump sum. The 'USDAW review was good news for many employees, but some would be impacted negatively'. The Claimant was in the latter camp.

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30. In paragraph 10, the ET recorded the Claimant's evidence that he had questioned this change, but had received no response. The Respondent, he said, considered that the booklet addressed the Claimant's concerns. He, however, did not consider that the booklet dealt with guaranteed overtime. His belief was that the booklet only referred to 'normal voluntary

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overtime'. He accepted the Respondent's position in relation to that. The Claimant considered that his questions had not been answered (paragraph 10).

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31. The Claimant told the ET that he had never agreed the changes to his 'guaranteed overtime entitlement'.

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32. In paragraph 11, the ET described the Claimant's evidence that he did not agree the changes to his 'guaranteed overtime entitlement'. He continued to work the overtime hours 'because he had a contractual obligation to do so'. He raised a grievance about it. He did not sign the new contract. From 3 July, the Claimant was paid for his 12 hours of guaranteed overtime at his standard rate. He received a lump sum of £4272 from the Respondent which the Respondent transferred directly into his account with his normal salary. The Respondent did not explain at the hearing how the sum was made up (paragraph 12).

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33. Under the heading 'Determination', the ET said, in paragraph 13, that 'guaranteed overtime simply means overtime that an employer is contractually obliged to offer the employee and which the employee is contractually obliged to work'. Describing it as different from normal or ordinary overtime which the employer is not obliged to offer, or the employee to work, the ET continued, 'Guaranteed overtime is created by a contractual agreement… and that contractual agreement can be changed in the same way as any other contractual agreement between the parties. Although [the Claimant] has an [ET] decision confirming his entitlement to guaranteed overtime, this does not confer any special or protected status on that contractual entitlement'.

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34. The ET said in paragraph 14 that the first question was whether the Claimant's terms and conditions incorporated 'the collective agreement'. The EJ had been referred to a judgment of Employment Judge Pearl on 16 March 2018 (which the EJ attached as schedule 1 to her judgment) ('the Jenkins judgment'). The Jenkins judgment was not binding on her 'but considers the same circumstances in respect of the question of incorporation of this particular collective agreement. It has been helpful in deciding this issue as it clearly sets out the history between [the Respondent] and [USDAW] at paragraph 14 onwards. In the Jenkins judgment, the ET decided that "the partnership agreement…has been incorporated into the employee's contract".' The Claimant 'accepts that the partnership agreement validly changes the overtime rate in respect of his normal overtime, i.e. overtime in excess of his 20 hours guaranteed entitlement. For the same reason as set out in paragraphs 49 to 54 of the Jenkins judgment, I find that the partnership agreement is incorporated within [the Claimant's] terms and conditions of employment'.

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35. In paragraph 15, the ET said that the pay review agreed between the Respondent and USDAW reduced overtime rates to normal salary. It affected the Claimant's 'previously [sic] 1.5 entitlement to single normal salary. There was no distinction within the USDAW agreement between different types of overtime. The agreement is said to apply to all overtime for the affected employees'. The EJ then said, 'There was nothing within [the Claiamnt's] previous contractual arrangement for guaranteed overtime or the agreement that guaranteed overtime would be paid at 1.5 times his normal rate that protects this contractual guaranteed overtime from the rate change as imposed by the collective agreement'. She could not find 'any basis' for the Claimant's 'claims that the guaranteed element of his overtime should be protected from the USDAW collective agreement, reducing the rate for paid overtime'.

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36. She went on to consider whether or not, if his agreement to the change was required, the Claimant had agreed to it. She held that he had not (paragraphs 17-18). There is no cross-appeal against that finding.

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The Jenkins judgment

37. The Jenkins judgment is annexed to the ET's judgment in this case. The claimants in that case all started work before 4 July 1999. They were therefore entitled to a premium rate of 2x for working on Sundays (whether contracted or overtime hours), and for working on Bank Holidays ('which would always be voluntary') (Jenkins judgment, paragraph 5). At paragraph 6 of the Jenkins judgment, the ET referred to the standard terms and conditions document as at 2016.

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38. The parts of the 2016 document which the ET quoted in the Jenkins judgment are similar but not identical to the equivalent provisions in C's 2012 particulars. It was clear from the opening words and from the caption above the signature, that the 2016 document was not an exhaustive statement of all terms and conditions (Jenkins judgment, paragraph 7). The 2016 document made similar provision about pay. The provision about the relevant collective agreement was similarly worded. The ET explained in paragraph 12 of the Jenkins judgment that the provision about the collective agreement had been different in documents produced before 1998, which referred to 'Joint Agreements Retail Division Parts One and Two', and that the reference to 'Parts one and two' had been kept in later versions by mistake. It therefore seems likely that the Claimant's 2001 particulars were from a standard form produced before 1998 but which was still being issued in 2001.

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39. The provision about changes to the contract was similar, as was the 'Summary'.

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40. The ET noted in paragraph 14 of the Jenkins judgment that about 60% of the Respondent's 250,000 employees were members of USDAW. The ET explained in paragraph 15 that employee representatives sit on a body called the National Forum. 12 of those representatives, who have to be members of USDAW, comprise the Pay Review Team, which negotiates under the collective agreement. The Partnership Agreement has eight sections. The last deals with pay review and premiums paid for Sunday and Bank Holiday work. In paragraph 16 of the Jenkins judgment, the ET described the process by which pay is negotiated and agreed.

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41. The Staff Handbook has a heading 'Pay Review'. This says, 'Our pay rates are subject to review annually through consultation with USDAW for all colleagues…' In paragraphs 18-19 of the Jenkins judgment, the ET described the process of pay negotiation, and in paragraphs 20-29, the background to, and the negotiation in 2015-16. In paragraph 27, the ET described the increase to normal pay which 'unlocked the impasse' (paragraph 28) which had been reached. USDAW proposed that premium rates should be 1.5 per hour on Sundays and Bank Holidays, a reduction in the premium rate which the Jenkins claimants had previously enjoyed. A quid pro quo was that hourly rates would go up.

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42. It is not clear from the Jenkins judgment how many of the claimants, if any, apart from Ms Jenkins (see paragraph 39) were obliged to work on Sundays, as opposed to working habitually on Sundays.

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43. The ET stated the issues it had to decide in paragraph 49 of the Jenkins judgment. It cited **Alexander v Standard Telephone & Cables Limited** [1999] IRLR 286 and **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 WLR 896. In paragraph

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52, the ET held that a reasonable employee would understand the reference in the particulars to be a reference to the up-to-date Partnership Agreement. The ET held there was no good reason why the Partnership Agreement should not be incorporated, including the section on pay, and the reference to annual pay bargaining (paragraph 54). The ET held that there was nothing to prevent the Partnership Agreement from reducing pay (paragraphs 55-59).

Submissions

44. In summary, Mr Ah-Time submitted that the EJ did not distinguish between the Claimant's two contracts, that she relied heavily on the decision in the Jenkins case, but that the circumstances in that case were different. None of the arguments in that case related to guaranteed overtime. The Claimant accepted that the collective agreement applied to his main contract, but it did not apply to the specific agreement he had which was evidenced by the 26 October 2005 letter. That was separate and independent from his main contract. The hours and rate were agreed. Those terms could not be varied by the Respondent unilaterally, or via the collective agreement.

45. In answer to a question from Mr Jenkins, he submitted that the hourly rate to which the premium of 1.5 would apply was whatever was the going rate. The Respondent had drafted the contract and any ambiguity should be resolved in the Claimant's favour. The Respondent could have asked the Claimant to transfer from Addlestone to Hayes on a normal hourly contract but had not done so. He had been given an independent and specific agreement to induce him to move. The collective agreement was not incorporated in this specific agreement. The October 2006 letter was a collateral contract: see **<u>Hughes v Pendragon Limited</u>** [2016] EWCA (Civ) 18.

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46. Mr Ah-Time submitted that the Claimant's contract did not fall into any of the categories described in the Partnership Agreement. The 20 hours of overtime was not voluntary, and so the material about premium payments in the Partnership Agreement did not apply to it. In his reply he submitted that the Partnership Agreement did not apply to the Claiamnt as it only referred to voluntary overtime. It did not apply to guaranteed overtime. It made no sense for the Claiamnt to be obliged by the October 2005 letter to do 20 hours of overtime every week, but for him not to be entitled to the premium set out in that letter. He has continued to work 20 hours overtime a week, but was not getting the consideration for it which had been agreed between him and Mr Collins in 2005.

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47. In his submissions, Mr Holloway referred to the long history of negotiations between USDAW and the Respondent. The collective agreement applied across a large workforce. The Partnership Agreement provides for pay to be reviewed annually. It could override the Claimant's individual agreement with the Respondent. The correct analysis was that the 2005 letter 'amended the contract in relation to location and overtime but collective bargaining remains applicable'. USDAW and the Respondnet had the authority to negotiate on pay. The EJ accepted that the 2005 letter was binding, but it did not prevent pay being negotiated under the collective agreement. The overtime agreement reached in the 2005 letter was 'pay'.

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48. We asked Mr Holloway whether the Claimant's contract fitted into one of the categories described in the Partnership Agreement. He did not, in our judgment, have a convincing answer to that question. He suggested that the Partnership Agreement should not be read literally. He suggested, for example, that the Claimant was not required to work every Sunday because he was entitled to take leave. We asked whether there was any evidence before the ET that any employee had a similar contract to the Claimant's. We were told that the Respondent's

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witness was not aware of any, and had told the ET that none of the 7500 employees for whom she was responsible had such a contract. Mr Holloway accepted that the text about overtime on page 52 of the bundle, which says that any overtime is 'voluntary' did not describe the Claimant's case.

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49. He accepted that there was no document which showed that the version of the Partnership Agreement in the bundle had been amended to reflect the outcome of the 2016/17 negotiation. That, however, was the effect of the 2016/17 negotiation, and it was communicated to employees in the briefings. The Partnership Agreement was specifically incorporated in the Claiamnt's particulars. That provided for a pay review process. He referred to paragraphs 16, 23 and 32 of the Jenkins judgment. If the Claimant was not under the Partnership Agreement, the Respondent would be able to pay him at the old rate of pay set out in the most recent particulars. The Partnership Agreement had been made on the understanding that it would apply to all relevant employees. Just because someone did not fit easily into one of the descriptions did not mean that they could be 'elevated' out of the Partnership Agreement altogether. The pay rates and premiums which were the outcome of the 2016/17 negotiations could not be separated. USDAW had only agreed to the change to premiums on the condition that that hourly rate was increased.

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50. He accepted that a consequence of the ET's decision was that the Claimant could now be required to work 12 hours of overtime a week at a lower premium than was agreed in the 2005 letter. The EJ was right to conclude that the Claimant's contract of employment was 'subject to collective bargaining'. Given the long history of collective bargaining, it would 'need something clear to change that'.

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51. In response to Mr Ah-Time's suggestion that the 2005 letter was a collateral contract, he submitted, first, that that was a new argument, not run at the ET hearing, and, second, that it could not stand as an independent agreement as there were many terms it did not cover. The obvious answer to a relevant question asked by the officious bystander would be that those terms were covered by the terms and conditions which had been agreed through collective bargaining. So, if the Partnership Agreement was not expressly incorporated, it was incorporated by implication. If that was wrong, it was the long-held custom and practice of the employer to have collective bargaining and the fruits of that would be implied into the contract.

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The law

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52. We were referred to several authorities. The decision which we have found most helpful is the decision of Hobhouse J (as he then was) in; **Alexander v Standard Telephone & Cables Limited** (*No 2)* [1991] IRLR 286.

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53. At paragraph 31, he summarised the principles in this way.

> **" The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn."**

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54. The courts have recognised that in some circumstances, a claimant may rely on a collateral contract to override the terms of a main contract. The paradigm is an oral promise which induces a person to enter into, and to sign, a written contract which contains a clause

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which is inconsistent with the oral promise: see, for example, **Mendelsshon v Normand** [1970] QB 177 at 183H-184C:

> **" There are many cases in the books when a man has made, by word of mouth, a promise or a representation of fact, on which the other party acts by entering into the contract. In all such cases the man is not allowed to repudiate his representation by reference to a printed condition…The reason is because the oral promise or representation has a decisive influence on the transaction – it is the very thing which induces the other to contract – and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation. As Devlin J said in Firestone Tyre and Rubber Co. Ltd. v. Vokins & Co. Ltd. [1951] 1 Lloyd's Rep 32, 39: "It is illusory to say: 'We promise to do a thing, but we are not liable if we do not do it'." To avoid this illusion, the law gives the oral promise priority over the printed clause."**

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55. The effect of a collateral contract may be to vary the terms of the main contract, or to estop a party from acting inconsistently with the collateral contract if it would be inequitable to do so. As Robert Walker J (as he then was) put it in **Wake v Renault (UK) Limited** (unreported, 25 July 1996) at pages 26-27:

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> **" A collateral contract is not to be lightly inferred, especially where the main contract is embodied in formal documents prepared by lawyers. Its terms must be sufficiently certain (and they are sometimes very simple indeed, as in the well-known case of City & Westminster Properties v Mudd 1959 Ch 129). Any assurance must, if it is to be capable of amounting to a collateral contract, be intended to bind as a contractual promise, as opposed to being merely a statement of present intention or policy which lacks contractual force. The principles are very clearly set out in the judgment of Ralph Gibson L.J. (with which Nicholls L.J. and Fox L.J. agreed) in Kleinwort Benson v Malaysian Mining Corporation [1989] 1 WLR 379."**

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Mr Ah-Time referred us to the decision of the Court of Appeal in **Hughes v Pendragon Limited** [2016] EWCA (Civ) 18.

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Discussion

56. There are five issues.

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i. What is the effect of C's written particulars of employment?

ii. What is the effect of the 2005 letter?

iii. What is the effect of the Partnership Agreement?

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iv. How do the three documents interact?

v. Is there a collateral contract?

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What is the effect of C's 2012 particulars?

57. The Claimant's 2012 particulars are on a standard form. Apart from the details at the top of the document and the rate of pay which applied when the particulars were issued they are standard terms. They are not a full statement of the terms of the contract. They describe the main terms of the contract and refer to other documents, principally the Staff Handbook, for details about some terms. They also provide that the terms and conditions 'include' those contained in the Partnership Agreements. We have no doubt that the particulars are effective, in general, to incorporate the Partnership Agreement in the Claimant's contract. However, that is subject to an important qualification. The qualification is that no specific term in the Partnership Agreement will be incorporated in the Claimant's contract of employment unless it is apt for incorporation in his contract of employment.

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58. Although the 2012 particulars post-date the 2005 letter, we do not consider that the term about overtime which they contain, and which is inconsistent with the 2005 letter, supersedes the 2005 letter, for reasons which we explain in the next two paragraphs.

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What is the effect of the 2005 letter?

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59. The 2005 letter has been interpreted by the ET in 2013 and by the ET in the decision which is the subject of this appeal. The 2013 judgment was not appealed, and neither party to this appeal has challenged the way in which the EJ in this case interpreted the 2005 letter. The two unappealed ET decisions about its meaning bind us and the parties. Our views about the correct interpretation of the 2005 letter are therefore irrelevant.

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60. The ET in 2013 held that the letter obliged the Respondent to offer the Claimant and to pay him for '20 hours per week guaranteed overtime'. In paragraph 13 of the decision under

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appeal, the ET held that the guaranteed overtime was 'overtime which the Respondent was obliged to offer to the Claimant and which the Claimant was obliged to work'. Since the ET in 2013 did not differentiate between the Sunday and other overtime, it must have decided that the 1.5 premium referred to in the letter was payable for both types of overtime. Both ET judgments were sent to the parties after the 2012 particulars were issued. It follows that both ETs must have decided that the inconsistent provision about overtime in the 2012 particulars did not override the terms of the 2005 letter.

61. We are therefore bound to hold that the letter obliges the Respondent to offer, and the Claimant to work, 20 hours of overtime a week, 8 of which are on Sundays, and that the Respondent is to pay for that overtime a premium of 1.5. We accept Mr Ah-Time's submission that in the factual context the multiplicand for the premium of 1.5 is, as he put, it, what from time to time is the 'going rate', that is, the hourly rate derived, from time to time, from the collective bargaining arrangements which are described in the Partnership Agreement. There is nothing in the Claimant's particulars, or in the 2005 letter, which makes such a term inapt for incorporation.

What is the effect of the Partnership Agreement?

62. We consider that the terms in the Partnership Agreement which refer to premiums do not, as a matter of construction, apply to the 20 hours of overtime which are provided for in the 2005 letter because the Claimant has an obligation to do this overtime, and the overtime is not therefore voluntary. The terms about premiums are not therefore apt for incorporation in his contract so as to displace the provisions of the 2005 letter as respects the 20 hours of guaranteed overtime. It follows that the changes to premiums introduced by the 2016/17 negotiation were not apt for incorporation in the Claimant's contract of employment so as to govern the 20 hours

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of guaranteed overtime. Any hours of overtime which the Respondent might offer and which the Claimant might agree to work in addition to the 20 hours of guaranteed overtime are voluntary. As a matter of construction, the Partnership Agreement covers voluntary overtime. It seems to us that, to that extent, the terms of the Partnership Agreement governing premiums, as reviewed annually in the course of collective bargaining, are apt for incorporation in the Claimant's contract of employment. We accept Mr Ah-Time's submission about that. The Claimant was right to concede, as the ET recorded in paragraph 14, that the premium change did apply to any overtime he did over the 20 hours, because any such overtime was voluntary.

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How do the three documents interact?

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63. The effect of our conclusions on the first three issues is that the 2016/17 pay review resulted in an uplift to the Claimant's basic rate, but did not change the premium which applied to the 20 hours of overtime described in the 2005 letter. The 2016/17 pay review also led to a reduction in the Claimant's entitlement to a premium of 1.5 for any overtime which the Claimant worked in addition to the 20 hours of guaranteed overtime.

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Is there a collateral contract?

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64. We do not consider it necessary to make a decision on Mr Ah-Time's submission that the 2005 letter is a collateral contract. The submission faces two linked difficulties. First, it does not seem to have been made at the ET hearing. The ET1 seems to have been completed by the Claimant himself. Unsurprisingly, it does not refer to collateral contract, although we note that the ET3 records that the Respondent understood that it was the Claimant's case in the internal grievance procedure that he had a 'special contract' (paragraphs 20 and 22) or that his contract was 'different compared to other people in Tesco' (paragraph 21). Second, it is not supported by any relevant findings of fact by the ET.

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65. We consider, in any event, that the 2005 letter was a variation of the 2001 particulars, supported by consideration (C's move to a different branch). We are not required to explain the relationship between the 2005 letter and the 2012 particulars, for the reasons we have given in paragraphs 59-61, above.

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Conclusions

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66. We consider that the ET erred in law in not asking whether each of the relevant terms of the Partnership Agreement was apt for incorporation in the Claimant's contract. The EJ assumed, rather, that having decided that the Partnership Agreement was incorporated in the Claimant's contract, it followed that every term of the Partnership Agreement was also

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incorporated. We consider, for the reasons we have given, that that is non sequitur. The incorporation, in general terms, of the Partnership Agreement, is not an answer to the question posed by this claim. We also consider that the EJ erred in paragraph 15, in apparently requiring

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an express protection of the premium to be conferred by the 2005 letter. The individual's contract is the starting point, and the question, rather, is whether there is a term in the collective agreement which is apt for incorporation in the individual's contract and which removes the entitlement to the 1.5 premium. For the reasons we have given, there is not.

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67. We should deal briefly with Mr Holloway's argument about implication and custom and practice. It is trite law that neither a term implied by law nor by custom and practice can

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contradict an express term of the contract in question. Any such process of implication in this case would contradict the express terms of the 2005 letter.

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68. We allow this appeal. The 2016/17 pay review did not affect the Claimant's entitlement to be paid a premium of 1.5 of the applicable basic hourly rate for his 20 hours of guaranteed overtime.

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69. We remit the case to the ET for it to consider the appropriate remedy.

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Appeal No. UKEAT/0261/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 26 March 2019
Judgment handed down on 23 May 2019

Before

MRS JUSTICE ELISABETH LAING DBE

MR D JENKINS OBE

MR T STANWORTH

MR J LOZAIQUE APPELLANT

TESCO STORES LIMITED RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR DANNY AH-TIME (Representative) 5 Princes Road Ashford TW15 2LT
For the Respondent	MR ORLANDO AIDAN HOLLOWAY (of Counsel) Instructed by: Squire Patton Boggs (UK) LLP 6 Wellington Place Leeds LS1 4AP

SUMMARY

CONTRACT OF EMPLOYMENT – Incorporation into contract

UNLAWFUL DEDUCTION FROM WAGES

The Appellant appealed against a decision of the Employment Tribunal dismissing his claim for unlawful deduction of wages. He contended that his contract of employment required him to do 20 hours of overtime per week for which he was entitled to be paid at time and a half. The Respondent argued that a collective agreement was incorporated in the Appellant's contract of employment, and that, as a result of negotiations between the Respondent and the relevant trade union, the rate for 12 hours of that overtime had been reduced from time and a half to single time.

The Employment Appeal Tribunal held that while the collective agreement was expressly incorporated in the Appellant's contract of employment, the revised term about overtime premiums was not apt for incorporation. It allowed the appeal.

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MRS JUSTICE ELISABETH LAING DBE

1. This is an appeal from a judgment of the Employment Tribunal ('the ET') sitting at Watford. The ET consisted of Employment Judge Skehan ('the EJ'). In a judgment sent to the parties on 10 July 2018 the ET dismissed the Claimant's claim for unlawful deduction of wages.

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2. We will refer to the parties as they were below. Paragraph references are to the ET's judgment unless we say otherwise.

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3. The Claimant was represented by Mr Ah-Time. The Respondent was represented by Mr Holloway of counsel. We are grateful to the representatives for their written and oral arguments.

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The dispute in outline

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4. The Claimant was employed by the Respondent from 19 November 2001 as a store security man at 2017 Addlestone. On 26 October 2005, he was offered a new job by the Respondent as CCTV operator at Hayes Extra 2642, by a letter of that date ('the 2005 letter'). He still works there.

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5. In 2016, the Respondent negotiated a new agreement with the Union of Shop, Distributive and Allied Workers ('USDAW'). That agreement included a reduction in premiums for overtime worked other than on Sundays. The relevant premiums have been and are expressed as a multiplier of the applicable hourly rate: '1.5' and '2'. In a nutshell, the Claimant did not accept that that part of the agreement applied to him. He contended that in accordance with the October 2005 appointment letter, he was guaranteed 20 hours of overtime a

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week, and was entitled to be paid a premium of 1.5 multiplied by the applicable hourly rate for each hour of overtime which he worked. He has continued to work 20 hours of overtime a week in accordance with that appointment letter. The Respondent has not, since the new agreement with USDAW in 2016, paid that premium for 12 of those hours. The Claimant then brought an unsuccessful claim in the ET for unlawful deduction of wages, which is the subject of this appeal.

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The relevant documents

C's 'terms and conditions of employment' (2001)

6. On 31 December 2001, the Claimant and a representative of the Respondent signed a document headed 'Terms and Conditions of Employment'. Under that heading, the document said: "This statement sets out the main particulars of the terms and conditions of employment' between the Respondent and the Claimant. The Claimant's job title was 'Store Security". He could be required to carry out other duties that might reasonably be required of him in other departments. He was to be based at Addlestone, but he could be required to work at another place which was within reasonable travelling distance.

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7. His 'normal, paid working hours' were 36.5 per week. The details of the working week would be as set out in the offer letter (a document which we have not seen) or 'those agreed with your immediate boss'. The Claimant might 'be expected to work additional hours if necessary'. If he worked fewer than 36.5 hours, he could be expected to 'co-operate in extending [his] normal working week, at short notice, in special circumstances'. If he was contracted to work on Sundays, he should refer to 'the Sunday Working Hours Addendum' for his rights. We have not seen that document.

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8. His pay was £250.65 per week. How that sum was made up could be found in his offer letter or on his itemised pay slip. We have not seen any payslips from this, or from any other, period.

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9. Under the heading 'Joint Agreements – Retail Division Parts one and two' the statement said, 'Your terms and conditions include those contained in the Joint Agreements, Retail Division Parts One and Two negotiated between [R] and USDAW. These apply whether or not you are a member of USDAW'.

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10. As well as the offer letter, and the Sunday Working Hours Addendum, the Terms and Conditions of Employment incorporated by express reference of the Claimant's 'Staff Handbook' for details about sickness, 'the Addendum to this statement' for details about holidays and notice periods, 'Members Guides' for details about pensions, 'the Staff Notice Board' for details about disciplinary procedures and further stage grievances, and 'the Grievance and Disciplinary Procedures booklet' for further stage grievances.

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11. Any changes to the details provided in the particulars would be communicated to the Claimant personally, in writing, within one month after the change. If the Respondent needed to change the contract, it would always consult for a month, and give notice of any change.

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12. Under the heading 'Summary' the document said, 'This statement, together with the Addendum and the documents referred to, form part of your terms and conditions of employment'. Above the signatures was a declaration, 'I understand and accept the terms and conditions as outlined above and confirm that I have received my Staff Handbook'.

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The letter dated 26 October 2005

13. On 26 October 2005, Mr Mike Collins, a, or the, 'Shrink Manager' wrote to the Claimant on the Respondent's headed notepaper. He said:

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> **" I am pleased to offer you the role of CCTV Operator at Hayes Extra 2642. You contract will be 36.5 hours and we will guarantee you at least 12 hours of overtime each week (which will be agreed on a weekly basis) and an 8-hour Sunday shift paid at a rate of 1.5."**

We were told that Hayes is about 12 miles from Addlestone. Mr Ah-Time also described the circumstances in which this offer was made, but the ET made no findings about those in its decision.

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C's 'terms and conditions of employment' (2012)

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14. In October 2012, the Respondent signed a further set of particulars. The Claimant's total pay by then had increased to £364.75 per week. Many provisions were the same as, or very similar to, the provisions in the 2001 particulars. The provision about hours was the same as the provision in the 2001 particulars; and was inconsistent with the terms of the letter dated 26 October 2005 as interpreted by the ET in 2013 (and as interpreted by the ET in this case). The ET did not refer to the 2012 particulars in its judgment

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15. The only additional documents referred to in this set of particulars are the Staff Handbook (for terms about sickness, holidays, pensions, notice periods, discipline, grievances and appeals). A further document, the Solving Problems booklet, is also referred to in the latter context. The summary said, 'This statement, together with your Offer Letter, Staff Handbook and any other documents referred to, forms part of your terms and conditions of employment. These terms and conditions replace those in any previous document you may have received'.

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16. There was a provision headed 'Collective Partnership Agreement'. It said, 'Your terms and conditions include those contained in the Partnership Agreements, Retail Division, Parts One and Two negotiated between [Respondent] and USDAW'.

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The 2013 ET judgment

17. The Respondent stopped providing the Claimant with overtime in early 2013. The Claimant brought an unlawful deduction of wages claim against the Respondent. In a judgment sent to the parties on 22 July 2013 the ET sitting at Watford (consisting of Employment Judge Heal) declared that that complaint was well founded. The Claimant was 'contractually entitled to work and be paid 20 hours per week guaranteed overtime for which he was not paid from 7 January 2013 to 20 May 2013'.

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The Handbook

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18. There is an extract from an unsigned copy of the Handbook in the bundle. Page 9 says that the rate of pay is in the employee's offer letter. It refers to various different components of pay, but not to overtime. A 'personal rate' is paid 'Where a colleague moves to another role as a result of …a move at the company's request…. Further details were available in another document. A further page (the number is illegible in our copy) deals with overtime. It says, 'If you opt to work overtime or it is in your contract to work premium hours you may be entitled to an additional payment'. The same page also says that pay rates are subject to annual review 'through consultation with USDAW for all colleagues…' The table of rates for additional hours worked in 2013 is set out. It is all but illegible. Doing the best we can, we think that the table sets out, among other things, premiums for work on Sunday, and for overtime for hours of work over 36.5 hours for one week from Sunday to Saturday inclusive other than Sunday and Bank Holiday. The premiums for each vary according to the date when an employee joined the

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Respondent. There are two premiums for Sunday working, double time and time and a half. There are five rates for overtime worked on other days of the week, ranging from time and a half to single time.

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The Manager's Briefing Guide 2016-17.

19. This document is, as its title indicates, a document addressed to managers, telling them what to say to brief their 'colleagues on the outcome of our pay and benefits review'. It is suggested that each briefing should last 30 minutes. Colleagues should be handed a booklet headed 'Your Pay and Benefits Guide 2016-17', which is a different document from the Manager's Briefing Guide. Managers are told to explain the main changes (an increase in hourly pay and some reductions in premium rates) and the reasons for them.

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Your Pay and Benefits Guide 2016-17

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20. The introduction explains that the Respondent and USDAW have reached a 'new pay deal'. There will be one approach to premiums for everybody and the main hourly rate would increase by 3.1%. Page 4 deals with changes to overtime premiums (excluding Sundays and Bank Holidays: 'All hourly paid colleagues working overtime will be paid at single time'. A further document headed 'Pay Review 2016-17 How the changes affect you' gives further details. The document in the bundle is a generic document, but its terms suggest that it was intended that individual employees would each be given a bespoke version.

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Working Together in Partnership

21. There are extracts from this in the bundle. The table of contents suggests that Booklets 1-7 contain terms that are not obviously apt for incorporation in a contract of employment, as they apparently cover arrangements for such matters as collective bargaining and

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representation. They describe, in other words, the 'partnership' between the Respondent and USDAW. Booklet 8, however, is entitled 'Terms and Conditions'.

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22. Booklet 8 is said to give 'information on a number of terms and conditions'. It lists eight contract types, which are then described on the following pages. No description fits the Claimant's case. He does not have a 'Permanent contract – full-time…', because while he may have fixed core hours, the additional hours he works as overtime are not done 'entirely

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voluntar[il]y'. Nor does he have an 'inclusive' contract, as described. He has not agreed to work a minimum of 13 Sundays, but rather, every Sunday (other than when he is ill or on leave). It is provided that additional Sundays worked 'over and above the inclusive contract are

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voluntary and paid as overtime'. That does not describe his case. His contract is not a 'flexible contract' as defined.

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23. Page 6 of booklet 6 deals with pay. It describes various potential components of pay. None, apart from basic pay, obviously applies to the Claimant. Page 8 is headed 'Premiums'. Premiums are described on page 8 under the headings 'Sundays', 'Bank Holidays', and 'Overtime (for hours worked over 36.5 hours in one week from Sunday to Saturday inclusive)

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other than Sundays and Bank Holidays'. Under the table is the following text 'Any overtime worked is voluntary and all hours worked should be paid at the colleague's contractual premium rate…'

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24. A further extract is headed 'Pay Review'. It recites that the pay package is reviewed annually 'and changed in agreement with USDAW'. The negotiation process is then described.

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The ET's reasons

25. The ET heard evidence from the Claimant and from Ms Powell.

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26. The ET found that the Claimant's terms and conditions were in a contract of employment dated 31 December 2001 (paragraph 6). As we have already said, the EJ did not refer to the 2012 particulars. The EJ referred to the provision about joint agreements which we have quoted above. The EJ said that the contract made various references to the Staff Handbook. In fact, as we have indicated, there are two such references in the 2001 particulars. The EJ said (paragraph 6) that the Staff Handbook 'is said to be expressly incorporated into [The Claimant's] contract of employment'. We will return to this topic; but we note that the 2001 particulars did not say that, though the 2012 particulars do. The EJ also said, 'Within the handbook, I was referred to a partnership agreement between [the Respondent] and USDAW'.

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27. In paragraph 7, the EJ said that the Claimant 'was entitled to work is [sic] normal hours, guaranteed overtime, and additional overtime'. The EJ did not identify the source of that entitlement, or further explain it. The EJ said that an entitlement to guaranteed overtime was unusual. Ms Powell said that the Claimant was the only employee in her section of 7,500 employees who had guaranteed overtime. The EJ described the 2013 judgment (which we have already quoted) as stating that the Claimant 'was entitled to 20 hours a week of guaranteed overtime'. She added that the letter of 26 October 2005 set out 'this entitlement' and 'confirm[ed] that the pay for this guaranteed overtime was 1.5 of normal salary'. The overtime could be broken down into 8-hour Sunday shifts and 12 hours additional guaranteed overtime. The EJ said that the Claimant 'was entitled to accept or refuse such additional overtime as may be offered to him by [the Respondent]'.

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28. In paragraph 8, the EJ said that the Claimant's Sunday overtime was not affected by 'the changes contained in the collective agreement'. The EJ continued, 'The collective agreement only purports to affect [the Claimant's] 12 hours of non-Sunday guaranteed overtime each week'. The EJ recorded C's evidence that he was entitled to guaranteed overtime. He only knew about his own position. He considered that R could not change his guaranteed entitlement to overtime or the hourly rate of 1.5. He accepted that USDAW could negotiate overtime pay and that the agreement reached by USDAW applied to him to the extent that it related to, and amended, the pay rate for his additional voluntary overtime (any amount over the guaranteed 20 hours). He did not accept that the USDAW 'deal applied to his guaranteed overtime entitlement'.

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29. The EJ described, in paragraph 9, a meeting between the Claimant and the Respondent in June 2016 to discuss 'the changes to his contract which would be imposed by the USDAW agreement'. The EJ had been referred to 'a generic copy of the booklet that was provided to [the Claimant] by [the Respondent] explaining the changes to his contract. This document sets out [the Respondent's] changes to premiums'. All employees would continue to be paid at 1.5 per hour for Sundays and Bank Holidays. Other overtime premiums would be paid at single time. The booklet said that if the Claimant suffered a net reduction in take-home pay, he would be supported by a lump sum. The 'USDAW review was good news for many employees, but some would be impacted negatively'. The Claimant was in the latter camp.

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30. In paragraph 10, the ET recorded the Claimant's evidence that he had questioned this change, but had received no response. The Respondent, he said, considered that the booklet addressed the Claimant's concerns. He, however, did not consider that the booklet dealt with guaranteed overtime. His belief was that the booklet only referred to 'normal voluntary

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overtime'. He accepted the Respondent's position in relation to that. The Claimant considered that his questions had not been answered (paragraph 10).

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31. The Claimant told the ET that he had never agreed the changes to his 'guaranteed overtime entitlement'.

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32. In paragraph 11, the ET described the Claimant's evidence that he did not agree the changes to his 'guaranteed overtime entitlement'. He continued to work the overtime hours 'because he had a contractual obligation to do so'. He raised a grievance about it. He did not sign the new contract. From 3 July, the Claimant was paid for his 12 hours of guaranteed

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overtime at his standard rate. He received a lump sum of £4272 from the Respondent which the Respondent transferred directly into his account with his normal salary. The Respondent did not explain at the hearing how the sum was made up (paragraph 12).

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33. Under the heading 'Determination', the ET said, in paragraph 13, that 'guaranteed overtime simply means overtime that an employer is contractually obliged to offer the employee and which the employee is contractually obliged to work'. Describing it as different

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from normal or ordinary overtime which the employer is not obliged to offer, or the employee to work, the ET continued, 'Guaranteed overtime is created by a contractual agreement… and that contractual agreement can be changed in the same way as any other contractual agreement

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between the parties. Although [the Claimant] has an [ET] decision confirming his entitlement to guaranteed overtime, this does not confer any special or protected status on that contractual entitlement'.

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34. The ET said in paragraph 14 that the first question was whether the Claimant's terms and conditions incorporated 'the collective agreement'. The EJ had been referred to a judgment of Employment Judge Pearl on 16 March 2018 (which the EJ attached as schedule 1 to her judgment) ('the Jenkins judgment'). The Jenkins judgment was not binding on her 'but considers the same circumstances in respect of the question of incorporation of this particular collective agreement. It has been helpful in deciding this issue as it clearly sets out the history between [the Respondent] and [USDAW] at paragraph 14 onwards. In the Jenkins judgment, the ET decided that "the partnership agreement…has been incorporated into the employee's contract".' The Claimant 'accepts that the partnership agreement validly changes the overtime rate in respect of his normal overtime, i.e. overtime in excess of his 20 hours guaranteed entitlement. For the same reason as set out in paragraphs 49 to 54 of the Jenkins judgment, I find that the partnership agreement is incorporated within [the Claimant's] terms and conditions of employment'.

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35. In paragraph 15, the ET said that the pay review agreed between the Respondent and USDAW reduced overtime rates to normal salary. It affected the Claimant's 'previously [sic] 1.5 entitlement to single normal salary. There was no distinction within the USDAW agreement between different types of overtime. The agreement is said to apply to all overtime for the affected employees'. The EJ then said, 'There was nothing within [the Claiamnt's] previous contractual arrangement for guaranteed overtime or the agreement that guaranteed overtime would be paid at 1.5 times his normal rate that protects this contractual guaranteed overtime from the rate change as imposed by the collective agreement'. She could not find 'any basis' for the Claimant's 'claims that the guaranteed element of his overtime should be protected from the USDAW collective agreement, reducing the rate for paid overtime'.

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36. She went on to consider whether or not, if his agreement to the change was required, the Claimant had agreed to it. She held that he had not (paragraphs 17-18). There is no cross-appeal against that finding.

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The Jenkins judgment

37. The Jenkins judgment is annexed to the ET's judgment in this case. The claimants in that case all started work before 4 July 1999. They were therefore entitled to a premium rate of 2x for working on Sundays (whether contracted or overtime hours), and for working on Bank Holidays ('which would always be voluntary') (Jenkins judgment, paragraph 5). At paragraph 6 of the Jenkins judgment, the ET referred to the standard terms and conditions document as at 2016.

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38. The parts of the 2016 document which the ET quoted in the Jenkins judgment are similar but not identical to the equivalent provisions in C's 2012 particulars. It was clear from the opening words and from the caption above the signature, that the 2016 document was not an exhaustive statement of all terms and conditions (Jenkins judgment, paragraph 7). The 2016 document made similar provision about pay. The provision about the relevant collective agreement was similarly worded. The ET explained in paragraph 12 of the Jenkins judgment that the provision about the collective agreement had been different in documents produced before 1998, which referred to 'Joint Agreements Retail Division Parts One and Two', and that the reference to 'Parts one and two' had been kept in later versions by mistake. It therefore seems likely that the Claimant's 2001 particulars were from a standard form produced before 1998 but which was still being issued in 2001.

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39. The provision about changes to the contract was similar, as was the 'Summary'.

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40. The ET noted in paragraph 14 of the Jenkins judgment that about 60% of the Respondent's 250,000 employees were members of USDAW. The ET explained in paragraph 15 that employee representatives sit on a body called the National Forum. 12 of those representatives, who have to be members of USDAW, comprise the Pay Review Team, which negotiates under the collective agreement. The Partnership Agreement has eight sections. The last deals with pay review and premiums paid for Sunday and Bank Holiday work. In paragraph 16 of the Jenkins judgment, the ET described the process by which pay is negotiated and agreed.

41. The Staff Handbook has a heading 'Pay Review'. This says, 'Our pay rates are subject to review annually through consultation with USDAW for all colleagues…' In paragraphs 18-19 of the Jenkins judgment, the ET described the process of pay negotiation, and in paragraphs 20-29, the background to, and the negotiation in 2015-16. In paragraph 27, the ET described the increase to normal pay which 'unlocked the impasse' (paragraph 28) which had been reached. USDAW proposed that premium rates should be 1.5 per hour on Sundays and Bank Holidays, a reduction in the premium rate which the Jenkins claimants had previously enjoyed. A quid pro quo was that hourly rates would go up.

42. It is not clear from the Jenkins judgment how many of the claimants, if any, apart from Ms Jenkins (see paragraph 39) were obliged to work on Sundays, as opposed to working habitually on Sundays.

43. The ET stated the issues it had to decide in paragraph 49 of the Jenkins judgment. It cited **Alexander v Standard Telephone & Cables Limited** [1999] IRLR 286 and **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 WLR 896. In paragraph

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52, the ET held that a reasonable employee would understand the reference in the particulars to be a reference to the up-to-date Partnership Agreement. The ET held there was no good reason why the Partnership Agreement should not be incorporated, including the section on pay, and the reference to annual pay bargaining (paragraph 54). The ET held that there was nothing to prevent the Partnership Agreement from reducing pay (paragraphs 55-59).

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Submissions

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44. In summary, Mr Ah-Time submitted that the EJ did not distinguish between the Claimant's two contracts, that she relied heavily on the decision in the Jenkins case, but that the circumstances in that case were different. None of the arguments in that case related to guaranteed overtime. The Claimant accepted that the collective agreement applied to his main contract, but it did not apply to the specific agreement he had which was evidenced by the 26 October 2005 letter. That was separate and independent from his main contract. The hours and rate were agreed. Those terms could not be varied by the Respondent unilaterally, or via the collective agreement.

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45. In answer to a question from Mr Jenkins, he submitted that the hourly rate to which the premium of 1.5 would apply was whatever was the going rate. The Respondent had drafted the contract and any ambiguity should be resolved in the Claimant's favour. The Respondent could have asked the Claimant to transfer from Addlestone to Hayes on a normal hourly contract but had not done so. He had been given an independent and specific agreement to induce him to move. The collective agreement was not incorporated in this specific agreement. The October 2006 letter was a collateral contract: see **Hughes v Pendragon Limited** [2016] EWCA (Civ) 18.

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46. Mr Ah-Time submitted that the Claimant's contract did not fall into any of the categories described in the Partnership Agreement. The 20 hours of overtime was not voluntary, and so the material about premium payments in the Partnership Agreement did not apply to it. In his reply he submitted that the Partnership Agreement did not apply to the Claiamnt as it only referred to voluntary overtime. It did not apply to guaranteed overtime. It made no sense for the Claiamnt to be obliged by the October 2005 letter to do 20 hours of overtime every week, but for him not to be entitled to the premium set out in that letter. He has continued to work 20 hours overtime a week, but was not getting the consideration for it which had been agreed between him and Mr Collins in 2005.

47. In his submissions, Mr Holloway referred to the long history of negotiations between USDAW and the Respondent. The collective agreement applied across a large workforce. The Partnership Agreement provides for pay to be reviewed annually. It could override the Claimant's individual agreement with the Respondent. The correct analysis was that the 2005 letter 'amended the contract in relation to location and overtime but collective bargaining remains applicable'. USDAW and the Respondnet had the authority to negotiate on pay. The EJ accepted that the 2005 letter was binding, but it did not prevent pay being negotiated under the collective agreement. The overtime agreement reached in the 2005 letter was 'pay'.

48. We asked Mr Holloway whether the Claimant's contract fitted into one of the categories described in the Partnership Agreement. He did not, in our judgment, have a convincing answer to that question. He suggested that the Partnership Agreement should not be read literally. He suggested, for example, that the Claimant was not required to work every Sunday because he was entitled to take leave. We asked whether there was any evidence before the ET that any employee had a similar contract to the Claimant's. We were told that the Respondent's

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witness was not aware of any, and had told the ET that none of the 7500 employees for whom she was responsible had such a contract. Mr Holloway accepted that the text about overtime on page 52 of the bundle, which says that any overtime is 'voluntary' did not describe the Claimant's case.

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49. He accepted that there was no document which showed that the version of the Partnership Agreement in the bundle had been amended to reflect the outcome of the 2016/17 negotiation. That, however, was the effect of the 2016/17 negotiation, and it was communicated to employees in the briefings. The Partnership Agreement was specifically incorporated in the Claiamnt's particulars. That provided for a pay review process. He referred to paragraphs 16, 23 and 32 of the Jenkins judgment. If the Claimant was not under the Partnership Agreement, the Respondent would be able to pay him at the old rate of pay set out in the most recent particulars. The Partnership Agreement had been made on the understanding that it would apply to all relevant employees. Just because someone did not fit easily into one of the descriptions did not mean that they could be 'elevated' out of the Partnership Agreement altogether. The pay rates and premiums which were the outcome of the 2016/17 negotiations could not be separated. USDAW had only agreed to the change to premiums on the condition that that hourly rate was increased.

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50. He accepted that a consequence of the ET's decision was that the Claimant could now be required to work 12 hours of overtime a week at a lower premium than was agreed in the 2005 letter. The EJ was right to conclude that the Claimant's contract of employment was 'subject to collective bargaining'. Given the long history of collective bargaining, it would 'need something clear to change that'.

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51. In response to Mr Ah-Time's suggestion that the 2005 letter was a collateral contract, he submitted, first, that that was a new argument, not run at the ET hearing, and, second, that it could not stand as an independent agreement as there were many terms it did not cover. The obvious answer to a relevant question asked by the officious bystander would be that those terms were covered by the terms and conditions which had been agreed through collective bargaining. So, if the Partnership Agreement was not expressly incorporated, it was incorporated by implication. If that was wrong, it was the long-held custom and practice of the employer to have collective bargaining and the fruits of that would be implied into the contract.

The law

52. We were referred to several authorities. The decision which we have found most helpful is the decision of Hobhouse J (as he then was) in; **Alexander v Standard Telephone & Cables Limited** (*No 2)* [1991] IRLR 286.

53. At paragraph 31, he summarised the principles in this way.

> **" The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn."**

54. The courts have recognised that in some circumstances, a claimant may rely on a collateral contract to override the terms of a main contract. The paradigm is an oral promise which induces a person to enter into, and to sign, a written contract which contains a clause

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which is inconsistent with the oral promise: see, for example, **Mendelsshon v Normand** [1970] QB 177 at 183H-184C:

> **" There are many cases in the books when a man has made, by word of mouth, a promise or a representation of fact, on which the other party acts by entering into the contract. In all such cases the man is not allowed to repudiate his representation by reference to a printed condition…The reason is because the oral promise or representation has a decisive influence on the transaction – it is the very thing which induces the other to contract – and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation. As Devlin J said in Firestone Tyre and Rubber Co. Ltd. v. Vokins & Co. Ltd. [1951] 1 Lloyd's Rep 32, 39: "It is illusory to say: 'We promise to do a thing, but we are not liable if we do not do it'." To avoid this illusion, the law gives the oral promise priority over the printed clause."**

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55. The effect of a collateral contract may be to vary the terms of the main contract, or to estop a party from acting inconsistently with the collateral contract if it would be inequitable to do so. As Robert Walker J (as he then was) put it in **Wake v Renault (UK) Limited** (unreported, 25 July 1996) at pages 26-27:

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> **" A collateral contract is not to be lightly inferred, especially where the main contract is embodied in formal documents prepared by lawyers. Its terms must be sufficiently certain (and they are sometimes very simple indeed, as in the well-known case of City & Westminster Properties v Mudd 1959 Ch 129). Any assurance must, if it is to be capable of amounting to a collateral contract, be intended to bind as a contractual promise, as opposed to being merely a statement of present intention or policy which lacks contractual force. The principles are very clearly set out in the judgment of Ralph Gibson L.J. (with which Nicholls L.J. and Fox L.J. agreed) in Kleinwort Benson v Malaysian Mining Corporation [1989] 1 WLR 379."**

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Mr Ah-Time referred us to the decision of the Court of Appeal in **Hughes v Pendragon Limited** [2016] EWCA (Civ) 18.

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Discussion

56. There are five issues.

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i. What is the effect of C's written particulars of employment?

ii. What is the effect of the 2005 letter?

iii. What is the effect of the Partnership Agreement?

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iv. How do the three documents interact?

v. Is there a collateral contract?

What is the effect of C's 2012 particulars?

57. The Claimant's 2012 particulars are on a standard form. Apart from the details at the top of the document and the rate of pay which applied when the particulars were issued they are standard terms. They are not a full statement of the terms of the contract. They describe the main terms of the contract and refer to other documents, principally the Staff Handbook, for details about some terms. They also provide that the terms and conditions 'include' those contained in the Partnership Agreements. We have no doubt that the particulars are effective, in general, to incorporate the Partnership Agreement in the Claimant's contract. However, that is subject to an important qualification. The qualification is that no specific term in the Partnership Agreement will be incorporated in the Claimant's contract of employment unless it is apt for incorporation in his contract of employment.

58. Although the 2012 particulars post-date the 2005 letter, we do not consider that the term about overtime which they contain, and which is inconsistent with the 2005 letter, supersedes the 2005 letter, for reasons which we explain in the next two paragraphs.

What is the effect of the 2005 letter?

59. The 2005 letter has been interpreted by the ET in 2013 and by the ET in the decision which is the subject of this appeal. The 2013 judgment was not appealed, and neither party to this appeal has challenged the way in which the EJ in this case interpreted the 2005 letter. The two unappealed ET decisions about its meaning bind us and the parties. Our views about the correct interpretation of the 2005 letter are therefore irrelevant.

60. The ET in 2013 held that the letter obliged the Respondent to offer the Claimant and to pay him for '20 hours per week guaranteed overtime'. In paragraph 13 of the decision under

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appeal, the ET held that the guaranteed overtime was 'overtime which the Respondent was obliged to offer to the Claimant and which the Claimant was obliged to work'. Since the ET in 2013 did not differentiate between the Sunday and other overtime, it must have decided that the 1.5 premium referred to in the letter was payable for both types of overtime. Both ET judgments were sent to the parties after the 2012 particulars were issued. It follows that both ETs must have decided that the inconsistent provision about overtime in the 2012 particulars did not override the terms of the 2005 letter.

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61. We are therefore bound to hold that the letter obliges the Respondent to offer, and the Claimant to work, 20 hours of overtime a week, 8 of which are on Sundays, and that the Respondent is to pay for that overtime a premium of 1.5. We accept Mr Ah-Time's submission that in the factual context the multiplicand for the premium of 1.5 is, as he put, it, what from time to time is the 'going rate', that is, the hourly rate derived, from time to time, from the collective bargaining arrangements which are described in the Partnership Agreement. There is nothing in the Claimant's particulars, or in the 2005 letter, which makes such a term inapt for incorporation.

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What is the effect of the Partnership Agreement?

62. We consider that the terms in the Partnership Agreement which refer to premiums do not, as a matter of construction, apply to the 20 hours of overtime which are provided for in the 2005 letter because the Claimant has an obligation to do this overtime, and the overtime is not therefore voluntary. The terms about premiums are not therefore apt for incorporation in his contract so as to displace the provisions of the 2005 letter as respects the 20 hours of guaranteed overtime. It follows that the changes to premiums introduced by the 2016/17 negotiation were not apt for incorporation in the Claimant's contract of employment so as to govern the 20 hours

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of guaranteed overtime. Any hours of overtime which the Respondent might offer and which the Claimant might agree to work in addition to the 20 hours of guaranteed overtime are voluntary. As a matter of construction, the Partnership Agreement covers voluntary overtime. It seems to us that, to that extent, the terms of the Partnership Agreement governing premiums, as reviewed annually in the course of collective bargaining, are apt for incorporation in the Claimant's contract of employment. We accept Mr Ah-Time's submission about that. The Claimant was right to concede, as the ET recorded in paragraph 14, that the premium change did apply to any overtime he did over the 20 hours, because any such overtime was voluntary.

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How do the three documents interact?

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63. The effect of our conclusions on the first three issues is that the 2016/17 pay review resulted in an uplift to the Claimant's basic rate, but did not change the premium which applied to the 20 hours of overtime described in the 2005 letter. The 2016/17 pay review also led to a reduction in the Claimant's entitlement to a premium of 1.5 for any overtime which the Claimant worked in addition to the 20 hours of guaranteed overtime.

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Is there a collateral contract?

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64. We do not consider it necessary to make a decision on Mr Ah-Time's submission that the 2005 letter is a collateral contract. The submission faces two linked difficulties. First, it does not seem to have been made at the ET hearing. The ET1 seems to have been completed by the Claimant himself. Unsurprisingly, it does not refer to collateral contract, although we note that the ET3 records that the Respondent understood that it was the Claimant's case in the internal grievance procedure that he had a 'special contract' (paragraphs 20 and 22) or that his contract was 'different compared to other people in Tesco' (paragraph 21). Second, it is not supported by any relevant findings of fact by the ET.

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65. We consider, in any event, that the 2005 letter was a variation of the 2001 particulars, supported by consideration (C's move to a different branch). We are not required to explain the relationship between the 2005 letter and the 2012 particulars, for the reasons we have given in paragraphs 59-61, above.

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Conclusions

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66. We consider that the ET erred in law in not asking whether each of the relevant terms of the Partnership Agreement was apt for incorporation in the Claimant's contract. The EJ assumed, rather, that having decided that the Partnership Agreement was incorporated in the Claimant's contract, it followed that every term of the Partnership Agreement was also incorporated. We consider, for the reasons we have given, that that is non sequitur. The incorporation, in general terms, of the Partnership Agreement, is not an answer to the question posed by this claim. We also consider that the EJ erred in paragraph 15, in apparently requiring an express protection of the premium to be conferred by the 2005 letter. The individual's contract is the starting point, and the question, rather, is whether there is a term in the collective agreement which is apt for incorporation in the individual's contract and which removes the entitlement to the 1.5 premium. For the reasons we have given, there is not.

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67. We should deal briefly with Mr Holloway's argument about implication and custom and practice. It is trite law that neither a term implied by law nor by custom and practice can contradict an express term of the contract in question. Any such process of implication in this case would contradict the express terms of the 2005 letter.

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68. We allow this appeal. The 2016/17 pay review did not affect the Claimant's entitlement to be paid a premium of 1.5 of the applicable basic hourly rate for his 20 hours of guaranteed overtime.

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69. We remit the case to the ET for it to consider the appropriate remedy.

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