Appeal No. UKEAT/0028/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 22 May 2019

Before

HER HONOUR JUDGE EADY QC

MR H SINGH

MR D G SMITH

MRS A EGBAYELO — APPELLANT

OCADO CENTRAL SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR N EGBAYELO (The Appellant's husband)
For the Respondent	MS G LEADBETTER (of Counsel) Instructed by: Ocado Central Services (in house Counsel) Building 1 & 2 Trident Place Mosquito Way Hatfield Herts AL10 9UL

SUMMARY

CONTRACT OF EMPLOYMENT - Incorporation into contract; Written particulars; Implied term/variation/construction of term

The Claimant worked for the Respondent as a Personal Shopper. She started her employment in 2010 and her terms and conditions contained a provision (at paragraph 21) allowing the Respondent to make reasonable changes, specifying how minor changes of detail were to be communicated. In 2011, the Respondent entered into a recognition agreement with the trade union USDAW and introduced a variation to the contracts of staff such as the Claimant, such that terms relating to pay, hours and holiday would now be the subject of collective agreements with USDAW ("the collective bargaining provision"). This was communicated to staff via 'MiOcado" (a website used for work-related communications) and on the screens used for work; the ET found that the Claimant had received this notification. Thereafter, annual pay increases were the subject of collective agreements with USDAW, which the Claimant (who was not a member of USDAW) accepted without objection. In 2017, the Respondent and USDAW agreed changes to holiday arrangements, which reduced annual entitlement with a corresponding increase in pay (which staff could then use to "buy back" leave days). The Claimant wrote to express her objection to this reduction in holiday but accepted the pay increase.

In her subsequent ET claim, the Claimant sought a declaration as to her terms of employment, contending the new holiday arrangements were not part of her contract.

The ET disagreed. It found the Claimant's contract had been varied in 2011 to provide for pay and holiday arrangements to be subject to collective agreements reached with USDAW; that variation had been allowed by paragraph 21 of the Claimant's terms and this meant the new holiday arrangements had been incorporated into her contract. Even if not permitted by paragraph 21, the collective bargaining provision had been incorporated into the Claimant's contract either by her implicit agreement (in accepting the pay increases agreed with USDAW after being notified that these were to be the subject of collective agreement) or by way of custom and

practice. Alternatively, given that the new holiday arrangements did not, taken overall, impose any detriment on the Claimant, paragraph 21 of her terms permitted this change in any event; alternatively, she could be taken to have accepted this variation given that she had agreed to accept the resultant increase in pay and it was not open to her to cherry pick only one part of the package. The Claimant appealed.

Held: *dismissing the appeal*

There was some question as to whether the incorporation of the collective bargaining provision had been effected by paragraph 21 of the Claimant's terms: to the extent there was any ambiguity arising from the apparent focus in that provision on "*minor changes of detail*" (which the move to collective bargaining was not), it would be construed against the Respondent and it was not possible to see that the ET had engaged with this issue or made relevant findings in this regard. This, however, was not fatal to the ET's decision. Having found that the Claimant had been notified of the introduction of the collective bargaining provision, the ET had permissibly concluded she had accepted this change by her conduct in accepting the collectively agreed pay rises that followed on an annual basis, alternatively that this had been incorporated by custom and practice. The appeal would therefore be dismissed.

Although not strictly necessary to deal with the further alternative bases for the ET's decision, the EAT considered that relying on paragraph 21 of the Claimant's terms as the means by which the new holiday arrangements were introduced gave rise to a similar difficulty to that identified before: it was not possible to see that the ET had engaged with the potential ambiguity arising in respect of that provision. On the other hand, the ET had been entitled to find it was not open to the Claimant to cherry pick one aspect of the new arrangements (the pay increase) and decline the rest: the ET had permissibly concluded that, by agreeing to accept the benefit, the Claimant could be taken to have agreed to the entirety of the package.

HER HONOUR JUDGE EADY QC

Introduction

1. This appeal concerns a move to collective bargaining within an employer; specifically it relates to how that impacted upon the employment contracts of existing employees and its effect in terms of subsequent changes to those employees' holiday arrangements and entitlement. Given the context, the hearing of this appeal was listed before a full panel of the EAT so that the experience of lay members, drawn from both sides of industry, could better inform the determination of the issues raised.

2. This is our unanimous Judgment. For convenience we refer to the parties as the Claimant and Respondent as below. This is the Full Hearing of the Claimant's appeal from the Reserved Judgment of the Watford Employment Tribunal (Employment Judge Hyams, sitting alone on 2 May 2018; "the ET"), sent to the parties on 21 September 2018. By that Judgment the ET answered the Claimant's claim for a statement of her entitlement to pay and holidays under section 11 of the **Employment Rights Act 1996** ("the ERA"), by holding that her contract of employment incorporated changes to her pay and holiday entitlement that had been collectively agreed with the trade union USDAW and had taken effect on 1 September 2017. The Claimant appeared in person before the ET but is today represented by her husband (who was also a Claimant before the ET, although he did not attend that Hearing). The Respondent has at all times been represented by counsel, albeit previously not by Ms Leadbetter, who now appears.

3. In considering this matter on the initial paper sift HHJ Auerbach directed that the appeal should proceed to a Full Hearing on the following bases:

(1) That the ET erred in law in finding that the introduction of the collective bargaining clause in issue was the type of change that was covered by the wording of paragraph 21 of the Claimant's terms and conditions.

(2) Alternatively, that the ET erred in finding that change was in any event incorporated by custom and practice.

(3) In the further alternative, that the ET erred in finding that the change in question was not financially detrimental to the Claimant.

(4) Yet further, the ET erred in concluding that the Claimant should be deemed to have accepted the change.

4. The Respondent resists the appeal, essentially relying on the reasoning provided by the ET.

The factual background

5. The Claimant works for the Respondent - a well-known online grocery supplier - as a personal shopper. She started her employment in December 2010, working to terms and conditions that, at paragraph 21, provided as follows:

> **"Changes to your Terms and Conditions: We reserve the right to make reasonable changes to any of your terms and conditions of employment and you will be notified of minor changes of detail by way of a general notice to all employees or an email or letter (addressed to you and sent to the address we hold for you or delivered to you at work) and any such changes will take effect from the date of the notice."**

6. The Claimant's husband subsequently also started employment with the Respondent in March 2012. His terms and conditions not only included a provision in the same terms as paragraph 21 of the Claimant's (although that was paragraph 22 in his terms and conditions), but additionally contained the following statement:

> **"Collective Agreements: Ocado will consult with representatives in the Ocado Council on working arrangements relating to your employment. In relation to certain aspects of your pay (basic pay, shift premia, service premia and overtime premia); hours (the number of hours and shifts worked per week) and holidays (holiday entitlement), Ocado has recognised Usdaw for the purpose of allowing its representatives to conduct collective**

bargaining on behalf of all hourly paid employees employed by Ocado at its sites… and as part of the consultative process within the Ocado Council."

7. That statement thus made clear that terms and conditions relating to pay, hours and holiday entitlement would be subject to collective bargaining agreements with the trade union USDAW. This reflected the Respondent's recognition agreement with USDAW which came into effect on 1 December 2011.

8. It was the Respondent's case that this provision for pay, hours and holiday entitlement to be determined by collective bargaining with USDAW ("the collective bargaining provision") had also been incorporated into the Claimant's contract, by reason of it having been communicated to her on 22 December 2011, by a pop-up message or page on the screen from which she received her work instructions. Specifically, the message relied on by the Respondent stated as follows:

"22 December 2011

As you may be aware Ocado has recently signed an agreement with USDAW (Union of Shop, Distributive and Allied Workers) to formally recognise them as a trade union. As of the 1st December 2011 we have agreed that USDAW will integrate with the existing Ocado Council and undertake collective bargaining on pay hours and holiday (the "Working Arrangements") on behalf of those who receive their pay via the weekly payroll.

I am therefore writing to confirm that the following clause should now be read in conjunction with your existing terms and conditions of employment:

Collective Agreements: Ocado will consult with representatives in the Ocado Council on working arrangement relating to your employment in relation to certain aspects of your pay (basic pay, shift premia, service premia and overtime premia); hours (the number of hours and shifts worked per week) and holidays (holiday entitlement). Ocado has recognised Usdaw for the purposes of allowing its representatives to conduct collective bargaining on behalf of all hourly paid employees employed by Ocado… as part of the consultative process within the Ocado Council.

All other terms and conditions will remain the same.

Yours sincerely

Gina Kingsland

Human Resources Manager."

9. Ms Kingsland, the Human Resources Manager who had sent out that message, gave evidence to the ET that the pop-up would remain on the MiOcado screen until the user had clicked through to the end of the screen pages (of which there were three of which it formed part) and

then clicked to continue onto the usual starting screen for the user. MiOcado is the website used by the Respondent's employees to view work rotas, make holiday requests and so on.

10. It was Ms Kingsland's evidence that no person who used the MiOcado screen after the pop-up was put on it could have failed to see the message. In any event, Ms Kingsland explained that the message was also put onto the graphical user interface ("GUI"), screens used by personal shoppers such as the Claimant, which is the means by which they are given information which they would need in order to do their job. Ms Kingsland was clear: no one could have escaped the message that a change to an employees' terms and conditions relating to pay, hours and holidays could thus be made as a result of an agreement between the Respondent and USDAW.

11. The ET accepted Ms Kingsland's evidence and found as a fact that the Claimant had seen this message: either she had seen the pop-up on her MiOcado screen when she had logged in at some point after 22 December 2011, or at some stage in the first half of 2012 she had seen a message in similar terms on one or more GUI screens when she picked up the information she would need for her job.

12. The ET further noted that at no stage had the Claimant expressed any objection to this change. The ET also accepted the Respondent's evidence that thereafter all pay increases received by the Claimant had been negotiated with USDAW.

13. In 2017, a change was introduced to staff holiday entitlement. This removed 24 hours of annual leave entitlement (i.e. three days if the employee worked an eight-hour shift) but (1) increased the pay of the employees concerned and (2) allowed them to buy back the holiday if they chose. It was the Respondent's case that there were tax advantages for employees who

bought back their holiday entitlement, albeit Ms Kingsland was unable to explain those advantages to the ET. Moreover, employees such as the Claimant who worked 10-hour shifts could effectively increase their holiday entitlement by buying back up to three shifts. The ET set out further details of the changes and, carrying out its own calculations, concluded that this variation to holiday entitlement did not negatively affect the Claimant.

14. In any event, by letter of 23 August 2017, the Claimant recorded her objection to the change being introduced, stating: "*I would agree to any pay rise to my wages without losing any of my holiday entitlement, otherwise let all the terms and conditions of my employment contract remain as it is.*"

15. The changes to holiday entitlement came into effect at the start of the Respondent's holiday year, on 1 September 2017. It was the Respondent's case that this had been the subject of much communication with staff at town hall briefing sessions. For the Claimant's part, she accepted that she was aware of the plan to change holiday entitlement, but said she had not understood how it was going to work and, when she had asked her manager about this he had said he did not understand either. The ET accepted, however, that these changes had been agreed between the Respondent and USDAW in the period before 1 April 2017. Moreover, although the Claimant had objected to the introduction of the changes, she was prepared to accept the benefit of the pay increases resulting from those changes.

The ET's Decision and Reasoning

16. The question for the ET was whether the changes made, from 1 September 2017, impacting upon the Claimant's holiday and pay entitlement in the way summarised above, formed part of the Claimant's terms of employment.

17. The ET first considered the position in the light of paragraph 21 of the Claimant's original terms and conditions. It concluded that the change to agreeing terms by way of collective bargaining with USDAW had been reasonable for the purposes of that provision and was thus a variation permitted under it (see the ET at paragraph 49.1). To the extent that this could not be characterised as falling within the term "minor changes of detail", the ET was satisfied that it had been incorporated into the Claimant's contract by custom and practice, alternatively that it had implicitly been by her as a result of her acceptance, without objection, of pay increases negotiated with USDAW and implemented each year after 2011 (ET, paragraph 49.2).

18. In the further alternative the ET took the view that the imposition of the new holiday and pay arrangements in September 2017 was empowered by paragraph 21, given that these gave rise to no detrimental impact for the Claimant (ET paragraph 49.3). Even if that was not correct, the ET was satisfied that the Claimant had accepted the new holiday and pay arrangements, given that she had accepted the pay increase, which was an integral part of those arrangements, and it was not open to her to cherry-pick by accepting the benefit pay increase without the corresponding reduction (unless she bought it back) in holiday entitlement (ET, paragraph 49.4).

The Parties' Submissions

The Claimant's Case

19. The Claimant contends that the collective bargaining provision was not part of her contract and it could not have been a change introduced under paragraph 21 of her terms and conditions because it was not a reasonable change. In particular, for a non-union member such as the Claimant. Alternatively, such a change would have needed to be communicated by the introduction of new contracts, not merely by way a pop-up message.

20. Equally, for the change to be incorporated by means of custom and practice it had to be reasonable. Here, however, the agreement only favoured the Respondent. Specifically, whilst there had been marginal annual increases in the rate of pay, it had not been made clear that these were the subject of a collective agreement. Indeed, the fact that terms and conditions were being changed by way of collective bargaining only became apparent when there was a change to the working week in 2016, which led to staff being worse off.

21. Furthermore, the collective bargaining provision was insufficiently clear, not making it plain that it could apply to non-union members such as the Claimant. More specifically, USDAW had never negotiated holiday entitlement before the changes in issue and it must be reasonable for the Claimant, who was not a member of USDAW, to resist this change. The changes to holiday entitlement did not reflect any custom or practice within the Respondent or any other employer in the grocery industry. It was, rather, a unilateral change that was unfavourable to the Claimant and other employees who would lose their holiday entitlement if they did not buy it back within a set period of time. The change was imposed unilaterally. There was no option for the Claimant or other employees to state whether they agreed to this or not. The fact that the Claimant had accepted pay rises between 2011 and 2017 did not demonstrate she had accepted the collective bargaining provision, which had not been properly communicated to her and the introduction of yearly pay rises did not alter that fact.

22. As for the changes to holiday arrangements there was no benefit to the Claimant, so it would not have come in under paragraph 21 of her terms and conditions. In any event, she had expressly objected to the introduction of this variation and could not be taken to have accepted the change.

The Respondent's Case

23. The focus of the Claimant's complaint was on the question of holiday entitlement. That, however, had either been incorporated into her contract as a result of the collective bargaining provision having already been incorporated, alternatively, as a reasonable change incorporated directly under paragraph 21. In the further alternative, it was incorporated as a result of the Claimant having accepted the beneficial aspects of the new holiday entitlement arrangements, such that she could be taken to have agreed the whole.

24. The Respondent contended that the ET was entitled to find incorporation of the collective bargaining provision had been permitted by paragraph 21 of the Claimant's terms and conditions. Although that provision did not expressly state how more significant changes were to be communicated, (i) it should not be read as limited to minor changes of detail (it plainly also allowed more significant changes to be introduced; the fact that it did provide for a specific form of communication in such cases just allowed for greater flexibility), and, in any event, (ii) given that the collective bargaining provision introduced a process, not a substantive change to a particular term, the ET had been entitled to find this was a minor change of detail (that was the implication of its reasoning at paragraph 49.1). To the extent the Claimant was seeking to avoid the ET's finding that she had been aware of the change to collective bargaining, she would have to establish that as a perversity challenge and could not begin to do so.

25. In the alternative, the ET had permissibly found that the change to collective bargaining had been incorporated by implied acceptance (and the Respondent noted that HHJ Auerbach had not in terms permitted any challenge to be pursued to a Full Hearing against this finding or against the ET's conclusion that this was incorporated by way of custom and practice). The Claimant had taken the benefit of pay rises negotiated with USDAW over a number of years (again, a

finding of fact by the ET, see paragraph 32). Those benefits were contractual and arose from the earlier incorporation of the collective bargaining provision, which was itself thus contractual (see **FW Farnsworth Ltd & Anor v Lacy & Ors** [2013] IRLR 198 at paragraph 70). Where changes were to the employee's benefit, or may include benefits (even if there may also be some detriments), the case law allowed that acceptance should be more readily found (see **Abrahall & Ors v Nottingham City Council & Anor** [2018] IRLR 628 CA at paragraph 102). As for custom and practice, the changes had taken place over a number of years and had been clearly drawn to the attention of the employees (and see **Duke v Reliance Systems Ltd** [1982] ICR 449 EAT) and, again, the Claimant would have to amount a perversity challenge to beat the ET's finding that the collective bargaining provision had been communicated to her and she could not. In the circumstances, the ET had been entitled to find that the incorporation of the collective bargaining provision was to be implied.

26. In the further alternative, the ET had in any event found that the Claimant had not suffered any negative impact (paragraph 41), which justified its finding that the change to holiday arrangements was reasonable and could thus be introduced under paragraph 21. In this regard the Claimant was again bound by the ET's findings as to the impact of the changes (paragraph 39). In the yet further alternative, by accepting the benefits of the increase in pay resulting from the introduction of the new holiday arrangements, the ET had permissibly found that the Claimant could be taken to have accepted those arrangements, notwithstanding her objection.

Discussion and Conclusions

27. The first question raised by this appeal requires us to look at the ET's finding that paragraph 21 of the Claimant's terms and conditions permitted a unilateral variation to introduce collective bargaining of terms, relating to pay and holiday, with USDAW.

28. As the ET noted, it is settled law that collective agreements, even if not contractually enforceable between the employer and the trade union, can be incorporated into individual contracts of employment. When changes are then made to the collective agreements, those changes will be reflected in the individual contracts, see **Robertson v British Gas Corporation** [1983] IRLR 302 and **Marley v Forward Trust Group Limited** [1986] ICR 891 CA. That will be the case whether or not an individual employee is a member of the union in question: she will be bound, not because the trade union represents her as a member in any negotiations, but because she has agreed to adopt the collectively bargained terms, see **Young v Canadian Northern Company** [1931] AC 83 PC. The question in this case was whether the Claimant ever agreed to the change, to move to collectively bargained terms.

29. It is well-established that parties to an employment contract can agree to a contractual term that allows for future unilateral variation by the employer. In construing such a term, however, Courts and Tribunals will be reluctant to permit reliance upon very broad clauses, generating unreasonable results; see the guidance by Lord Woolf MR *obiter* in **Wandsworth London Borough Council v D'Silva** [1998] IRLR 193:

> **"31. The general position is that contracts of employment can only be varied by agreement. However, in the employment field an employer or for that matter an employee can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort. In addition, the court is unlikely to favour an interpretation which does more than enable a party to vary contractual provisions with which that party is required to comply. If, therefore, the provisions of the code which the council were seeking to amend in this case were of a contractual nature, then they could well be capable of unilateral variation as the council contends. In relation to the provision as to appeals the position would be likely to be different. To apply a power of unilateral variation to the rights which an employee is given under this part of the code could produce an unreasonable result and the courts in construing a contract of employment will seek to avoid such a result."**

30. In the present case, paragraph 21 of the contract gave the Respondent an express right to vary the Claimant's terms and conditions, to the extent that this introduced a reasonable change. The change made in 2011 introduced a collective bargaining process. It was not a substantive

change to a particular term of the contract, but it introduced a process by which such changes might be brought about, by way of negotiations with a recognised trade union. Given the Respondent's recognition agreement with USDAW and thus the relationship it had entered into with that union, it was entirely reasonable for it to seek to introduce this change into employees' existing terms and conditions. The ET found that the introduction of a collective bargaining provision was a reasonable change. This was, as the Respondent submits, plainly a permissible conclusion.

31. A difficulty arises for the Respondent in this case, however, in that paragraph 21 then goes on to explain how minor changes of detail will be communicated but is silent as to how changes that are more significant might be communicated. One view might be that paragraph 21 would only allow the Respondent to unilaterally vary employees' terms and conditions where such a variation was both reasonable and a minor change of detail. Ms Leadbetter seeks to resist that construction, saying that, on its face, paragraph 21 allows for more significant changes to be introduced; the fact that it did not expressly address the question how such changes were to be communicated simply allowed for a greater flexibility in those circumstances. In any event, she argues, the ET apparently considered this could be seen as a minor change of detail and thus adequately communicated by way of general notice to employees.

32. We consider that there are difficulties in upholding the ET's conclusion purely on the basis of paragraph 21 of the Claimant's terms and conditions. First, because there is a degree of ambiguity as to whether that provision allows reasonable changes that do other than introduce a minor change of detail and, to the extent that there is any ambiguity, it is trite law that it should be construed against the Respondent (this being its standard terms and conditions document). In this regard, we note, in the Respondent's favour, that paragraph 21 goes on to speak of *any* such

changes, thus suggesting that the intention may well have been that it should apply to changes that are both minor changes of details and to more significant variations. The difficulty, however, is that the ET does not seem to have grappled with this potential ambiguity, so it is hard to see how its reasoning engages with the point. Secondly, if the ET was seeking to suggest that the introduction of collective bargaining, and the change this would then imply for each employee, was simply a minor change of detail, we think that would be open to question; it plainly was not. In any event, it is, again, unclear as to whether and/or how the ET engaged with this issue. Thirdly, even if paragraph 21 could be relied on to introduce more significant changes, the collective bargaining provision was communicated by way of general notice to employees, which the ET seems to have found was the means of communicating minor changes of detail, apparently making no finding as to whether this was sufficient for any more substantive change.

33. Whatever the difficulties in seeing the introduction of collective bargaining as incorporated through paragraph 21 (or, more precisely, whatever the difficulties of seeing the ET's clear reasoning in that regard), in the alternative, the ET went on to find that the Claimant could, in any event, be taken to have agreed to the variation. She had not done so expressly but the ET found this agreement could be implied, either by her conduct in accepting the benefits of the change - the pay rises agreed with USDAW under the collective bargaining arrangements – or, by necessary implication, by way of custom and practice.

34. Any inference of acceptance must be unequivocal, only referable to acceptance of the variation; see paragraph 87 **Abrahall and ors v Nottingham City Council** [2018] 628, where Underhill LJ observed as follows:

> **"...the inference must arise unequivocally. If the conduct of the employee in continuing to work is reasonably capable of a different explanation it cannot be treated as constituting acceptance of the new terms: that is why Elias J in *Solectron* used the phrase *'only* referable to'. That is simply an application of ordinary principles of the law of contract (and also of waiver/estoppel). It is not right to infer that an employee has agreed to a significant diminution in his or her rights unless their conduct, viewed objectively,**

> **clearly evinces an intention to do so. To put it another way, the employees should have the benefit of any (reasonable) doubt."**

See also **FH Farnsworth Ltd v Lacy** [2013] IRLR 198. That said, such acceptance will be readily inferred where the term in question is either wholly favourable to the employee or where it is part of a package that has both favourable and unfavourable aspects. As Underhill LJ went on to note in **Abrahall** at paragraph 102:

> **"…Sometimes pay-cuts are proposed as part of a package of measures some of which are (at least arguably) to the employees' benefit. If the employees continue to work without protest following implementation, taking the good parts as well as the bad, it is usually easy to infer that they have accepted the package in its entirety. But where that is not the case it is more difficult to say that they are not simply putting up with a breach of contract because they are not prepared to take positive steps to remedy it, whether by taking industrial action or by bringing proceedings…"**

See also per Sir Patrick Elias at paragraph 107:

> **"107. In practice employees will often agree to a variation by conduct. This will readily be inferred, for example, where the change is to the employee's benefit, such as where he is given a pay increase. Unless the contract is wholly exceptional, he will not have expressly to confirm acceptance before the increase takes effect..."**

35. As for a variation by way of custom and practice, as the ET correctly directed itself, at paragraph 42 of its Judgment:

> **"*Henry v London General Transport Services Ltd* [2002] ICR 910 shows that it is possible for an employee to become bound by a term of a contract by custom and practice within a particular workplace. However, it was said by Pill LJ (with whose judgment Longmore LJ and Sir Martin Nourse agreed) in paragraph 26 of his judgment that**
>
> > **"Clear evidence of practice is, however, required to establish something as potentially nebulous as custom and practice, and there should be a scrutiny commensurate with the particular circumstances."**

36. In **Duke v Reliance Systems Ltd** [1982] ICR 449 EAT, Browne-Wilkinson J (as he then was) observed as follows:

> **"…A policy adopted by management unilaterally cannot become a term of the employees' contracts on the grounds that it is an established custom and practice unless it has at least shown that the policy has been drawn to the attention of the employees or has been followed without exception for a substantial period."**

37. Here, however, as the ET found, the collective bargaining provision - and thus the change to collective bargaining for pay, hours and holidays - had been clearly communicated to employees of the Respondent, including the Claimant. Although the Claimant sought to object that she did not read the pop-up message in December 2011 or early 2012, we are bound by the ET's clear finding of fact that she did, a finding that was plainly supported by the evidence adduced below. As the ET also found, thereafter, over a number of years, the Claimant accepted the benefit of pay increases that resulted from the collective agreements reached between the Respondent and USDAW; she had been told that these would be the product of such collective bargains, and thus incorporated into her contract of employment, and she had chosen to accept these contractual benefits. In acting for the Claimant today, Mr Egbayelo has sought to suggest that these were not particularly significant increases and says that it had not been made clear that they were the result of any collective agreement. The fact is, however, these were increases to the Claimant's pay, which she chose to accept, year on year. As to whether they were expressly stated to have been collectively agreed on each occasion, we cannot see that matters; that pay increases would be the subject of collective agreement with USDAW had been made clear when the change to collective bargaining was introduced in 2011 and, as from December 2011 or early 2012, the Claimant was aware that this was the case. This was thus the process by which pay, hours and holidays were to be agreed and that had been drawn to the Claimant's attention and followed without exception for a number of years. The ET was entitled to find that the collective bargaining provision had been incorporated into the Claimant's contract by way of her implicit agreement, or that it had become a term of her contract by reason of custom and practice.

38. Although that would be sufficient to dispose of the appeal, for completeness we have gone on to consider the ET's alternative findings. As for the suggestion that the change to holiday arrangements could, in any event, have been directly introduced under paragraph 21, we consider

that runs into the same difficulties as we earlier identified. Although, the ET permissibly concluded this was a reasonable change, it was not a minor change of detail and it is, therefore, again open to question as to whether paragraph 21 would itself allow for such a variation, or, at least, whether the ET's reasoning is adequate to demonstrate whether/how it found that it did. That said, it is again apparent that the Claimant was prepared to accept the benefits arising from these changes to the holiday entitlement arrangements. Although she had objected to the introduction of the new arrangements, as the ET found, she was prepared to accept the benefit of the increase in pay that these involved (see the ET at paragraph 41). This was, as the ET found, a package that involved both benefits and potential detriments for employees. That was a permissible finding and the ET was entitled to hold that, by expressly accepting that part of the package that was beneficial, the Claimant had also to be taken to have accepted the potential downside.

39. Therefore, although unnecessary for our Judgment given our finding on the incorporation of the collective bargaining provision, we would also have upheld the ET's decision on the basis that it was not open to the Claimant to cherry-pick only those parts of the new arrangements that she liked and still contend that she was not bound by the less beneficial aspects of the same package.

40. For all those reasons, we duly dismiss this appeal.