Appeal No. EA-2020-000413-VP (formerly UKEAT/0232/20/VP)

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 August 2021
Judgment handed down on 24 September 2021

Before

HIS HONOUR JUDGE AUERBACH

(SITTING ALONE)

MR A AGBEZE APPELLANT

BARNET ENFIELD AND HARINGEY MENTAL HEALTH NHS TRUST RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS SUSAN CHAN (Of counsel)
For the Respondent	MR CONNOR KENNEDY (Of counsel) Instructed by: Capsticks Solicitors LLP 1 St George's Road Wimbledon London SW19 4DR

SUMMARY

UNLAWFUL DEDUCTION FROM WAGES

The claimant was a healthcare assistant who provided his services as a "bank" worker. Under the express terms of his contract the respondent was not obliged to offer him any work at any time, and he was not obliged to accept any assignment in fact offered to him. The contract also provided only for payment in respect of assignments offered to, and accepted by, him.

Following an allegation of misconduct, the respondent suspended the claimant from the bank for a number of months while it was investigated. This meant that he was treated as not eligible to be offered any work during the suspension period. The claimant presented a claim for unlawful deduction from wages, on the basis that there was an implied term that he was entitled to be paid average wages during the suspension period, so long as there was work available to do. The claim failed in the Employment Tribunal. The claimant appealed.

Held: There was no basis on which to imply a term of the sort contended for by the claimant. **Rice Shack Ltd v Obi**, UKEAT/0240/17, did not point to that conclusion, as in that case the background obligation to pay wages during the period of suspension was conceded, and the sole issue for determination was a narrower one. **North West Anglia NHS Foundation Trust v Gregg** [2019] ICR 1279 was not in point, as it concerned the position of a suspended permanent employee, whom the employer was obliged by the contract to continue to pay, so long as he fell to be treated as ready, willing and able to work. The claimant's contract, by contrast, only expressly obliged the employer to pay him in respect of a period during which work had been specifically offered and accepted. On consideration of the authorities, the proposed implied term was not one that arose from an application of the common law principles of implication of contractual terms. Nor could the reasoning in **Uber BV v Aslam** [2021] ICR 657 be deployed to achieve that result. The appeal was dismissed.

HIS HONOUR JUDGE AUERBACH

The Facts and the Employment Tribunal's Decision

1. I shall refer to the parties as they were in the Employment Tribunal (the Tribunal), as claimant and respondent. This is the claimant's appeal against the decision of the Tribunal (EJ Hyams) dismissing his claim of unlawful deduction from wages. Both before the Tribunal and before me the parties were represented, respectively, by Ms Chan and Mr Kennedy of counsel.

2. I can take the facts wholesale from the decision of the Tribunal.

> **"3 The claimant was (and at the time of the hearing before me remained) engaged (to use a neutral term) by the respondent to provide services as a health care assistant. He did so as a "bank worker". His claim arose from the fact that between 22 January 2018 and 9 May 2018 he was not permitted to provide services as such a worker to the respondent because, as it was said in paragraph 11 of the grounds of resistance to the claim:**
>
> > **'There was a concern that the Claimant had not reported [an assault] in contravention of the [respondent's] Management of Incidents Policy and Raising Concerns at Work policy for reporting incidents.'**
>
> **4 The claimant was permitted to resume providing services to the respondent as a bank worker after 9 May 2018 and he continued to provide such services at the date of the hearing before me.**
>
> **The terms under which the claimant provided services to the respondent**
>
> **5 The terms of the agreement under which the claimant provided services to the respondent as a health care assistant were at pages 175-180. They started in the following terms:**
>
> > **'1 The status of the Agreement**
> >
> > **This Summarised Terms of Agreement constitutes a framework of terms and conditions that will apply on each occasion that you provide bank services to the Trust. This Agreement is not a contract of employment and save for paragraphs [17] and [18] the terms of this Agreement will not apply other than for the duration of periods when you are providing bank services to the Trust. For the avoidance of doubt the terms set out in paragraphs [17] and [18] will apply at all times including periods when you are not providing services to the Trust.**
> >
> > **There is no obligation on the part of the Trust to offer any work to you or for you to accept any offer of work made by the Trust under this Agreement.**
> >
> > **Any contract of employment that you may have with the Trust will be separate to this Agreement. References in this Summarised Terms of Agreement to "you", "your" and similar are references to the Worker.'**
>
> **6 Paragraphs 17 and 18 of the agreement were not material for present purposes.**
>
> **7 Clause 3 of the agreement was in these terms:**
>
> > **'Hours of work**
> >
> > **There are no regular or fixed hours of work. You will provide bank services on an 'as and when' basis as required to meet the needs of the Trust from time to time**

and as agreed by you. The actual hours of your work will be agreed with your manager when you accept a particular assignment.

If you have a separate contract of employment with the Trust or elsewhere you should not accept bank work under this Agreement that will conflict with such employment or that will cause you to exceed the working time limits set out in the Working Time Regulations 1998 of 48 hours per week unless you have signed an opt out agreement. It is your duty to ensure you are working safe shifts.'

8 Clauses 5-9 provided:

'5 Duties

The principal duties that you will be required to perform will be provided to you at the commencement of each period of bank work under this Agreement. You will be expected to maintain the appropriate professional registration where applicable prior to carrying out any duties and to act only within your sphere of competence.

6 Remuneration

Your level of remuneration will be determined at the time of your appointment or when you are offered each assignment and will be based on Agenda for Change payscales according to the duties you are offered whilst providing bank services.

You will be paid monthly by credit transfer into a bank or building society account on the 23rd day of the month.

You may be entitled to pay enhancements depending on the hours you work and the shift pattern. This will be determined by the responsible manager that has agreed for you to work a specific shift which will be processed automatically through the e-rostering system.

7 Deductions from pay

The Trust shall have the right to make deductions from any payment due to you where an overpayment has occurred. The mistake will be rectified by deducting a sum equivalent to the overpayment from the next following payment.

8 Paid leave

You are not entitled to any contractual leave. However, you will be entitled to paid statutory leave subject to the provisions of the Working Time Regulations 1998. [Payment in respect of this will be made by a supplement of 5.6/46.4 (12.07%) of your monthly pay and will be identified separately on each pay advice you receive.] You will not be entitled to any further payment in respect of this leave entitlement.

9 Sickness or injury

If you are unable to provide services that you have agreed to do because you are unwell it is your responsibility to notify the manager or shift leader for the service you were due to work as soon as possible to notify them of your absence. If you are unable to during office hours, for whatever reason, to contact the relevant department and request to speak to the most senior person on duty. As a bank worker you are not entitled to sick pay.'

9 The only other provision of the agreement that I need to set out is clause 13, which was in these terms:

'Disciplinary Issues

During periods of bank work under this Agreement you will not be subject to the Trust Disciplinary Policy. However, in cases where issues of professional or personal misconduct occur, a brief investigation of the issues will be carried out and your ability to work on the bank may be reviewed in accordance. As a precautionary measure your account may be suspended in the interests of

protecting you, other staff and/or patients. Where the information is found to warrant further action, you may be removed from the Bank and/or the professional regulatory body may be informed if deemed necessary to protect patient safety.

If you have another substantive contract with the Trust, and are disciplined for conduct issues, your membership of the bank may be reviewed and your ability to work on the bank maybe [sic] limited or suspended. Your conduct on the bank, periods of bank work, may also affect your substantive role.'"

3. The claimant's claim was that he was entitled to be paid wages in respect of the period from 22 January to 9 May 2018 at the average rate that he had been earning hitherto. Mr Kennedy submitted to the Tribunal that nothing was payable to the claimant under his contract, except in respect of the period of an assignment during which he was actually working. He relied on the primacy of the contract, citing a passage in the decision of the Court of Appeal in **North West Anglia NHS Foundation Trust v Gregg** [2019] ICR 1279 at [54]. Within that passage the Court itself cited **Kent County Council v Knowles**, UKEAT/0547/11.

4. Ms Chan relied before the Tribunal on the same passage in **Gregg**. Her position was described by the Tribunal, at [14], as follows:

'Ms Chan relied on that passage in arguing that it was a matter of custom and practice, based on case law, "that if an organisation for whom a person is working suspends the person, then, in the absence of an express term to the contrary, the organisation has to pay the employee.'

5. However, the judge considered that there was no basis on which to imply such a term. After referring to another authority which was not found to be of assistance, he continued:

'16 In addition, as Mr Kennedy submitted, what Ms Chan was doing was seeking to rely on an implied term which flew in the face of the apparent purpose of the bank worker contract here, the material terms of which I have set out in paragraphs 5 and 7-9 above.

17 Those terms were to my mind clearly to the effect that the claimant was to be paid only for his time spent in fulfilling an engagement which he entered into under the terms, and not between such engagements. Thus, if the claimant was precluded by the respondent from working because it refused to enter into any engagements with him under the contract for a period of time, then he could not (whether or not he was a worker within the meaning of section 230(3)(b) of the ERA 1996, or an employee within the meaning of section 230(1) and (2) of that Act) make a claim of an unlawful deduction from his wages.

18 In general, wages are regarded as being for work done, or for time that has been devoted, either under a contract of employment or "any other contract" within the meaning of 230(3)(b) of the ERA 1996, to the employer or the party buying the worker's services. In any event, contracts of employment such as those under which

> **the employees in Gregg and Knowles were employed, which entitled them to be paid during their periods of suspension, provide for the payment of a salary or wages for agreed hours. Such contracts are different altogether from contracts such as that which was in issue here.'**

6. Before the Tribunal the claimant also particularly relied upon **Rice Shack Limited v Obi**, UKEAT/0240/17. The claimant in that case was on a zero-hours contract. She succeeded in her claim for wages in respect of a period during which she was described as suspended, and during which she was also working for a third party. The judge rejected a submission by Ms Chan that he was bound by **Obi** to find in favour of the present claimant. At [19] he observed:

> **'Having looked at that case, I could see that there was very little material difference between the terms of the contract relied on there and the terms of the bank worker agreement here, except that the contract in Obi was called a contract of employment, so that the claimant had continuity of employment, whereas the contract in issue here was expressly stated not to be a contract of employment.'**

7. However, continued the judge, it was conceded in that case that Ms Obi was in principle entitled to be paid during the suspension period. The sole issue that had to be decided was the narrower one of whether she had lost that right when she began working for a third party. The conclusion was that she did not lose that right on that account, because she did not thereby put herself in breach of the contract. As the general principle, that she was entitled to be paid whilst suspended, had been conceded and not argued, and even though that point was essential to the decision in **Obi**, that concession could not give rise to a binding precedent.

8. The judge's conclusion in the present case, at [28], was as follows.

> **'Turning, then, to the contract between the claimant and the respondent in this case, I concluded that it did not require, either expressly or by reason of an implied term, the respondent to pay the claimant during any period of suspension of the sort referred to in clause 13, i.e. of the claimant's "account". In my view, it was clear that the only kind of claim that could be made in respect of the fact that the claimant was precluded from working under the terms of the contract by his "account" being suspended (and whether or not such claim would succeed was not something that I considered, as I did not need to do so) was one for damages for breach of contract. Such a claim does not fall within section 23 of the ERA 1996: it is not a claim of an unlawful deduction from wages.'**

The Ground of Appeal

9. In the Notice of Appeal the single ground of appeal is expressed as follows;

> **"The Appellant submits that EJ Hyams erred in law when he found that because of the Appellant's status as a 'bank' worker who was offered work on [an] 'as and when' basis, he had no contractual entitlement to average wages during his suspension, despite the contract not providing that any suspension could be without pay. Entitlement to pay during suspension arises by virtue of a term implied by custom and practice."**

10. However, that ground was accompanied, in the notice of appeal, by a skeleton argument (which in turn formed the basis of Ms Chan's skeleton for this hearing). That included the proposition that there is an implied term in the contract of *every* worker **"that workers are entitled to be paid during a suspension, including zero hours and casual workers, as long as work would otherwise have been available to them"**. At the start of oral argument Ms Chan submitted that implication by custom and practice was an apt way to describe a term of that sort. Mr Kennedy objected that implication of a term by custom and practice occurs where it is found that a particular custom and practice has in fact been followed, which met the legal test expounded by Farwell J in **Devonald v Rosser and Sons** [1906] 2 KB 728, at 743, of being "reasonable, certain and notorious". He submitted that Ms Chan was arguing for a form of general implied term which was not based on an alleged factual custom and practice in the given case at all, and which was therefore not within the scope of the stated ground of appeal.

11. It appeared to me that there was force in Mr Kennedy's submission that, as a matter of legal usage, the concept of an implied term by custom and practice conventionally refers to the sort of implied term developed in the line of authorities of which **Devonald v Rosser** is taken to be the wellspring, and which has not so long ago been reviewed by the Court of Appeal in **Park Cakes Limited v Shumba** [2013] IRLR 800. The "custom and practice" label for the term advanced by Ms Chan was therefore, respectfully, inapposite, or at least unconventional.

12. That said, however, the *substantive* case that Ms Chan was seeking to advance appeared to me to be essentially along the lines of that which she had advanced before the Tribunal (to which she also there attached the label of "custom and practice" – see [4] above) and in the

skeleton argument accompanying the ground of appeal, and that tabled for this appeal hearing. Indeed it was the *whole* basis of the appeal. Ms Chan confirmed that, neither before the Tribunal, nor in the EAT, was it any part of her case that there was in fact a relevant custom and practice of paying average wages in circumstances such as those of the claimant, which was also reasonable, notorious and certain.

13. Although Ms Chan also began her oral submissions by taking me to **Société Générale London Branch v Geys** [2013] ICR 117, an authority not hitherto cited by her, the substance and general line of her argument was, therefore, not unheralded. I was therefore inclined to think that the fair way to proceed was to permit Ms Chan to develop her argument orally, but also to allow Mr Kennedy an extended break over lunch to review **Geys** and his position generally, before making his submissions. He agreed to that course, and, when we resumed, he indicated that, while it remained his case that Ms Chan required permission to amend, he was content that he was fully able to engage with the arguments, and left that matter to me.

14. I think that it would have been better had Ms Chan not used the term "custom and practice" in the ground of appeal, to describe the nature of the implied term being contended for, and also for the gist of the content of the implied term contended for to have been set out in the ground of appeal itself, rather than embedded in the narrative of the accompanying skeleton argument. But I am satisfied that the groundwork was all there, and that during the course of the hearing of this appeal, both counsel had a full and fair opportunity to make submissions on the implied term for which she did contend, and the authorities said to be pertinent to it.

Arguments

15. As well as the skeleton arguments, I heard extensive oral argument over the course of the day, in the course of which a number of employment law and other contract-law authorities were

considered. I will start by setting out what seem to me to have been the main lines of the submissions on each side, as they finally emerged in the overall course of the arguments.

Claimant

16. Ms Chan's principal arguments were, in summary, as follows.

17. The wages jurisdiction enabled an employee to claim in the Tribunal, in respect of a given period, the wages which were, in accordance with section 13(3) **Employment Rights Act 1996** "properly payable" to him, the claim here being that they were contractually payable. The Tribunal had the power to resolve any contractual issue as necessary to determine the question. See **Agarwal v Cardiff University** [2019] ICR 433. In this case no express term of the claimant's contract addressed whether a period of suspension would be with or without pay. Clause 13 was silent on that question. The implied term for which the claimant contended filled that gap. The Tribunal should have concluded that that implied term had the effect that average wages were contractually properly payable in respect of that period.

18. As to how, doctrinally, the implied term arose, as explained by Lady Hale in the following passage in **Geys**, contractual implied terms are broadly of two kinds:

> **"55. In this connection, it is important to distinguish between two different kinds of implied terms. First, there are those terms which are implied into a particular contract because, on its proper construction, the parties must have intended to include them: see *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988. Such terms are only implied where it is necessary to give business efficacy to the particular contract in question. Second, there are those terms which are implied into a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it: see *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, *Liverpool City Council v Irwin* [1977] AC 239.**
>
> **56. A great deal of the contractual relationship between employer and employee is governed by implied terms of the latter kind. Some are of long-standing, such as the employer's duty to provide a safe system of work. Some are of more recent discovery, such as the mutual obligations of trust and confidence. This was referred to by Dyson LJ in *Crossley v Faithful and Gould Holdings Ltd* [2004] IRLR 377 as an "evolutionary process". He also described the "necessity" involved in implying such terms as "somewhat protean", pointing out that some well-established terms could scarcely be said to be essential to the functioning of the relationship. At para 36, he said this:**
>
> **"It seems to me that, rather than focus upon the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised**

> **implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations."**
>
> **There is much to be said for that approach, given the way in which those terms have developed over the years."**

19. The term contended for in the present case was of the second kind.

20. Whilst it was accepted that there had been a concession in **Obi**, so that it was not binding on the point at issue here, consideration of that decision was still illuminating. The concession, submitted Ms Chan, simply reflected the common law position that zero-hours workers such as Ms Obi were entitled to pay during suspension, as long as there was work to be done, notwithstanding that there was no obligation on Rice Shack to provide her with any work. It was noteworthy that in the Tribunal below in that case (I was referred to a copy of that decision as well), that proposition had been advanced by the Tribunal judge, and neither of the parties took issue with it. In the EAT, HHJ Eady QC did not cast any doubt upon it.

21. The implication of such a term was, said Ms Chan, in accordance with a purposive interpretation of the contract as it "existed in reality", in order to give effect to statutory employment rights. The decisions in **Knowles** and **Gregg** (above) both provided illustrations of this term in operation.

22. In **Knowles** the employee was suspended pending his trial on criminal charges which he denied, and eventually dismissed. The Tribunal held that he was entitled to be paid during the period of suspension and the EAT (HHJ Jeffrey Burke QC) dismissed an appeal as not arguable. Ms Chan cited extensively from the EAT's decision, including the following at [12]:

> **"I start, as did the Employment Judge, with the familiar principle that an employee who is alleged to be guilty of serious misconduct can be suspended by his employers on full pay, subject to any argument that he had thereby been deprived of his right to earn monies, the amount of which depends upon the work he does (for instance, in a commission case), but that a suspension without pay is a breach of contract on the employer's part unless the relevant contractual terms provide otherwise. Virtually everyone who works in the field of employment law will have seen many cases in which an employee is believed by his employer to have committed serious misconduct against the employer, and is suspended on full pay by the employer as a result pending investigation and disciplinary process. The ACAS Code of Practice on disciplinary**

and grievance procedures in 2009 refers to suspension on pay; it does not refer to suspension without pay."

23. Ms Chan submitted that the EAT was there emphasising that it is custom and practice, as indicated in the ACAS Code on Disciplinary and Grievance Procedures, that any suspension to investigate misconduct will be on full pay, in the absence of any term providing to the contrary. She cited paragraph 8 of the ACAS Code, which provides:

> **"In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action."**

24. She noted that this paragraph does not refer even to the possibility of suspension without pay. The discussion in **Knowles** also emphasised that the fact that an employer has suspended a worker during an investigation of alleged misconduct, does not mean that the worker is not still ready, willing and able to work, or that there is not work to be done.

25. In **Gregg** a doctor was suspended pending police and internal investigations into the deaths of two patients in his care. Suspension of his professional registration, and bail conditions, meant that he was unable to carry out his duties. His claim that he was entitled to be paid during the suspension succeeded before the Court of Appeal. Ms Chan cited the speech of Coulson LJ at [52], and then a number of passages from within [54] –[61]. It is convenient to set out here those paragraphs, in which I have underlined the passages highlighted by her:

> **"52. It is, not always easy to discern a clear set of principles from these authorities. However, the following seem to me to be uncontroversial:**
>
> **a) If an employee does not work, he or she has to show that they were ready, willing and able to perform that work if they wish to avoid a deduction to their pay (*Petrie*).**
>
> **b) If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It will depend on the circumstances.**
>
> **c) An inability to work due to a lawful suspension imposed by way of sanction will permit the lawful deduction of pay (*Wallwork v Fielding*).**
>
> **d) By contrast, an inability to work due to an "unavoidable impediment" (Lord Brightman in *Miles v Wakefield*) or which was "involuntary" (Lord Oliver in *Miles v Wakefield*) may render the deduction of pay unlawful.**

e) Where the employee is accused of criminal offences, the issue cannot be determined by reference to the employee's ultimate guilt or innocence (*Harris*, *Burns*), nor simply by reference to whether he or she was granted bail or not (see the comments in *Knowles* about the decision in *Burns*, with which I agree)."

54. I consider that the starting point for any analysis of the Trust's attempt to deduct Dr Gregg's pay must be the contract itself (*Walker*, *Knowles*, *Paterson*). Was a decision to deduct pay for the period of suspension in accordance with the express or the implied terms of the contract? If the contract did not permit deduction, then, as envisaged by Lord Templeman in *Miles v Wakefield*, the related question is whether the decision to deduct pay for the period of suspension was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the 'ready, willing and able' analysis summarised at paragraphs 52 – 53 above – falls to be considered. But, in my judgment, a considerable degree of caution is necessary before concluding that someone like Dr Gregg, who was and remains the subject of an interim suspension imposed in the public interest, is not 'ready, willing and able' to work, or is to be characterised as avoidably or voluntarily unable to work.

4.3 The Terms of the Contract

55. I am in no doubt that the express terms of Dr Gregg's contract in this case do not permit the deduction of pay during an interim, non-terminatory suspension. There are a number of reasons for that.

56. First, Clause 12 prohibits any deduction from or variation to the annual salary paid, in monthly instalments, to Dr Gregg. On the face of it, that would not only not permit this attempted deduction, it would expressly prohibit it.

57. Secondly, there is no other express term in the contract which permits such deduction. Given that this form of interim, non-terminatory suspension is now a feature of the professional life of a medical practitioner, it seems to me that, if it was intended that salary would not be paid on the imposition of such a suspension, the contract would have said so.

58. Thirdly, although I do not consider that paragraph 25 of Part II of the MHPS (paragraph 7.3 above) is of any direct application to this case – because it only applies where there is an exclusion by the Trust and, in this case, Dr Gregg's pay was deducted at a time when the Trust's exclusion had been brought to an end and it was the IOT suspension which was material (paragraph 16 above) – I consider that it is of some assistance in showing the overall assumptions made about deductions of pay during temporary suspensions or exclusions. As such, contrary to Mr Sutton QC's submissions, it works against the Trust, because it provides that exclusion will "usually be on full pay". The same is also true of paragraph 10 of the Trust's own Disciplinary Policy (paragraph 8.3 above). Whilst I accept that paragraph 10 appears to be dealing with a suspension decision by the Trust, as opposed to the suspension of registration by the IOT, it is relevant to note the repetition there of the concept of suspension as "a neutral act", and the express promise that suspension "will be without detriment to normal, full pay entitlement".

59. In my view, there could be no basis on which to imply a term into the contract allowing the Trust to deduct pay in the circumstances of an interim suspension. Such a term is not necessary in order to make the contract work; see *Liverpool City Council v Irwin* [1977] A.C.239 and *Marks and Spencer v BNP Paribas Ltd* [2015] UKSC 72. Nor is it so obvious that it 'goes without saying', in the way explained in *Marks and Spencer*. Furthermore, as I have said, any such term would be contrary to Clause 12: at best, it could only be discretionary and, as Mr Sutton QC accepted, such a discretionary term could not supplant the mandatory provision in Clause 12.

60. As to custom and practice, there was no evidence in this case that there was any custom and practice that the imposition of a temporary, non-terminatory suspension permitted the Trust to deduct Dr Gregg's pay. As I have said, the only provisions in the contract that might show a more general position, namely paragraph 25 of Part II of MHPS, and paragraph 10 of the Disciplinary Policy, indicate that pay will *not* be deducted during an interim suspension/exclusion. In this way, both MHPS and the Trust's own Disciplinary Policy support the contention that, by reference to the evidence as a whole, there was no basis on which Dr Gregg's pay could be deducted.

> **61. Accordingly, whilst there is rather more to it than just paragraph 25, I consider that the judge reached the right conclusion: there was nothing in Dr Gregg's contract which permitted the deduction of pay during the interim, non-terminatory suspension."**

26. Ms Chan submitted that the position of the claimant was similar to that of a medical practitioner such as Dr Gregg. If there was an allegation of misconduct, then, because he dealt with vulnerable patients, suspension would be the default option whilst it was investigated. While, theoretically, the claimant was free to work elsewhere during his suspension, the reality was that no other bank or healthcare trust, particularly a mental health trust, would engage a healthcare worker while they remained suspended for alleged misconduct. If the respondent had no obligation to pay wages while it lasted, there was no incentive on it to deal with the matter promptly. Further, clause 13 of the claimant's contract referred to a "brief" period of suspension; but the suspension in his case, of several months, could not be described as brief.

27. The fact that the claimant had no guaranteed hours should not make any difference. The implied term that suspension is with pay applied equally to those on casual or zero hours contracts, as long as there would otherwise have been work for the worker to do during the period in question. It was implied in view of the relationship of subordination between employers and workers, in order to give effect to employment protection rights. The rationale for this implied term applied to workers who were not employees, as well as to those who were.

28. Ms Chan referred to the reasoning of the Supreme Court (Lord Leggatt JSC, with whom the other justices agreed) in **Uber v BV Aslam** [2021] ICR 657, at [68] - [76]. Where rights are conferred by legislation they should be interpreted so far as possible so as to give effect to the statutory purpose. The general purpose of employment protection legislation is to protect vulnerable workers, who are in a subordinate and dependent position, from various forms of unfair treatment. The control which an employer is able to exercise over working conditions and

remuneration means that the relations cannot safely be left to contractual regulation, and are considered to require statutory regulation. At [76] Lord Leggatt said:

> "**Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.**"

29. This approach was in point. It was irrelevant whether the claimant was an employee or a worker. The relevant question was whether the statutory protection against unlawful deduction from wages should apply purposively to the present scenario: a zero-hours worker being suspended without pay for 3 ½ months for suspected misconduct, based on a suspicion that was subsequently found to be unfounded. Ms Chan submitted that, applied purposively, the statutory protection should indeed apply to this scenario. That was consistent with good practice as reflected in the ACAS Code. The protection was necessary because, as in **Obi**, the power to make a decision in relation to the investigation lay entirely in the respondent's hands.

30. **Devonald v Rosser** itself, she submitted, could be seen as an illustration of the court stepping in to protect a vulnerable worker. The issue at hand there was whether there was an implied custom and practice that piece workers at a tinplate works would *not* be paid during a notice period following a shut-down, to which the answer was "no". But it was striking that it was taken as read that the plaintiff was entitled to be so paid, in the *absence* of such a term.

31. As Dyson LJ had discussed in the passage from **Crossley v Faithful & Gould Holdings Limited** [2004] ICR 1615 cited by Lady Hale in **Geys**, the implication of a term of the second, "class", kind may be more realistically viewed as arising not as a matter of necessity, but from

considerations of reasonableness, fairness or policy. In the course of further argument Ms Chan referred also to **Scally v Southern Health and Social Services Board** [1991] ICR 771 (HL). In that case a group of employees were not aware of the introduction of a valuable right to purchase added pension years within a limited time window. It was held that the employer had an implied duty to inform the employees of its existence. Ms Chan submitted that this was an instance of a generalised term being implied, going beyond something that was a matter of business necessity, in order to protect employees who were in a subordinate position.

32. Ms Chan concluded that the term for which she contended went with the grain of the **Uber** approach, surmounted the **Crossley** bar, which was not as high a test as necessity, and was appropriately focused and limited in its scope and implications.

Respondent

33. Mr Kennedy's principal arguments were as follows.

34. The expression "properly payable" in section 13(3) of the **1996 Act** meant that there had to be a legal entitlement to payment. Here, as usually, a contractual entitlement was asserted. The claimant did not rely on an express term. Ms Chan had now also confirmed that she relied on a claimed term to be implied into all workers' contracts.

35. The claimant had wrongly conflated the conventional concept of suspension of a full-time employee, with what had actually happened in this case, which was the application of a restriction on his bank-worker account. He was not suspended *from* work, but denied the *opportunity to be given* bank work for a period of time. This reflects a real and significant difference between the position of an employee under a permanent contract of employment, where the starting point under the contract is that they have an ongoing right to be paid; and the position of a bank worker, where the starting point is that the hirer has no obligation to give them any work, and they only

have a right to be paid for such work as they are given and have carried out. The contractual baseline in the two types of case is different. To conflate the position of a suspended conventional employee with that of a restricted casual worker failed to respect the fundamental nature and terms of the underlying contractual relationship.

36. **Obi** was correctly identified by the Tribunal in the present case as a case in which a concession on this point was made, and so it was not of binding authority. Nothing could be inferred from the failure of HHJ Eady QC to query the concession. Even if it had been prompted by the judge below, the concession in **Obi** had clearly been made in the Tribunal, and there was no attempt to reopen it in the EAT. It would then have been wrong for the EAT proactively to question it. There was no need to comment on it. The appeal was solely concerned with the narrower and distinct question of the impact of taking another job.

37. Neither **Knowles** nor **Gregg** supported the claimant's case. Both involved permanent employees. The starting point under the contract was therefore, in both cases, different from the present case. In any event, on examination, both cases were decided not on the basis of the existence of an implied term such as was contended for here, but on the basis of the terms of the actual contract in the case at hand. In **Gregg** Coulson LJ identified at [56] that the terms of Dr Gregg's contract prohibited any deduction from, or variation to, the monthly instalments of annual salary; and noted at [58] that there was also a term that any suspension by the trust would be "without detriment to normal, full pay entitlement."

38. At [69] Coulson LJ said:

> **"Thus, although wary of giving a black and white answer to this last element of the question raised in Issue 1, I consider that, in a situation where the contract does not address the issue of pay deduction during suspension, the default position should be that, in the ordinary case, an interim, non-terminatory suspension should not attract the deduction of pay. There may be exceptional circumstances (such as a complete or part admission of guilt) which might justify such a deduction, but they would not ordinarily arise."**

A 39. But he was not describing there the existence of an implied term of the sort for which Ms Chan contended. Nor, in any event, did this paragraph embody the *ratio* of the decision.

B 40. **Knowles** was, again, a case involving a salaried employee, where the starting point was that he had an ongoing right to receive his monthly salary. HHJ Burke QC's observations at [12] were about such employees. The real issue was whether Mr Knowles was, having regard to the particular facts, to be treated as ready, willing and able to work during his suspension. The C passage in the ACAS Code to which reference had been made is plainly concerned with the position of conventional employees. The ACAS website confirmed that it was directed at employees rather than workers.

D 41. In the present case the express contractual position was clear. Under his contract the claimant had no regular or guaranteed hours, and was only entitled to be remunerated for hours in fact worked. Implying an obligation to pay restricted workers would run contrary to the E express terms of the agreement. It could not be right that the respondent, which was contractually free to decline to offer work, or stop offering it altogether, at any time, and without any reason, was nevertheless obliged to pay wages, if it used the terminology that the individual was "suspended" from the bank, or because it had elected to decline to offer work for the *particular* F reason that an allegation of misconduct was under investigation.

42. In **Geys**, at [55], the concept of necessity was used in relation to implied terms of both kinds. A term could be implied into a particular individual contract on the basis that it could be G inferred that the parties to that particular contract must have intended whatever was necessary for their contract to have business efficacy. In relation to the second type of implied term, which formed part of every contract of a certain class, the term was implied not because that reflected H the individual parties' inferred intentions, but because the courts deemed it a "necessary" incident of the relationship concerned, unless the parties had expressly excluded it. It was not the ratio of

Crossley that a class term could be implied on the basis of mere reasonableness. It did not lower the bar to the point where a term of the sort for which Ms Chan contended could be implied into the contract of every bank worker.

43. In any event, in **Geys** Lady Hale also cited the well-known authority of **Liverpool CC v Irwin** [1977] AC 239, which concerned the relationship of landlord and tenant. In that case Lord Wilberforce held that the test to be applied was that "such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity." Lord Wilberforce specifically disagreed with the suggestion by Lord Denning MR, in the Court of Appeal in that case, that there could be an implied obligation based upon reasonableness.

44. **Geys** itself concerned what was required to give an effective notice of termination of employment. While citing Dyson LJ's dictum in **Crossley** at [56], Lady Hale also continued, at [57]: "Whatever the test to be applied, it seems to me to be an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate." She went on to say, at [58], that it was "necessary" that the employee receive not only payment in lieu of notice but also the relevant notification from the employer as to when the termination takes effect. At [60] she described such a notice as a "necessary incident of the relationship."

45. Mr Kennedy submitted that **Scally** fell within the **Irwin** line of authority. It did not stand for the proposition that a term could be implied into contracts of employment generally on the basis that it was reasonable to do so. At best for the claimant it might be said that such a term could be implied if it was a reasonably necessary incident of the relationship, but that test still set

a high bar, which Ms Chan's proposed implied term did not surmount. As the commentary in *Harvey* put it, Lord Bridge had devised a specific answer to a specific problem.

46. As for **Uber v Aslam**, the issue there was whether the claimants were workers within the statutory definition. The Supreme Court had indicated that, in answering that question, the primary question was one of statutory interpretation and not contractual interpretation. At its highest, it meant that, if, on a proper interpretation of the statutory definition, Parliament intended that a relationship should fall into the category of worker and employer, the employer could not use express contractual terms to negate that result. It was not authority for the proposition that a term such as was contended for in the present case, should be implied into all workers' contracts, on the basis that this was the inferred purpose of the wages legislation.

47. Mr Kennedy concluded that the term contended for by Ms Chan was not "necessary" in the **Irwin** sense, nor in the sense that Lady Hale found that the term implied in **Geys** was a necessary incident of every employment contract. It was not necessary, or even reasonably necessary, in order to make a bank or casual contract function, for the employer to pay the worker during a period of restriction from being offered bank work. The term being contended for by Ms Chan was very wide. It would not just apply to NHS bank workers, but to all casual or zero-hours workers, unless there was an express term in their contract stating that any suspension from eligibility to be offered work would be without pay. The introduction of such a term, if thought necessary to protect such workers, must be a matter for Parliament.

48. Mr Kennedy did not take issue with the point that Ms Chan took from **Agarwal**. But he submitted that the position of the present claimant was conceptually analogous to that of the cabin crew in **Lucy v British Airways plc**, UKEAT/0033/08. When their base was closed they ceased to be rostered for flying duties, and so ceased to receive various allowances which were paid to those who did carry out flying duties. They could not claim those allowances as wages, because

they had not been earned and were not properly payable. The claims were properly formulated as being for damages for the loss of the chance to earn the allowances; and, while they remained employed, those contractual damages claims were not within the Tribunal's jurisdiction. The present judge's observations at the end of [28] in similar vein were correct.

49. For completeness I note that both counsel referred me to two Tribunal decisions arising from factual scenarios said to be similar to those of the present case: **Ibrahim v Maidstone and Tunbridge Wells NHS Trust**, 2300321/2020, 13 September 2020, and **Choro Padoh v Sussex Partnership NHS Foundation Trust**, 2304969/2019, 16 October 2020. These went different ways. Each counsel relied on the decision which went the same way as they sought me to decide the present appeal, as of persuasive effect, and submitted that the other decision was wrong or could be distinguished. Neither decision, of course, binds me.

Discussion and Conclusions

50. This was a claim for unlawful deduction from wages pursuant to Part II **Employment Rights 1996**. It could only succeed on the basis that average wages were "properly payable" to the claimant, during the period in question, within the meaning of section 13(3), that is, that he had a legal entitlement to be paid such wages. See **New Century Cleaning Co Ltd v Church** [2000] IRLR 27. In this case, as usually, what was relied upon was a contractual entitlement.

51. The source of such an entitlement could only be an express term of the contract or an implied term. As the authorities have from time to time explored, in some cases where there is an umbrella contract, this does more than just supply a reference point for the terms that apply *during* assignments, but also itself gives rise to some mutual obligations throughout the duration of the umbrella contract itself, including between assignments. In this case there were two expressly designated clauses of that type, relating to data protection and declaration of interest on joining the bank, but they were rightly not argued to be relevant here.

52. Ms Chan submitted that the express terms of the contract in this case were simply silent on the question of whether a period of suspension was paid or unpaid, as clause 13 did not address this. Mr Kennedy's position was that to imply a right to be paid during such a period would go contrary to the natural meaning of the express provisions of this bank contract.

53. As to that, the express terms of the contract included that: (a) save for the clauses that I have mentioned, its terms did not apply outside periods when the claimant was providing bank services (clause 1); (b) there was no obligation on the respondent to offer any work nor on the claimant to accept any offer of work (clause 1); (c) there were no regular hours, these being as required, and agreed (clause 3); and (d) remuneration would be based on Agenda for Change pay scales "according to the duties you are offered whilst providing bank services" (clause 6). Taken together the effect is clearly that the availability of work, and the willingness of the claimant to do it, are not sufficient to trigger an entitlement to wages. That only arises if the respondent chooses to offer an assignment, and the claimant chooses to accept it.

54. I also agree with Mr Kennedy that, for the purposes of the issue raised by this appeal, there is a fundamental difference between a contract the basic architecture of which is of that sort (whatever label the contract may be given), and a conventional employment contract, which itself provides for guaranteed and required work and hours, and correspondingly guaranteed and required pay, so long as the employee is ready, willing and able to work.

55. Corresponding to that distinction is an important distinction between the legal implications of action taken by the employer, which may, nevertheless, in both types of case, be described as "suspension". The term "suspension" is commonly used to describe a situation in which a conventional employee is told, in respect of a period during which they would normally be required by their contract to work or be available for work, and would normally be entitled to

be paid accordingly, that they are not only not required to work, but are positively required not to work and/or attend at the workplace. In such a case the starting point is that such a management direction will not, without more, deprive them of their underlying contractual right nevertheless to continue to be paid in respect of that period, unless the contract expressly so provides. Importantly, in such cases, the underlying right to be paid derives automatically from the contract itself, and so the employer's fiat cannot unilaterally take it away.

56. But the particular provision within clause 13 of the claimant's contract referred to suspension in a different sense, being the possibility that, during a disciplinary investigation, "your ability to work on the bank may be reviewed", and "your account may be suspended". The reference to "your account", it was not in dispute, was to the claimant's registration on the bank. The substantive step being contemplated here, is that the claimant might be treated as not eligible to be *offered work* during the period of that suspension. But the underlying contract itself would not have automatically conferred on him the right to be paid wages during some or all of that period. That would only have arisen had the respondent elected to offer him such work (which the contract did not oblige it to do), and had he taken up that offer.

57. Pausing there, I am therefore inclined to think that the failure of clause 13 to address the question of whether a suspension of the claimant's account would be with or without pay, did not leave a gap in the express contractual provisions overall. The position was already catered for by the other express terms of the contract. If that is right, then, reading the contract as a whole, the express terms of the contract occupied the field, providing the answer to the question whether the claimant was entitled to be paid in the period in question – in the negative – and there was no room, therefore, for the implication of a different implied term.

58. However, I recognise that nevertheless there is no express term in this case that states positively that a period of "suspension" in the clause 13 sense will be unpaid; and that it might

A be said that this leaves the door open just wide enough for an implied term to plant its footprint; and the arguments, as I have described focussed, in any event, on whether such a term should be implied, assuming that there was room for one. I therefore turn to those arguments.

B 59. I will start with **Obi**. I do not think that this decision assists. It is clear, and Ms Chan accepts, that there was a concession made in that case, in the Tribunal, and from which there was no attempt to resile in the EAT. It does not matter why the employer in that case made the C concession, or, respectfully, what the employment judge in that case may have assumed was the underlying legal position on this point. As Mr Kennedy submits, there was no basis or need for the EAT to go behind, or comment, on the concession, or its legal correctness. The EAT was solely concerned with a narrower point. The decision in **Obi** itself, on the only and particular D point at issue in that case was, respectfully, plainly correct. But it does not provide any support to the present claimant's case for the existence of the implied term sought.

E 60. I turn to **Knowles**. The claimant was an employee who received an annual salary. Following his arrest on serious allegations of fraud his employer started an investigation. He was not in custody and was still available for work. He was suspended initially on full pay, but then, from a certain date, without pay. Eventually, following a disciplinary hearing, he was dismissed. F He successfully claimed wages in respect of the period of suspension that had been without pay. The EAT dismissed an appeal as having no reasonable prospect of success.

G 61. The argument revolved around whether Mr Knowles fell to be treated as ready, willing and able to perform his duties at the relevant time. If so, then the employer remained obliged to pay him, even though it had suspended him. If not, then he could not expect to be paid. Reading the decision as a whole, the analysis that emerges, of the particular facts, is as follows. The fact H that Mr Knowles had been arrested and charged did not mean that he was unwilling or unable to work. His alleged conduct had not made that impossible. He had not been remanded in custody.

Had the employer lifted the suspension, he would have gone back to work. By being ready and willing to work he had done what was required of him to earn his wage.

62. The passage in the discussion cited by Ms Chan, referring to the wider context in which it is common that employees accused of serious misconduct may be suspended on full pay pending an investigation, is not, it seems to me, pointing to an implied term, which was found to be applicable to Mr Knowles, and was the source of his right to be paid. Rather, these scene-setting remarks, and some closing remarks to the effect that the employer may feel that the law should be otherwise, but it is not, bookend the substantive reasoning, explaining that the conclusion of law that the EAT reaches there is, legally, unremarkable.

63. In all events, the salient point is that Mr Knowles was *not* held by the EAT to be entitled to full pay by virtue of an implied term of the sort contended for in the present case, but, rather, because, by being ready, able and willing to work, during a period when he would normally be entitled under his contract to be paid for doing so, he was fulfilling his side of what is sometimes called the wage-work bargain, and had therefore earned his contractual wages.

64. I turn to **Gregg**. I have already described the essential facts. Coulson LJ (Peter Jackson and Lewison LJJ concurring), reviewed the key authorities which had expounded upon the concept of being "ready, willing and able to work". Having done so, the discussion continued as I have set out above. At [52] he drew out a number of principles, including that, where an inability to work was the result of a third party decision or external constraint, a deduction of pay *may* be unlawful, but it will depend on the circumstances.

65. Coulson LJ went on to say, at [54], that the starting point must be the contract itself. If it did not permit a deduction, then "the related question is whether the decision to deduct pay was in accordance with custom and practice. If the answer to both these questions is in the negative,

then the common law principle – the 'ready, willing and able' analysis… falls to be considered." But caution was required before concluding that someone subject to an interim suspension of this kind was to be characterised as avoidably or voluntarily unable to work. He went on to hold that there was no express term sanctioning the withholding of pay. Nor, he held at [59], could there be any basis to imply such a term in the circumstances of a suspension. Such a term was not necessary (citing **Liverpool CC v Irwin**). Further, in these particular circumstances, neither the "not ready willing and able" argument, nor its close relative, the "co-dependency" argument assisted the employer. Coulson LJ also held that a particular express term did not, on its correct construction, permit the trust to withhold pay in these circumstances.

66. Once again, I find nothing in this decision which assists the present claimant. Dr Gregg was, like Mr Knowles, suspended from salaried employment during a period when he would ordinarily have been entitled to be paid. He was, ultimately, held in the requisite legal sense, to be ready, willing and able to work. He was therefore, under his contract, automatically entitled to his wage *unless* an express or implied term of the contract provided otherwise. It was the *employer* which needed to establish the existence of such a term. No express term had that effect. No such implied term was found to be in play. Nothing in **Gregg** therefore assists the present claimant's case that he was entitled to be paid by virtue of an implied term which operated positively in his favour.

67. As to the ACAS Code paragraph, this is a general Code, applicable to employees. I think it is clear that the reference to "suspension with pay" assumes the **Knowles**-type scenario as its implicit model, in which the employee is suspended during a period in which they would ordinarily be automatically entitled under their contract itself to be paid.

68. I turn to the general authorities on contractual implied terms. **Devonald v Rosser** was concerned with whether the lack of any work for the employees to do *excused* the employer from

its obligation to pay wages, and, specifically, whether there was in fact, in that case, a custom and practice of a sort that could give rise to an implied term to that effect. I do not think that anything in that decision assists the present claimant's case for an implied term conferring a positive right on him, such as is contended for in this case.

69. There are numerous authorities that have explored the doctrinal bases on which terms may be implied into contracts, and extensive discussion in the textbooks on how such implied terms may be categorised or sub-categorised. For the purposes of what I have to decide, I do not have to drill down into all the sub-categories. As a starting point I gratefully adopt the overview given by Lady Hale (by which I am of course in any event bound) in **Geys**, in the passage which I have cited at [18] above, sub-dividing contractual implied terms into two broad kinds. As I have noted, Ms Chan argues in the present case, for a term of the second kind, a so-called "class" or "category" implied term, to be implied into the contracts of all workers.

70. I think it is clear from Lady Hale's speech that she accepted, following **Irwin**, that the test, in principle, for the existence of such a term, is not one of reasonableness, but one of necessity. Where the term contended for is of the second type, the Court is not giving effect to what it infers must necessarily have been the unstated common intention of the actual contracting parties. It may therefore perhaps be said that the concept of necessity in relation to a type 2 implied term, is deployed in a slightly different way than it is in relation to a type 1 term. But it seems to me, from Lady Hale's express citation of **Irwin**, and the passages at [57], [58] and [60] to which Mr Kennedy referred me (see [14] above), that Lady Hale did not regard **Crossley** as having lowered the bar; and that the test that she applied was still whether the implied term contended for was, a "necessary incident" of a contract of that particular kind.

71. Nor does **Scally** support a different general approach. In the critical passage, at [12], Lord Bridge (giving the sole reasoned judgment) said this:

> **"Will the law then imply a term in the contract of employment imposing such an obligation on the employer? The implication cannot, of course, be justified as necessary to give business efficacy to the contract of employment as a whole. I think there is force in the submission that, since the employee's entitlement to enhance his pension rights by the purchase of added years is of no effect unless he is aware of it, and since he cannot be expected to become aware of it unless it is drawn to his attention, it is necessary to imply an obligation on the employer to bring it to his attention to render efficacious the very benefit which the contractual right to purchase added years was intended to confer. But this may be stretching the doctrine of implication for the sake of business efficacy beyond its proper reach. A clear distinction is drawn in the speeches of Viscount Simonds in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, 576 and Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239, 255 between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship. If any implication is appropriate here, it is, I think, of this latter type. Carswell J accepted the submission that any formulation of an implied term of this kind which would be effective to sustain the plaintiffs' claims in this case must necessarily be too wide in its ambit to be acceptable as of general application. I believe, however, that this difficulty is surmounted if the category of contractual relationship in which the implication will arise is defined with sufficient precision. I would define it as the relationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention. I fully appreciate that the criterion to justify an implication of this kind is necessity, not reasonableness. But I take the view that it is not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in a position to enjoy its benefit. Accordingly I would hold that there was an implied term in each of the plaintiff's contracts of employment of which the Boards were in each case in breach."**

72. It is clear from this passage that the outcome did not involve a departure from the principles set out in **Irwin**, but was reached compatibly with them, in particular because the term in question was not one to be implied into the contract of *every* employee, but only one that exhibited the particular factual features there set out. In the concluding part of that passage Lord Bridge states, in terms, that the test being applied is one of necessity, not reasonableness.

73. I turn then to the argument drawing on **Uber BV v Aslam**. As is well known, the issue in that case was whether the drivers concerned were workers, as defined in various legislation, when carrying out a particular job of conveying a passenger, and, if so, whether they were also working whenever they were logged on to the Uber App. At stake were the rights to the national minimum wage, paid annual leave, and other statutory rights conferred only on those who meet the common statutory definition of a worker.

74. In a section of his speech headed "interpreting the statutory provisions" Lord Leggatt JSC explained that whether the claimants were "workers", was primarily a question of statutory interpretation, not of contractual interpretation. The modern approach is to consider the statutory purpose and to interpret the language of the provision in question so far as possible in a manner that gives effect to that purpose. Building on the discussion in **Autoclenz v Belcher** [2011] ICR 1157, of the potential significance of the relative bargaining power of the parties in the work context, to the task of divining their true agreement, he further examined how to approach the question of what assistance consideration of the written contract may or may not offer, when determining whether an individual is a worker within the statutory definition. This led to the conclusion at [76] that I have earlier set out.

75. Ms Chan seeks to rely on this reasoning to support her argument that the statutory protection against unlawful deduction from wages should apply purposively in the present case. She refers to what she says are the realities of the position of a bank worker like the claimant, in terms of his practical ability to get work elsewhere while under investigation by the respondent. However, whatever those realities may or may not be, I do not think that the reasoning in **Uber v Aslam** can be relied upon doctrinally in the way that she suggests. That decision was concerned specifically, and solely, with the meaning, and scope, of the statutory concept of worker, and not with the distinct question of what terms should be implied into the contracts of those who are, indeed, workers. There is in it, unsurprisingly, no consideration or discussion of the authorities relating to implied terms, whether generally or specifically in the work context.

76. It is true that, just as the analysis in **Autoclenz** and **Uber**, of the definition of worker, was informed by peculiar features of the reality of work, as opposed to other, contractual relationships, so established "class" implied terms, such as the duty of trust and confidence, reflect particular practicalities and dynamics of employment relationships. But it does not follow that the

reasoning in **Uber** points to a ready-made answer to whether the list of such terms implied into worker contracts should be extended to that contended for in this case.

77. It seems to me that the creation of an implied term, as contended for in this case, would go significantly beyond that which could be rationalised as a necessary incident of all worker relationships, or even a reasonably necessary one, and hence it cannot be supported by the principles of implication that I take from authorities such as **Irwin** and **Geys**. It would be of a materially different kind from implied terms, such as the duty of trust and confidence, which reflect features that are inherent in all working relationships, or the term implied in a case such as **Geys**, which reflects the practically necessary incidents of a notice of termination of employment in every case. Nor do I think that common law principles support the implication of such a term into all worker contracts of the zero-hours or bank types. The introduction of such a term would materially alter the nature of contractual relationships of this type.

78. Ms Chan correctly, relying on **Agarwal v Cardiff University**, makes the point that the Tribunal had the power to determine any contractual or other legal issue that it needed to, in order to decide whether the wages claimed were properly payable. But his claim still rested on the proposition that, by an implied term, he did have the *right* during this period to be paid what was dubbed "average wages". For the reasons I have given, I do not think that the Tribunal was wrong to conclude that there was no such implied term in this case. Whether his claim could arguably have been framed another way does not fall to be determined in this action.

Outcome

79. For all the foregoing reasons the appeal is therefore dismissed.