Case Numbers: 2600918/2020; 2600917/2020; 2600922/2020; 2600923/2020; 2600932/2020; 2600933/2020; 2601431/2020; 2601432/2020; 2601433/2020; 2601434/2020; 2601435/2020; 2601436/2020; 2601437/2020; 2601438/2020

EMPLOYMENT TRIBUNALS

Claimants:			**Respondent:**
1) Mrs S Ford	2600918/2020	v	Wilko Retail Limited
2) Mrs A King	2600923/2020		
3) Mr S Kettle	2600922/2020		
4) Mrs L Smith	2600932/2020		
5) Miss R Clarke	2600917/2020		
6) Mrs L Stevens	2600933/2020		
7) Mr P Desbrow	2601434/2020		
8) Ms L Bown	2601433/2020		
9) Mrs R Ash	2601431/2020		
10) Ms R Bhogaita	2601432/2020		
11) Ms M Jetha	2601435/2020		
12) Ms D Joshi	2601436/2020		
13) Ms S Patel	2601437/2020		
14) Ms G Smith	2601438/2020		

Heard at: Leicester **On:** 21, 22, 23 & 24 March 2022

Before: Employment Judge Fredericks

Appearances
For the claimant: Mr D Patel (Counsel)
For the respondent: Ms R Barrett (Counsel)

RESERVED JUDGMENT

1. The claimants' claims for unlawful deduction from wages are not well founded and are dismissed.

2. The claimant's complaints of having been subject to unlawful detriments as a result of exercise of their rights to opt-out of Sunday working are not well founded and are dismissed.

REASONS

Introduction

1. These claims arise as a result of the claimants, all of whom had opted out of Sunday working, were rostered to work on Sundays by the respondent, and were subsequently not paid when they did not attend work to complete those Sunday shifts. The claimants also claim that they were subjected to unlawful detriments by (1) being rostered to work on a Sunday without having those Sunday hours redistributed during the week to make up lost hours, and (2) not being offered overtime to make up lost hours during the week. The claimants are supported in the action by the GMB Union and GMB officers gave evidence over the course of the hearing.

2. The respondent contends that the claimants had no contractual right for hours to be redistributed and that, even if they did have originally, that right was removed following a collective bargaining exercise undertaken between the respondent and the GMB Union acting on behalf of all of the respondent's employees.

3. I heard test cases over these four days, selected and agreed by the parties' representatives, with the assistance of guidance provided by Regional Employment Judge Swann in a preliminary hearing on 10 December 2020. The test claimants whose evidence was considered during the hearing were:

   a. Louise Smith (Customer Service Assistant, Lee Circle store);
   b. Linda Bown (Customer Service Assistant, Lee Circle store);
   c. Roseanna Ash (former Customer Service Assistant, Lee Circle store);
   d. Rachel Clarke (Customer Service Assistant, Lee Circle store);
   e. Stuart Kettle (former Customer Service Assistant, Lee Circle store); and
   f. Audrey King (Customer Service Assistant, Coalville store).

4. Audrey King was unwell during the hearing and unable to give evidence, but her witness statement was provided and referred to during the hearing and so I was satisfied evidence was available to consider how any other non-test claimants at the Coalville store were treated.

5. The claimants were represented by Mr D Patel, Counsel. In support of their case, I heard evidence from:

   a. Louise Smith (Customer Service Assistant, Lee Circle store);
   b. Linda Bown (Customer Service Assistant, Lee Circle store);
   c. Roseanna Ash (former Customer Service Assistant, Lee Circle store);
   d. Rachel Clarke (Customer Service Assistant, Lee Circle store);
   e. Stuart Kettle (former Customer Service Assistant, Lee Circle store);
   f. Eamon O'Hearn Large (GMB National Officer); and
   g. Gary Carter (GMB National Officer).

6. The respondent was represented by Ms R Barrett, Counsel. In support of their case, I heard evidence from:

   a. Richard Shackleton (former Employee Relations Manager at the respondent);
   b. James Millinship (Store Manager, Tamworth Retail Park (and formerly Coalville)); and
   c. Ian McDonald (Store Manager, Lee Circle).

7. I also had access to an agreed bundle of documents which ran across three volumes to some 1465 pages in final form. Additional material was disclosed during the course of the trial. Page references in this document refer to the pages of that bundle and those agreed additions.

Issues to be decided

8. The agreed issues adopted for the hearing were:

   a. ***Contractual position –***
      i. *Did any of Cs' original contracts ("Original Contracts") permit R to reduce their weekly contractual hours pro-rata by the number of hours in a Sunday shift which they were rostered to work, but did not work ("Reduction")?*
      ii. *If not:*
         1. *Did the GMB and R reach a legally binding collective agreement in 2016 ("Collective Agreement")?*
         2. *If so, have Cs' Original Contracts been lawfully varied by way of the Collective Agreement so as to incorporate a term permitting R to make the Reduction?*
         3. *If so, on what date did that variation take effect?*
      iii. *Further, or in the alternative, has the R's remuneration policy ("Remuneration Policy") been incorporated into any or all of Cs' Original Contracts?*
      iv. *If so:*
         1. *On what date was it so incorporated? and*
         2. *Did this incorporation operate so as to lawfully vary any or all of the Original Contracts so as to permit R to make the Reduction?*
         3. *If so, on what date did that variation take effect?*
   b. ***Unlawful deductions –***
      i. If the Original Contracts have not been lawfully varied so as to permit R to make the Reduction, does the ensuing reduction in Cs' pay constitute an unlawful deduction from wages contract to s13 Employment Rights Act 1996?
      ii. If so, what are the claims worth?
   c. ***Detriment (contrary to s45 ERA 1996) –***
      i. *In the event that Cs did not work on a Sunday they were rostered to work, did R refuse to reschedule those hours to another day in the week (thereby causing a financial loss to the Cs)?*
      ii. *If so, was this a detriment contrary to s45(1) ERA 1996?*
      iii. *Did R fail to provide the Cs with any overtime so as to enable them to mitigate those losses?*

iv. *If so, was this a detriment contrary to s45(1) ERA 1996?*

Findings of fact

9. The relevant facts are as follows. Most of the facts are agreed and are clearly supported by the documentation. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point.

Commencement of the claimants' employments and contractual documents

10. On 12 September 1995, Gillian Smith commenced working for the respondent. She agreed to a statement of contractual terms which outlined her core working hours, and said (page 408):

> *"Flexible hours √*
>
> *TOTAL CONTRACTED HOURS: 12.00 PER WEEK, over 7 days.*
>
> *You may be required to work extra hours when necessary. Where at all possible, a minimum of 24 hours notice will be given."*

11. On 20 October 2001, Louise Smith commenced working for the respondent. She agreed to a statement of contractual terms which outlined her core working hours, and said (page 424):

> *"HOURS:*
>
> *You are contracted to work 4.00 hours, flexible from Monday to Sunday inclusive. You may be required to work extra hours when necessary and where possible, 24 hours notice will be given."*

Louise Smith's hours were subsequently increased (pages 425 to 429).

12. On various dates between 19 August 2002 and 18 April 2015, Linda Bown, Rachel Clarke, Peter Desbrow, Shirley Ford, Lesley Stevens, Audrey King, Rosanna Ash, Deepa Joshi, Stuart Kettle, Rupal Bogaita, Meeta Jetha, and Sangita Patel commenced working for the respondent. They all agreed to the same standard statement of contractual terms which outlined core working hours, and which said (see for example page 430):

> "*Your terms and conditions of employment are contained in your offer letter of employment, personnel policy and procedures manual and this principal statement of terms and conditions.*
>
> *…*
> *6. HOURS OF WORK*
>
> *You are contracted for [number] hours per week scheduled over 5 out of 7 days (Sunday to Saturday) ** You may be required to work statutory and bank*

holidays. You will be required to be flexible to work additional hours or extra hours when requested. Where at all possible a minimum of 24 hours notice will be given to you.

***Store staff may 'opt out' of working Sundays by giving 3 months notice in writing to your manager of your intention not to work Sundays, as defined under the Sunday Trading Act 1994.*

…
11. COLLECTIVE AGREEMENTS & CHANGES TO TERMS OF EMPLOYMENT

The HR Policy and Procedure manual has been collective [sic] *agreed in negotiation with the GMB union and directly applicable to your employment. There are no other collective agreements in place affecting your employment unless otherwise notified. The Company reserves the right to make reasonable changes to any of the terms and conditions of employment, details in this Statement or in the Company policy or collective bargaining agreements following negotiation with the GMB union. You will be notified of minor changes of detail by way of a general notice to all team members. You will be given not less than 1 month's written notice of any significant changes, which may be given by way of an individual notice or a general notice*."

13. It is plain, and agreed, that each of the claimants were originally contracted for a fixed number of hours per week, which were to be offered and worked flexibly at any point over the full seven days of the week.

The claimants' opt-outs of Sunday working

14. Each of the claimants exercised their statutory right to opt out of Sunday working through the completion of an opt-out notice. It is agreed that none of the claimants had since opted in again.

15. Only two opt-out notices were provided in the bundle (pages 418 to 420 and page 423), but the respondent accepts the approximate dates or periods given in the claim forms as being the dates or periods that the respective claimant did indeed opt out.

16. Those dates are: Shirley Ford, *"a number of years ago"* (page 24); Gillian Smith "*in around 2002"* (page 332); Stuart Kettle in 2003 (page 60); Lesley Stevens "*in around 2008"* (page 114); Rachel Clarke (page 86) and Meeta Jetha (page 278) "*in around 2009"*; Peter Desbrow "*in around 2010"* (page 258), plus an additional notice to take effect from 30 May 2018 (page 423); Audrey King "*in around 2011"* (page 42); Louise Smith (page 78), Linda Bown (page 243) and Sangita Patel (page 314) "*in around 2015"*; Deepa Joshi "*in September 2015"* (page 296); Rupal Bogaita "*in January 2017"* (page 225); and Rosanna Ash "*in September 2018"* (page 207) or March 2019 (as claimed in her evidence).

The Remuneration Policy

17. The respondent has a policies and procedures manual which is available to staff on an internal intranet and as a hard copy. In evidence, it was confirmed that there is a hard copy of the manual in the canteen at the Lee Circle Store. Mr Shackleton confirmed that every policy update is agreed with the GMB Union and notified to colleagues on a stand in the canteen and also on the staff notice board. The various versions of the remuneration policy are relevant to the issues in this case. The applicable provision at any one time can be found in the policies and procedures manual.

18. From February 1997 to 7 February 2002, the remuneration policy said (page 445):

> *"Opting Out*
>
> *The normal (weekly) contract held by most store staff enables us to contract staff to work on Sundays. Staff may however, give three months notice and then 'opt out' of Sunday Working. There is no obligation upon the company in these circumstances to 'make up' the employees contract hours else where [sic] within the working week. Staff who have opted out may work occasional Sundays if required and they consent, but have the right to refuse to work."*

19. Between 7 February 2002 and January 2007, the remuneration policy said (page 449):

> *"All (retail) team members under their contract of employment are contracted to work on Sundays. Team members may however, after giving three months notice 'op out' of Sunday working. An 'opting out' notice may be given at any time. The 'opting out' notice must be in writing, signed and dated by the team member. During the three month opting out period team members will still be member. During the three month opting out period team members will still be required to work Sundays in line with the terms and conditions within the contract of employment.*
>
> *Should any team member who is solely recruited to work on Sundays decide to 'opt out' there is no obligation upon the company in these circumstances to make up' the contract hours else where within the working week.*
>
> *Team members who have opted out can surrender their right by giving further notice, signed and dated, saying that they now agree to Sunday working or that they do not object to working a particular Sunday."*

20. Between January 2007 and November 2016, the remuneration policy said (page 453):

> "*Sunday working*
>
> *All retail team members are contracted to work on Sundays.*
>
> *Opting out of Sunday working*
>
> *If you wish to 'opt out' of Sunday working you should:*

- *Write to your manager to confirm that you wish to opt out of Sunday working.*
- *Make sure the letter is signed and dated.*
- *Give three months notice – you may be asked to continue working on a Sunday until the end of the three month period.*
- *You should be aware that by opting out we are not obliged to reschedule those hours you would have worked to another day in the week."*

21. There is conflicting evidence about whether or not the remuneration policy in place from 2007 to 2016 was agreed by GMB. It is a relevant dispute because whether or not it was agreed may affect its validity. Mr Patel argues that the 2002 remuneration policy was agreed with GMB, as shown by them being signed by GMB, but that subsequent changes to the policies were not signed and so could not be agreed. He points to Mr O'Hearn Large and Mr Carter's confirmation that any changes to the policies and procedures were usually signed by GMB if agreed, and to Mr Shackleton agreeing that this was the historic practice. Mr Patel submits that there is no evidence that the policies subsequent to 2002 were signed by a GMB national officer, and submits that no claimant had seen the remuneration policy let alone agreed to it.

22. Ms Barrett disagrees with Mr Patel's submission that a lack of signature from GMB indicates a lack of agreement. She submits that Mr Shackleton's recollection that the policies were agreed with GMB and made available to staff in the canteen should persuade me, on the balance of probabilities, that those policies were agreed. Mr Shackleton explained that he recalled GMB beginning to conduct business through e-mail more informally and that agreement was generally offered through e-mail rather than always through the provision of a formally ratified signature. He could not search for and find those e-mails that he recalled because he no longer worked at the respondent and his e-mails did not exist anymore. Ms Barrett also observes that the remuneration policy was always found within the policies and procedures, and reminds me that the claimants Louise Smith, Linda Bown and Roseanna Ash all confirmed that the policies and procedures were accessible on site and could be found in the canteen at the Lee Circle store.

23. On balance, I prefer the evidence of the respondent witnesses on this point. GMB was, in my view, aware of the 2007 remuneration policy. Its representatives at the respondent were able to explain the policy to Mr O'Hearn Large, and knew that wording taken in 2016 from the policy into the contract of employment had come from the remuneration policy in place. When confronted with this explanation, Mr O'Hearn Large did not, in 2016, point out that the remuneration policy was not agreed or was not somehow in force. It seems inherently unlikely that the respondent, having engaged with GMB in relation to policies before and (as will be seen) after 2007, would neglect to consult with GMB over such an important policy and then operate it for some nine years without GMB becoming aware of and objecting to it. Consequently, I find that the 2007 remuneration policy was agreed by GMB.

24. From November 2016 to date, the remuneration policy has said (page 457):

"*Sunday working*

All team members are contracted to work on Sundays where required.

Opting out (Retail team members only)

Retail store staff may 'opt out' of working Sundays as defined under the Sunday Trading Act 1994. If you wish to 'opt out' of Sunday working you should:

- *Write to your manager to confirm that you wish to opt out of Sunday working.*
- *Make sure the letter is signed and dated.*
- *Give three months notice – you may be asked to continue working on a Sunday until the end of the three month period.*

You should be aware that if you 'opt out' of Sunday working:

- *The Company is not obliged to reschedule those hours you would have worked on a Sunday to another day in the week; and*

your contracted weekly working hours and pay may be reduced accordingly (from the effective date of you 'opt out'), to reflect the weekly Sunday hours which will no longer be worked by you."

The 'Changing the Terms of a Contract Policy'

25. This policy, introduced in January 2007, says (page 460):

"Y*our normal hours of work are notified when you start working for us. We reserve the right to require team members to work different hours if the needs of our business dictates; whether temporarily or permanently. Changes may involve shorter or longer hours of work, working at different times or on different days of the week. We also reserve the right to require team members to move to a different shift pattern. It is a condition of team members' contracts that they agree to work different hours if requested to do so by Wilkinson, however we will always give contractual notice.*

We reserve the right to vary your terms and conditions of employment at our discretion in circumstances where such variation is in the interests of improving the efficiency of the Wilkinson business..."

The GMB Union's role in contractual change

26. On 14 September 1999, the respondent and GMB entered into an agreement where the respondent recognised GMB as the sole union able to negotiate in respect of respondent employees in collective bargaining processes. A copy of that agreement was provided at pages 1475 to 1484.

27. The Changing the Terms of a Contract Policy mentioned above refers to the role of GMB in the contractual change process. At page 460, the policy says that the

respondent will consult with the affected staff member and will work with GMB on all changes which are either contractual or collectively agreed. It says that *"for all team members up to and including T grade, the GMB Union can negotiate on the terms and conditions of employment with Wilkinson"*.

The respondent's approach to Sunday working prior to the 'new approach'

28. The respondent witnesses explained that the respondent has always been concerned about the implications of staff choosing to opt out of Sundays in terms of maintaining staffing levels within stores on Sundays. This concern is apparent from the minutes of a meeting dated 7 March 2012, where the 'Working of Sundays – Cross Functional Working Party' recorded that stores would be unable to operate if too many members of staff opted out of Sundays (page 642) but that the respondent wished to move to a position where all stores scheduled Sunday working regularly to ensure it is *"controlling costs"* in a manner which is *"sustainable for the future"*. Page 643 records GMB's suggestion that there should be *"wholesale roll out across stores to avoid fractions and claims of inconsistency"*. The meeting concluded that the respondent was aiming for *"roll out across entire estate over the next 24 months based on priority"*.

29. In April 2012, the GMB circulated a bulletin to all team members at the respondent (pages 644 and 645). It is signed by Mick Rix, the GMB national officer at the time. The bulletin is titled 'Wilkinson Retail Team Members Working of Sundays Consultation'. The bulletin reminds team members that *"all team members' contracts as you know already cater for Sunday working"* and goes on to explain that the respondent *"wish[es] to properly establish Sunday working across their retail outlets for team members"*. GMB set out the principles behind the consultation being conducted and outlines that a 'fall back position' may need to be invoked if too many staff members opt out of Sunday working when rostering employees to work on Sundays became a regular occurrence.

30. The relevant parts of the 'fall back position' provided:

> "- *If there is a business case for an individual store i.e. sales/payroll position - a full operational review should have taken place...*
> - *Ask team members who do not work Sundays to work Sundays, giving 4 weeks' notice.*
> - *Take into account any flexible working requests and whether individuals have worked a Sunday in the last 12 months.*
> - *If too many team members opt out, consider change from 5 out of 7 to 4 out of 6, so a team member can be recruited for the extra day i.e. reduce by 1/5th (contract not average*)".

31. In May 2012, Mick Rix wrote again to advise that no objections to the proposals had been received following consultation. GMB advised the respondent that the proposal including the fall back position was accepted as a new working agreement on behalf of all of the respondent employees caught by the recognition agreement.

32. The upshot of the agreement is that, from this date, the respondent had the agreement from GMB to alter employees' working patterns, including the possibility that those who had opted out of Sundays might have their contracted hours reduced by one fifth, to allow the respondent to recruit to fill a Sunday gap. This agreement was against the acknowledged backdrop, as mentioned above, that the employment contracts used by the respondent allowed the respondent to roster any employees to work any Sundays in any case.

33. It is agreed that the respondent did not ultimately use the 'fall back position' and nor did it move to a policy whereby all staff would have to work some Sundays. It did not feel it necessary to do so and so chose not to.

The Collective Agreement

34. From April 2016, the Government introduced a National Living Wage. Prior to this, the respondent commenced negotiation with GMB about how it would be implemented across its staff at grade T and below (the employees caught by the GMB collective bargaining mandate). The matter was then put to a ballot of the respondent's staff at grade T and below. The ballot paper (page 796) asked for responses by 19 February 2016. Two options were put to the members in the documents circulated with the ballot paper (pages 797 to 805).

35. The first option was not recommended by the GMB and was not approved in the ballot. The second option was recommended by GMB and approved by the members, and it provided an enhanced hourly pay for staff (though the Sunday premium was removed to balance the cost of that). The approved option also included a commitment in relation to the practice of rostering employees to work on Sundays. The wording approved was *"where business allows redistribute contracted hours where team members opt out of Sunday working"* (page 801).

36. The respondent and GMB then looked to capture the proposal and approval in a written collective agreement, which would include agreement of a new standard contract of employment for respondent staff. An unsigned version of that final agreement was provided at pages 841 to 852. It is apparent that there was and still is some disagreement about the nature of the collective agreement, the 'new' contractual terms, and whether or not this approved proposal was ever agreed because there is no signed version of the Collective Agreement.

37. On 26 February 2016, Mr Shackleton e-mailed a draft version of the proposed new contract to the GMB reps who worked for the respondent, and this was forwarded by Mr Gaskell (GMB rep) to Mr O'Hearn Large on the same day. He said: "*It is the same as the old contract, with just the premiums taken out. There is no difference other than the agreed changes have been taken out"* (page 835).

38. Mr O'Hearn Large replied on 3 March 2016 to note that the contract had clauses in relating to the effect of opting out of Sunday working, whereas the previous version of the contract had no such wording. The specific wording of the draft contract queried is not clear from the document at page 834, but it makes clear to the employees that if they opt out: (1) the respondent is not obliged to reschedule Sunday hours; and (2) that an opted out employee may be reduced if the employee does not work a Sunday for which they are rostered. Mr O'Hearn Large

asked whether this wording is new and whether it is the same as the 'fall back provision'.

39. Mr Gaskell responded on 4 March 2016 and advised that the provisions were not new, but were drawn from the respondent's remuneration policy. He said that the provisions were placed into the contract to make them clearer to employees, but that the provisions always applied because they were in the policies and procedures. Mr Gaskell is quite animated in his email querying whether the respondent was able to roster opted out Sunday workers on Sundays and then not pay them, and was quite critical of the lack of legal advice about this issue.

40. The draft collective agreement contained the following relevant terms:

> *"1.2 The collectively agreed terms set out in this Agreement are designed to meet the Company's obligations to implement the new 'National Living Wage' through an increase to the national minimum wage which came into effect on 1st April 2016, and to change certain terms relating to pay, benefits and working conditions of the Company's affected employees.*
>
> *…*
>
> *2.1 The Company and the Union agree that the collectively agreed terms have been implemented for affected employees of the Company with effect from 27th March 2016.*
>
> *…*
>
> *3.1 This collective agreement covers the following categories of employees of the Company now and in the future:*
>
> *(a) Non Executive (T grade and below)*
>
> *…*
>
> *4.1 The collectively agreed changes are as detailed in Option 2 on the Union's ballot paper and are set out fully in the attached Appendices 1 to 3, which form part of this Agreement.*
>
> *5. INCORPORATION INTO EMPLOYEES' CONTRACTS*
>
> *5.1 Despite the presumption that this collective agreement is itself not legally enforceable as between the Company and the Union, the parties expressly acknowledge and agree that the terms and conditions collectively agreed as set out at clause 4 above (and Appendices 1 to 4) are apt for incorporation into the individual contracts of employment of the Company's employees in Scope as referred to at clause 3 above.*
>
> *5.2 The Company and the Union further intend and agree that these collectively agreed terms be incorporated into the individual contracts of employment of the employees, pursuant to their Statements of Principal Terms and Conditions of Employment.*

5.3 For ease of reference, Appendix 7 sets out details of the collectively agreed changes, as incorporated into the Company's standard Statement of Principal Terms and Conditions of Employment.

5.4 The Company and the Union acknowledged their joint responsibility as set out in their Recognition Agreement to communicate these collectively agreed terms to the affected employees and to ensure that they are incorporated into their contracts of employment."

41. Appendix 1 to the agreement (page 845) is a summary of agreed terms, including the headline raise in hourly rates and the removal of premiums previously paid for Sundays, bank holidays, locations, duty managers, overtime and unsociable hours. The 25% premium for night shifts was agreed to be removed and replaced by a flat rate of £1.50 per hour. At the bottom of the section titled 'working practices', the document records *"where the business allows, redistribute contracted hours where team members opt out of Sunday working"*.

42. Appendix 7 to the agreement (page 851) is the new contract of employment which was the subject of the e-mail exchange between Mr Gaskell and Mr O'Hearn Large. In respect of hours of work, it said:

"You should be aware that, if you "opt out" of Sunday working:

- *the Company is not obliged to reschedule those hours which you would have worked on a Sunday to another day in the week; and*
- *your contracted weekly working hours and pay may be reduced accordingly (from the effective date of your "opt out"), to reflect the weekly Sunday hours which will no longer be worked by you."*

43. There is a dispute between the parties about whether or not this Collective Agreement was agreed. The version in the bundle was unsigned and does not appear to be a final executable form given that the signature blocks are blank. Mr Patel urges me to consider that the agreement was not completed and so the provisions within it do not take effect. He says that the GMB required the National Officer to approve of and sign the agreement for it to be effective. Ms Barrett asks me to find that the Collective Agreement was agreed because of the nature of the discussion between the parties to the agreement at the time, and because the terms of the agreement (and contractual change to employee contracts) were implemented by the respondent.

44. On 10 March 2016, Mr O'Hearn Large e-mailed Mr Shackleton (page 838) about the implementation process following the ballot. In it, he asks for a copy of the amended contract for existing staff. He also askes whether the respondent is in a position to sign and exchange copies of the 2016 Collective Agreement, which indicates that the broad terms of the agreement were no longer under negotiation. He also attaches some advice to members about the opting out of Sunday working, which he describes as being that the respondent will reschedule those hours where possible following a local discussion. Mr O'Hearn Large references the implementation pack which was to go to the respondent's managers, indicating that this, too, is not under negotiation any longer.

45. Mr Shackleton responds on 15 March 2016 (page 837) to advise that the respondent is not planning to ask employees to sign new contracts following the agreement. On the same day, Mr O'Hearn Large e-mailed Mr Shackleton to say (page 836):

> *"Now members have authorised GMB to accept the changes it's good practice to reflect this in writing. Could you please send through a copy of the proposed changes to the collective agreement for our signature and formal ratification on behalf of GMB?"*

46. In my view, this is an important e-mail. Mr O'Hearn Large does not say, here, that the outcome of the ballot is invalid or ineffective pending formal ratification by signature from GMB. He says that it is 'good practice' to reflect acceptance in writing, and I consider that the appropriate inference from this is that the acceptance has already occurred. It must have occurred to have been capable of being reflected in writing.

47. The signing of the Collective Agreement was still being discussed in June 2016. At a meeting between the respondent and GMB representatives on 6 June 2016, Mr Shackleton asked *"where are we with getting it signed and by who please?"*, and Mr Gaskell replied *"Nothing in there we have not spoke about. I think Harry should sign it off but as far as we are concerned it is ok. Can sign at the next scheduled meeting"* (page 854). The 'Harry' referred to was Harry Donaldson, who attended the next meeting on 19 June 2016. Mr Shackleton said *"this [Collective Agreement] has been forwarded for signing previously but still outstanding. Can we please have an update?"* and another GMB representative replied *"resend it to all and we will check and get it signed"*.

48. These meetings are discussing the implementation of the result from the ballot, and they are done so prior to the Collective Agreement being signed. Key parts of the balloting process, such as the introduction of the national living wage and the removal of the Sunday premium, have already been done by this point. The parties are plainly acting in accordance with the terms of the draft agreement that they are talking about getting signed. The management pack sent to managers to implement changes expressed the consequences of the ballot would become effective from 27 March 2016 (page 812). Team members were asked to confirm they understood the changes that had taken effect as a result (page 813). The new employment contract was also available. The test claimants confirmed that they viewed these documents and accepted the alterations to the Sunday premium which applied to them. The records confirming this, and confirming that all employees at Coalville and Lee Circle had done the same, were at pages 597 and 599.

49. Consequently, I find that the respondent and GMB were in agreement about the outcome of the ballot and the way in which it would be implemented. I do not consider that there needed to be a signed Collective Agreement to infer this agreement; it is clear from (1) the actions of the parties, (2) the ending of negotiation of the Collective Agreement and requests for signature, and (3) the implementation of the ballot results without protest from the senior GMB

individuals involved. In any event, each of the claimant's individually agreed to the key changes.

50. It follows, given that the Remuneration Policy pre-dating the ballot and Collective Agreement was agreed, and given that the Collective Agreement was agreed, that the resultant change to the Remuneration Policy in 2016 which gave effect to the Collective Agreement was also agreed.

Sunday working guidelines and the rostering of the claimants on Sundays

51. In March 2016, the respondent issued a document called "Sunday Working Guidelines – managing retail team member opt-outs". A copy of those guidelines was provided at pages 474 to 477. The document's purpose was to inform managers about how to deal with the anticipated rise in staff opting out of working on Sundays. There were six escalating steps, each designed to minimise the impact on stores and mitigate the risk that so many staff would opt out that Sunday trading would become impossible. The final step in the escalating chain was to conduct redundancy consultations. The pen-ultimate step was the 'fall back position' originally consulted on and agreed with GMB.

52. Also in March 2016, GMB produced a notice for the respondent's staff, signed by Mr O'Hearn Large, which responded to queries about the changes to Sunday working. A copy of the notice is at page 832. The main query that the notice sought to address was *"the legality of what happens when you opt out of Sunday working".* The notice advised:

> *"Our considered legal view is that if you opt out of Sunday working, Wilkos is not legally obliged to provide you with alternative hours on other days. This may mean that you have a decrease in your pay if you opt out…. However for members who are regularly rostered to work on Sundays we have agreed with Wilko's that if you decide to opt out of working on Sundays they will try to reschedule your hours subject to business needs*."

53. The respondent submits that its business needs changed following the ballot in 2016. In September 2018, a business review identified that the respondent was losing revenue and generating inefficiency as a result of not taking deliveries into stores on a Sunday. The supply chain had moved to a seven day model and so stores needed to follow suit. The meeting where the review was presented was on 13 September 2018. A copy of that review was at pages 516 to 529.

54. Also in September 2018, the respondent circulated a briefing to all staff in relation to Sunday working practices. A copy of that briefing was at page 608. It said:

> "*When a team member opts out of Sunday working it is essential that the store can continue to operate and therefore Sunday shifts will be scheduled regularly and consistently for all team members across the store, regardless of whether they have opted out of Sunday working or not.*
>
> *Where a team member has opted out however, they will not be required to work their scheduled Sunday shifts and the hours will instead be given to another team member. The team member who has opted out will not therefore receive*

payment for the hours not worked on the Sunday and the team member covering the shift will receive the payment instead.

It is important to note that this will result in the team member working fewer hours and being paid less hours for the week in which their Sunday shift would have fallen."

55. The principles outlined above were explained again in a briefing dated 9 October 2018 (pages 540 to 541) and again in a briefing dated 29 October 2018 (pages 547 to 549).

56. The introduction to the change to Sunday working came to the Lee Circle store in October 2018. The Lee Circle claimants' evidence, which is accepted by the respondent, is that the then store manager Janet Owens discussed the Sunday working guidance. On 1 March 2019, Ms Owens told her staff members that Lee Circle would receive Sunday deliveries from April 2019. This would necessitate all staff members doing a share of Sundays. Ms Owens told the staff that those who were opted out of Sunday working would lose out on that pay and that the pay may not be made up through overtime. There is no evidence that Ms Owens ran through the escalating steps before resorting to what was essentially the 'fall back position' from 2012.

57. By April 2020, the Sunday deliveries at Lee Circle store had ceased. Upon cessation of Sunday deliveries, there was a reduced need for staff to work on Sundays and so the Lee Circle claimants, and other delivery focused team members, were not rostered to work on Sundays. Mr MacDonald explained in his evidence that Sunday deliveries returned in August 2020, and so the requirement for Sunday delivery staff returned. This resulted in the Lee Circle store claimants working on Sundays. There is no evidence that Mr MacDonald ran through the escalating steps before resorting to what was essentially the 'fall back position' from 2012, either.

58. Ms King's written evidence (although she was not present to give evidence) describes much the same occurrences taking place at the respondent's Coalville store. She describes the then store manager Eleanor Purple telling her about the new Sunday working guidance in October 2018. She was notified on 1 March 2019 that the Coalville store would be receiving deliveries on Sundays from the first week in April, that she would be rostered to work them, and that she would lose pay if the shifts were not done. She was told that she could make up the hours if available. The respondent says that Sunday deliveries were stopped between Easter 2020 and November 2020, but that Ms King did not accept the offer of being taken off rostered Sundays.

Overtime

59. The claimants claim that they have suffered detriment from opting out of Sunday working because they are not being given the opportunity to make up their hours through overtime. This, they say, would allow their hours to be redistributed throughout the week. The respondent witnesses described how the staffing in stores were being run to a very tight budget and so additional hours were rarely available. Mr MacDonald explained that the money not being paid to staff

members who did not work on Sundays was then spent on recruitment for and giving shifts to staff specifically hired on a temporary basis to cover those Sunday shifts.

60. He also explained that any overtime available was usually to cover holidays or sickness, and that most of those shifts fell to be in the evenings. Mr MacDonald said that he would not ask any day shift member to do these shifts because it would lead to a long day for those members of staff. He noted that the Lee Circle claimants all worked from very early in the morning (essentially shifts starting in the night), and so it would be impermissible for any of them to do evening overtime because (1) it would lead to a split shift, and (2) the overtime shifts would end too close to the next regular shift starting.

61. The claimants produced additional disclosure on the first day of the trial (pages 1464 to 1474). This showed the morning delivery team's rota for the Lee Circle store for a selection of weeks in May 2019, July 2019, August 2019, September 2019, and October 2019. It showed the Lee Circle claimants being rostered to work on Sundays. It also showed other staff members whose contracted hours appeared to only be on Sundays. It was said, and I accept, that these were the temporary Sunday workers. The document shows that there are a few occasions where one of those Sunday workers is given overtime in the mornings on days where others of the claimants could have worked. I draw this conclusion about the evidence because the overtime is given on days where a claimant, who did not work the Sunday as rostered, was also not working on a weekday where overtime is given. It appears that this happened particularly where another colleague was on holiday, as Mr MacDonald had asserted.

62. It is apparent that there were morning shifts available as overtime that the Lee Circle claimants could have done but which went to someone. It is, though, important to understand *why* this was the case for reasons that will become apparent once the relevant legislation is examined. I asked the respondent witnesses to explain to me how overtime came to be distributed. I was told, very plainly and in a way I accept, that the hours that are available for overtime come out the week prior to the shifts taking place. It will be mentioned informally in briefings or perhaps advertised on a notice.

63. Some team members, who are known to be unavailable on certain days or who cannot work more than a certain number of hours, might not be asked at all. What is clear to me is that the claimants were not excluded from the possibility of working those overtime shifts. Indeed, the roster shows that Louise Smith did a run of longer shifts on week commencing Sunday 11 August 2019 when there was holiday elsewhere, thereby allowing her to make up her lost Sunday hours in that week.

64. Generally, though, the claimants did not advance much evidence at all in relation to the rostering of overtime within the stores, and no evidence at all which linked their perceived exclusion from doing overtime to their decisions to opt out of Sunday working. The claimants allege that the disclosure of the rota showing overtime is proof that the hours were not redistributed where business allows. However, I consider that the picking up of overtime by the claimants, where

available and appropriate when considering their other shifts, indicates that their lost hours were redistributed across the week where business allowed.

65. I find that the Lee Circle claimants were treated in the same way as their colleagues when the overtime was available to be shared. They were not treated differently to their colleagues, either.

The claimants' grievance

66. The claimants submitted a grievance over the rostering on Sundays and the consequential deductions to their wages. The grievance did not bring about a change in policy and so the claimants started this action instead.

Relevant law

Right to opt-out of Sunday working

67. It is agreed that the claimants are 'Shop Workers' for the purposes of the *Employment Rights Act 1996*. The legislation relating to the opting out of Sunday working is outlined at *section 40* and *section 41* of the Act. None of the claimants have opted back in for Sunday working and so those parts are not relevant.

68. *Section 40* reads:

> *"40 - Notice of objection to Sunday working.*
>
> *(1) A shop worker or betting worker to whom this section applies may at any time give his employer written notice, signed and dated by the shop worker or betting worker, to the effect that he objects to Sunday working.*
>
> *(2) In this Act "opting-out notice" means a notice given under subsection (1) by a shop worker or betting worker to whom this section applies.*
>
> *(3) This section applies to any shop worker or betting worker who under his contract of employment—*
>
> > *(a) is or may be required to work on Sunday (whether or not as a result of previously giving an opting-in notice), but*
> >
> > *(b) is not employed to work only on Sunday."*

69. The relevant part of *section 41* reads:

> *"41 - Opted-out shop workers and betting workers.*
>
> *(1) Subject to subsection (2), a shop worker or betting worker is to be regarded as "opted-out" for the purposes of any provision of this Act if (and only if)—*
>
> > *(a) he has given his employer an opting-out notice,*

(b) he has been continuously employed during the period beginning with the day on which the notice was given and ending with the day which, in relation to the provision concerned, is the appropriate date, and

(c) throughout that period, or throughout every part of it during which his relations with his employer were governed by a contract of employment, he was a shop worker or a betting worker.

(2) A shop worker is not an opted-out shop worker, and a betting worker is not an opted-out betting worker, if—

(a) after giving the opting-out notice concerned, he has given his employer an opting-in notice, and

(b) after giving the opting-in notice, he has expressly agreed with his employer to do shop work, or betting work, on Sunday or on a particular Sunday."

70. *Section 43* of the Act outlines the contractual consequences of providing an opting out notice. The relevant part of that section reads:

43 - Contractual requirements relating to Sunday work

(1) Where a shop worker or betting worker gives his employer an opting-out notice, the contract of employment under which he was employed immediately before he gave that notice becomes unenforceable to the extent that it –

(a) requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday after the end of the notice period, or

(b) requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday after the end of that period.

(2) Subject to subsection (3), any agreement entered into between an opted-out shop worker, or an opted-out betting worker, and his employer is unenforceable to the extent that it—

(a) requires the shop worker to do shop work, or the betting worker to do betting work, on Sunday after the end of the notice period, or

(b) requires the employer to provide the shop worker with shop work, or the betting worker with betting work, on Sunday after the end of that period.

(3) Where, after giving an opting-in notice, an opted-out shop worker or an opted-out betting worker expressly agrees with his employer to do shop work or betting work on Sunday or on a particular Sunday (and so ceases to be opted-out), his contract of employment shall be taken to be varied to the extent necessary to give effect to the terms of the agreement."

71. *Section 45* of the Act protects opted out shop workers such as the claimants from detrimental treatment as a consequence of opting out of Sunday working. The relevant parts read:

> *"45 - Sunday working for shop and betting workers*
>
> *(1) An employee who is—*
>
> *(a) a protected shop worker or an opted-out shop worker, or*
>
> *(b) a protected betting worker or an opted-out betting worker,*
>
> *has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee refused (or proposed to refuse) to do shop work, or betting work, on Sunday or on a particular Sunday.*
>
> *(2) Subsection (1) does not apply to anything done in relation to an opted-out shop worker or an opted-out betting worker on the ground that he refused (or proposed to refuse) to do shop work, or betting work, on any Sunday or Sundays falling before the end of the notice period.*
>
> *(3) An employee who is a shop worker or a betting worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee gave (or proposed to give) an opting-out notice to his employer.*
>
> *(4) Subsections (1) and (3) do not apply where the detriment in question amounts to dismissal (within the meaning of Part X).*
>
> *(5) For the purposes of this section a shop worker or betting worker who does not work on Sunday or on a particular Sunday is not to be regarded as having been subjected to any detriment by—*
>
> *(a) a failure to pay remuneration in respect of shop work, or betting work, on a Sunday which he has not done,*
>
> *(b) a failure to provide him with any other benefit, where that failure results from the application (in relation to a Sunday on which the employee has not done shop work, or betting work) of a contractual term under which the extent of that benefit varies according to the number of hours worked by the employee or the remuneration of the employee, or*
>
> *(c) a failure to provide him with any work, remuneration or other benefit which by virtue of section 38 or 39 the employer is not obliged to provide."*

72. Although no authority has been found which considers the meaning of 'on the ground that' for 'detriment' in the context of *section 45*, Mr Patel submitted that it should have the meaning given in whistleblowing detriment cases. Ms Barrett did

not disagree. That test, from *Fecitt v NHS Manchester [2012] ICR 372*, says that the question is whether the thing is done materially (ie. more than trivially) in response to the act which cannot trigger the act of detriment. In other words, for this case, the question is whether the claimants' opting out of working Sundays triggered the decision to roster them on to work Sundays such that they lost out financially for doing so.

Interpretation of contractual terms

73. In *Arnold v Britton [2015] UKSC 36*, Lord Neuberger outlined how a court or tribunal should approach disputes about the meaning of contractual terms. The correct way to do so is to interpret the intention of the parties as to the meaning of the terms by reference to *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"* (per Lord Hoffmann in *Charterbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38*).

74. To assist with this exercise, Lord Neuberger reviewed existing authorities and distilled them into six relevant factors to be considered in order to determine how a contract has been constructed and how it should be interpreted. Those factors are [para 15]:

    a. the natural and ordinary meaning of the clause;
    b. any other relevant provision of the contract (Lord Neuberger was considering a lease in *Arnold* but the same principles apply);
    c. the overall purpose of the clause and the contract;
    d. the facts and circumstances known or assumed by the parties at the time that the document was executed; and
    e. commercial common sense; but
    f. disregarding subjective evidence of any party's intentions.

75. Consequently, the interpretation is an objective exercise by design. Lord Neuberger emphasises the importance of the ordinary language of the provision being considered, which should not be undervalued by any reliance on what is said to be commercial common sense within the surrounding circumstances [para 17]. The clearer the natural meaning of a clause, the more difficult it is to justify departing from that meaning [para 18].

Incorporation of terms from the Staff Handbook

76. Where the tribunal is asked to find terms are incorporated into an employment contract, where the source of those terms come from a different document or no document at all, the tribunal needs to be satisfied that the circumstances justify a finding of incorporation. Where there is only passing reference to standard terms and conditions such as a staff handbook, it is unlikely that those standard terms and conditions would be found to have been incorporated. Where there is a specific statement which expresses incorporation of specific policies into the contract of employment, then it is more likely that those specific policies would be found to have become an incorporated part of the contract of employment (*Hussein v Mallenash Ltd [1996[UKEAT 36/96)*.

77. In *Alexander and ors v Standard Telephones and Cables Ltd (No.2) [1991] IRLR 286*, Hobhouse J said: *"where a document is expressly incorporated by general words is it still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract"*. In that case, Hobhouse J found that the absence of express reference to a collective agreement in a statement of employment particulars contributed to the terms in the agreement not being terms incorporated into the contractual relationship between the claimant and respondent.

78. It is not necessary for a whole document to be incorporated into the contract for some of the contents of the document to be found to be contractual terms (*Keeley v Fosrec International Ltd [2006] IRLR 961*). Instead, it might be that only some of the policies, or parts of policies, from a staff handbook might be found to be contractually incorporated. This was the case in *Bateman v Asda Stores Ltd [2010] IRLR 370*, where it was found that the inclusion of the following words was sufficient to incorporate terms into the contract:

> *"The letter you received offering you your job (and any subsequent contract change letters), together with the following sections in this handbook, form your main terms and conditions of employment"*.

79. In *Hussain v Surrey and Sussex Healthcare NHS Trust [2011] EWHC 1670*, Andrew Smith J said that there is no single test about whether terms are contractually incorporated, but that there were some indications which might show an agreement was to have a contractual effect, such as:

a. the importance of the provision to the contractual working relationship;
b. the level of detail prescribed by the provision;
c. the certainty of what the provision requires;
d. the context of the provision; and
e. whether the provision is workable.

Variation of contractual terms

80. In this case, it is not disputed that the Collective Agreement would be binding between the parties once agreed. The dispute arises because the claimants said that the Collective Agreement had not been agreed, and the respondent said that it had. Consequently, the law, and the application of the law, in relation to whether or not the GMB had the authority to bind employees in this instance need not be covered. Each claimant accepts that the GMB Union had the authority to negotiate with the respondent and come to agreements. The relevant question is what effect those binding agreements had on the employment contract.

81. Terms agreed between an employer and a trade union negotiating on behalf of the workforce may become binding contractual terms between the employer and an employee if they are apt to do so *(Robertson v British Gas Corporation [1983] ICR 351)*. Incorporation of these terms into the employment contract may be implied or

expressly incorporated. In *National Coal Board v Galley [1958] 1 WLR 16*, the employment contract contained a clause which read that wages would be:

> *"regulated by such national agreement and the county wages agreement for the time being in force and that this contract of service shall be subject to those agreements and to any other agreements relating to or in connection with or subsidiary to the wages agreement and to statutory provisions for the time being in force affecting the same".*

It was held that Galley was consequently bound by provisions agreed between the National Coal Board and the union relating to pay and working patterns.

82. Variation to contractual terms may also happen outwith a collective bargaining process with a union. An employer may reserve for itself the right to vary terms in a handbook unilaterally to reflect the changing needs of the employer's business. This may include the introduction of a new pay policy, imposed without the consent of the employees (which is what happened successfully in *Bateman*). Plainly, employees should be aware of a policy if they are to be expected to be bound by it (*W Brooks & Son v Skinner [1984] IRLR 379)*.

83. Variation to contractual terms may also happen by agreement. Such an agreement may be oral and the variation never committed to writing. The question is whether the tribunal is satisfied on the evidence available that an oral agreement served to vary the contract of employment (*Simmonds v Dowty Deals Ltd [1978] IRLR 211)*. Naturally, the best form of evidence of a variation by agreement is through writing. No agreement will be found where consent is obtained under duress, but, even where the alternative to acceptance is to be dismissed, it is unlikely that the agreement will be voided due to duress; working under protest and suing for breach of contract when dismissed is an alternative to consenting in these circumstances (*Hepworth Heating Ltd v Akers and ors [2003] UKEAT)*.

84. Any variation of contract requires the exchange of consideration to be valid. Courts and tribunals have been able to find consideration for variations quite quickly, whether that is in relation to the settling of a pay claim where a pay rise is awarded (*Lee and ors v GC Plessey Telecommunications [1993] IRLR 383)*, or where the employer enjoys greater staff retention where guaranteed bonuses are promised (*Attrill and ors v Dresdner Kleinwort Ltd and anor [2013] EWCA Civ 394)*.

Unlawful deduction from wages

85. An employer is unable to deduct from the wages of a worker employed unless this is authorised by statute or contract, or where the worker has previously agreed to the deduction in writing (*section 13(1) Employment Rights Act 1996)*. Wages must be 'properly payable' to count as a deduction (*section 13(3)*). Determining whether wages claimed are 'properly payable' requires the tribunal to consider the circumstances of the case and what the contract of employment means for those circumstances (*Agarwal v Cardiff University and anor [2019] ICR 433 CA; Delaney v Staples (t/a De Montfort Recruitment) [1991[ICR 331 CA)*.

86. Naturally, the work must be completed for the wages to fall due and become properly payable. In *Hussman Manufacturing Ltd v Weir [1998] IRLR 288 EAT*, Mr Weir brought a claim alleging unlawful deduction when his shifts were altered lawfully (though under protest), which led to a reduction in his earnings because he was moved to day shifts which did not carry the premium he used to earn. The EAT held that the fact that a lawful change or circumstance might have a negative impact on the economic situation of the employee affected does not mean that there has been an unlawful deduction from wages. The wages 'properly payable' to Mr Weir on his new shift pattern were the same as the others on his pattern; he was not entitled to keep his shift premium once he was not working shifts which attracted a premium.

Discussion and conclusions

The contractual position – opting out and the operation of the legislation

87. Each of the claimants' original contracts contemplated that they could work on Sundays. The first applicable iteration of the contract said that work was to be done *"over 7 days"*. The next said *"flexible from Sunday to Monday inclusive".* The final iteration said "*[number] hours per week scheduled over 5 out of 7 days (Sunday to Saturday)*". Prior to the submission of the opting out notices, it is plain that the claimants could have been required to work Sundays, and would have been in breach of contract and liable to disciplinary action if they did not attend work on Sundays when rostered to do so.

88. The question is what happens to the contractual provisions when an opting out notice is submitted in accordance with *section 40 and 41 Employment Rights Act 1996*? The claimants submit that the operation of the opting out notice meant that the respondent was no longer able to roster the claimants to work on Sundays. The claimants' contracts, it is said, became unenforceable in relation to the provisions requiring them to work on Sundays. The claimants submitted that the practical effect of this was to take the contracts' meaning as being that the relevant hours should be spread over six days, Monday to Saturday. Instead of, for example, being required to work flexibly five over seven days, it was said that the requirement should be to work flexibly five over the remaining six days once Sundays were excluded. This was described as the 'plain and obvious meaning' of the contractual terms, and it is submitted that none of the contractual provisions can be properly construed as entitling the respondent to reduce the claimants' hours by rostering them to work on Sundays. The claimants also submit that the fact that the respondent negotiated with GMB about Sunday working through a contractual amendment indicated that this was a common interpretation of those clauses.

89. The claimants also draw attention to *section 38 Employment Rights Act 1996*. That provision relates to protected shop workers on guaranteed hours contracts which includes Sundays. Those workers are specifically excluded from the right to have Sunday hours redistributed across the rest of the week. Mr Patel says that the comparative silence about this point in relation to non-protected shop workers who opt out of Sundays is indicative that Parliament intended for such hours to be redistributed. He also argues that the regime is designed to allow shop workers to

opt out of Sunday working without suffering a detriment, and so it is unlikely that the regime was intended to allow opted out Sunday workers to be treated in the way he says the respondent has been. In conclusion, Mr Patel argues that the legislation is silent on the effect of the opt out, and so it falls to me to construe the contractual terms accordingly.

90. The respondent submits that the legislation is clear. It says that an opted out shop worker's contract is unenforceable to the extent that it cannot force someone to work on Sundays and it cannot punish them for failing to work on Sundays having opted out. The respondent notes the provisions of *Arnold*, but does not agree that the claimants' proposed construction (that Sunday is excluded) follows a legal analysis of the provisions in the circumstances. Ms Barrett argues that the provision is exactly as it says: the claimants are all still contracted to work on Sundays, perhaps 5 out of 7 days where applicable, but that the respondent cannot enforce the contract if the claimants do not present for Sunday shifts. In short, the respondent argues that the opting out of Sunday working has had no contractual effect on the claimants' contracts. Ms Barrett says there is no contractual entitlement of redistribution for any hours lost as a result of an opted out claimant not attending a Sunday shift for which they have been offered work and rostered on.

91. I concur with the respondent on this point. The legislation does not say that the contract is varied as a result of opting out of Sunday working. The provisions in relation to requiring Sunday working are simply unenforceable. In my judgment, this means that the claimants cannot be criticised or subjected to absence management or disciplinary procedures for not turning in for Sunday shifts. The legislation plainly contemplates that those opting out of Sunday working might be contracted to and asked to work on Sundays. Otherwise, there would be no need for the provision at *section 45(5)* which explicitly states that a failure to get paid for Sunday work not completed following an opt out does not constitute a detriment suffered.

92. Respectfully, I consider the 'plain and obvious meaning' of the contracts in the circumstances to be exactly as they are written. The claimants are contracted to work flexibly across a variety of days including Sundays, and may be offered work on any of those days in accordance with the contract. In my view, the respondent is therefore contractually able to roster opted out Sunday workers to work on Sundays.

93. I have considered Mr Patel's argument in relation to *section 38* and about Parliament's possible intention to not have Sunday workers losing out if they choose to opt out. It strikes me as a slightly dangerous argument to make, although it is correct that there is no express provision saying that those Sunday shifts need not be reallocated on alternative days. The problem as I see it is that 'protected shop workers' on guaranteed hours do not benefit from the rights the claimants allege they hold. Those protected workers with guaranteed hours may be considered to expect greater rights than shop workers who are not 'protected' by virtue of being in work prior to Sunday trading. More fundamentally, if Parliament intended lost Sunday hours to have been redistributed over the week where appropriate, I consider it likely it would have said so.

94. Consequently, I consider that the claimants' opting out of Sunday working did not operate to alter or vary the contracts they already held. All remain contracted to work on Sundays and the respondent may ask any of them to work on Sundays and roster them accordingly. It simply cannot subject them to detriment should they not attend work in accordance with a notified intention to not attend. Any wages lost as a result of simply being rostered on Sundays cannot be classed as a detriment because *section 45(5)* excludes this.

The Remuneration Policy in its iterations

95. Alternatively, I consider that the remuneration policies were apt for incorporation into the contracts of employment of all claimants, were indeed so incorporated, and expressly provided that the claimants had no contractual right for Sunday shifts to be distributed across the week following the 2007 remuneration policy being implemented.

96. The claimants urged me not to conclude that the Remuneration Policy, which I have found to have been agreed by the respondent and GMB, was incorporated into their contracts of employment. Mr Patel submits that the various remuneration policies should not be considered contractual in nature because (1) they contradict the plain terms of the contracts, and (2) they are inconsistent with the respondent's conduct. On this last point, it is submitted that the respondent not rostering opted out Sunday staff in on Sundays prior to 2019, whilst also acknowledging that GMB had not agreed to the remuneration policies and ultimately seeking to agree the Sunday working position in collective bargaining, were all behaviours indicating that the respondent knew it could not lawfully roster the claimants to work on Sundays.

97. The respondent urged me to conclude that the remuneration policy was incorporated into the contracts of all of the claimants. All claimants save for Louise Smith and Gillian Smith signed employment contracts which expressly referred to the *"personnel policies and procedures manual"* as being a source of the contractual terms between the respondent and those claimants, and one which is collectively agreed with GMB. Ms Barrett submits that the wording used was sufficient for those terms and the remuneration policy to have been incorporated into the contract of employment for at least the twelve claimants affected, and suggests that the wording is very similar to the wording which was found to enable incorporation in *Bateman*.

98. On the subject of whether Louise Smith and Gillian Smith were bound by the remuneration policies, Ms Barrett submits that their contracts are scant on any detail or mention of provisions in relation to, for example, holiday, grievance/disciplinary issues, or sick pay. Ms Barrett submits that those two claimants knew to check the respondent's policies and procedures to find the detail about those clauses, which must have been able to have been relied upon. Ms Barrett argues that the remuneration policies provided crucial detail about those two claimants' pay which was absent from their core contracts.

99. Ms Barrett also submits that consideration of the factors set out in *Hussain* should lead to the conclusion that the key provision in the Remuneration Policy from 2007 to date (that opted out Sunday workers may not have their hours redistributed across the week) is contractually incorporated. She says this because:

a. the provision is important to the contractual working relationship as it clarifies how hours will be rostered should the employee opt out of Sunday working, which is an eventuality specifically anticipated and referred to in the Principal Statement of Terms and Conditions of Employment at clause 6;
b. the provision gives sufficient detail to enable the parties to know the effect of opting out on contractual hours, without being so detailed the courts could be caught up in 'micromanagement';
c. the provision is clear and certain in its effect; it specifies that the Respondent will be under no obligation to reschedule the hours the worker would have worked on Sunday to a different day of the week;
d. the context points towards the provision being contractual. The rest of the Remuneration Policy deals with matters such as pay and shift premium rates which are core features of the contractual relationship; and
e. the provision is workable, and indeed has been workable in practice since stores implemented the Sunday Working Guidelines in 2018/2019.

100. In my view, the remuneration policies were incorporated into the contracts of employment, from the start of their employments, for all but Louise Smith and Gillian Smith. Their contracts made clear and unambiguous reference to the policies and procedures. The remuneration policies gave important detail about how those claimants would be paid, and circumstances in which they would not be paid, in a way which is clear in language and workable. I agree with Ms Barrett's analysis on the application of ***Bateman*** and I consider that application of the factors outlined in ***Hussain*** indicate that the remuneration policies should be considered as contractually incorporated for the reasons offered by Ms Barrett above.

101. I separate out Louise Smith and Gillian Smith in this section because the contracts they signed, which were operational until amendment, did not make reference to the respondent's suite of policies and procedures. However, following the exercise outlined in ***Hussain***, considering the purpose and importance of the remuneration policy, I consider that the policy was apt for incorporation. Further, as found above, the remuneration policies were agreed between the respondent and GMB, and negotiations under the recognition agreement had the effect of binding all of the claimants, including Louise Smith and Gillian Smith. Those two claimants were or ought to have been aware of the policies as updated due to them being displayed on notice boards and in the staff canteen.

102. I do not concur with Mr Patel that the remuneration policies are somehow at odds with the wording in the claimants' contracts. Those contracts allowed the claimants to opt out of Sunday working, which is done through the legislative mechanism of rendering Sunday working unenforceable, and the remuneration policy explained how the opt-outs would work in practice. I do not see anything inherently contradictory in that. Further, I do not wish to fall into a logical trap which says, effectively, that the respondent knew it could not withhold hours or pay from opted out Sunday workers who were rostered in on Sunday and so it did not do that in order to avoid an unlawful action. The respondent's witnesses were all very plain that rostering the claimants in to work on Sundays was not an immediate response in the circumstances. It was not a response that the respondent wished to follow, and so it did not use its power to do so for several years even though it always considered that it could. I accept that.

103. This means that, since 2007, the respondent also had the contractual ability to roster claimants to work on Sundays and expressly did not have to redistribute hours. The fact that it did not choose to do so does not mean that it could not, as outlined above.

The Collective Agreement

104. I have found that the Collective Agreement was agreed and implemented by the respondent. The thrust of the Collective Agreement was to do with removing the Sunday premium to allow the National Living Wage to be implemented across the business in a way which was sustainable for the business. I do not consider that the Sunday opt-outs were a trigger for the Collective Agreement. There had clearly been historic concern about responding to employees opting out of Sunday working (hence the 'fall back position'), but this was not the reason for the collective bargaining exercise.

105. Having found the Collective Agreement to have been agreed and implemented, I consider that the terms agreed were apt for incorporation into the claimants' contracts, and they were so incorporated. Clause 5.1 of the Collective Agreement (page 843) says:

> *"Despite the presumption that this collective agreement is not legally enforceable as between the Company and the Union, the parties expressly acknowledge and agree that the terms and conditions collectively agreed as set out at clause 4 above (and Appendices 1 to 4) are apt for incorporation into the individual contracts of employment of the Company's employees in Scope…*"

106. Clause 5.3 of the Collective Agreement (page 843) says:

> *"For ease of reference, Appendix 7 sets out the details of the collectively agreed changes, as incorporated into the Company's standard Statement of Principal Terms and Conditions of Employment".*

107. Appendix 1 (page 845) includes the term highlighted at paragraph 41 above, which is that *"where business allows, redistribute contracted hours where team members opt out of Sunday working"*.

108. The contract at Appendix 7, which is in the form shown to and confirmed by the claimants as outlined at paragraph 48 above, does not include the commitment that hours would be redistributed. In relation to opting out of Sunday working, the contract says:

> *"HOURS OF WORK*
>
> *You are contracted to work for STD_HOURS hours per week flexibly over 5 out of 7 days (Sunday to Saturday). ** You may be required to work statutory and bank holidays. You will be required to work additional hours or extra hours when requested. Where at all possible, a minimum of 24 hours' notice will be given to you.*

*** Retail store staff may 'opt out' of working Sundays by giving three months' notice in writing to their manager of their intention not to work Sundays, as defined under the Sunday Trading Act 1994 and as further detailed in the attached Sunday Working Statement. You should be aware that, if you "opt out" of Sunday working:*

- *The Company is not obliged to reschedule those hours which you would have worked on a Sunday to another day in the week; and*
- *Your contracted weekly working hours and pay may be reduced accordingly (from the effective date of your "opt out"), to reflect the weekly Sunday hours which will no longer be worked by you."*

109. Notwithstanding the absence of the term relating to redistributing hours where business allows from the contract at Appendix 7, I consider that that term is incorporated into the claimants' contracts following its inclusion in the Collective Agreement. Not only do the parties agree that the terms within the Collective Agreement are apt for incorporation, I consider that the imposition of a duty on the respondent to conduct such a distribution was an important part of the consultation, and is a crucial part of how the Sunday working and opting out of staff should operate in practice.

110. In my judgment, then, the Collective Agreement resulted in three key provisions being contractually incorporated in the employment relationship between the claimants and the respondent:

a. The respondent does not need to pay the claimants who opt out and do not work on Sundays for which they are rostered; and
b. The claimants are not automatically entitled to have those 'lost' hours redistributed across any other days throughout the rest of the week; but
c. The respondent does have a duty to redistribute those 'lost' hours where business allows it to.

Unlawful deductions from wages

111. The respondent is not required to pay opted out Sunday workers for Sunday shifts that they have not completed. Those wages are not properly payable because the shifts are not completed, following the principle outlined in *Weir*. I have found that the respondent was not under a blanket requirement to redistribute the claimants' Sunday hours across the week as a result of both the applicable legislation and because of the contractual terms between the claimants and the respondent. I have found that the Collective Agreement did incorporate a term into the employment contract to the effect that the respondent would, where business allowed, redistribute contracted hours where team members opt out of Sunday working. I consider, on the evidence before me, that the respondent has complied with this obligation.

112. In my judgment, the respondent also took steps to mitigate the economic effects on the claimant of the decision to roster the on Sundays. The claimants were unable to present any cogent evidence to persuade me on the balance of probabilities that the respondent had the budget to redistribute hours but did not do

so. It is apparent from the facts that some of the claimants did complete overtime on occasion, which is indicative of the respondent redistributing hours when able to do so. I accept the respondent's witnesses' evidence that the majority of overtime available was not appropriate to distribute to the claimants because (1) the hours were earmarked for other departments to satisfy business needs, and/or (2) the hours were available on days or times that the claimants were unlikely to accept or would be unable to accept lawfully. In the case of Ms King, it appears that she has refused overtime or to have her shifts moved away from Sundays. It follows that the Sunday hours for opted out workers have been redistributed to them where allowed. I accept the respondent's submission that most if not all of the money 'saved' from not paying wages to opted out workers for Sundays has been spent on additional Sunday resource to fill the gaps created.

113. Where unattended Sunday shifts do not give rise to properly payable wages, and when there is no obligation to redistribute hours which the claimants have opted not to work, then there is naturally no unlawful deduction from wages. The wages simply are not earned and this claim falls to be dismissed.

Detriment

114. The claimants have brought claims for detriment following the respondent rostering them to work on Sundays even after they had opted out of Sunday working. In cross examination, Mr Patel took the respondent witnesses through the reasons for all staff to be rostered for Sunday working and asked each of them whether the decision to adopt the new approach was informed by the number of staff whom had opted out of Sunday working. Each of those witnesses confirmed that the strategy was as a response to the staff opting out of Sundays because the respondent needed to respond in order to stay properly operational on Sundays, which was vital to the survival on stores.

115. Alongside those responses from the respondent, the claimants argue that the decision to adopt the new approach at all, which led to the claimant's being asked to work on days they had opted out from, was materially influenced by the fact they had opted out of Sunday working. Consequently, Mr Patel submitted that the claimants had suffered a detriment contrary to *section 45* because the decisions to (1) not redistribute those lost Sunday hours, and (2) not give the claimants overtime, were both done on the grounds that the claimants had opted out of Sunday working.

116. To support the submission, Mr Patel observed:

a. The respondent witnesses are clear that the change to Sunday working practices was as a direct response to the claimants and others opting out of working on Sundays;
b. It is not clear from the evidence that there was a business need to roster the claimants in on Sundays with the effect that the claimants lost contracted hours;
c. Only opted out workers lost out on contracted hours compared to non-opted out workers; and

d. The management guidance about the implementation of the new Sunday polices (pages 478 and 479) emphasised the step of persuading opted out workers to work on Sundays.

117. In reply, Ms Barrett submits that hours were distributed where available. She notes that the claimants were not required to work on Sundays when the Sunday deliveries stopped being taken on Sundays. She submits that the claimants have not shown on the balance of probabilities that the claimants were not offered overtime which was available and that the claimants were willing to do. Of all of the claimants, only Ms Clarke, it is noted, complained about any overtime issue in her witness evidence.

118. In terms of whether or not adoption of the new approach to roster the claimants on Sunday was 'done on the ground that' the claimants had opted out of Sunday working, Ms Barrett submitted that:

a. The operational review presentation of 13 September 2018, which was in the bundle, showed that the respondent had changed to a seven day delivery model (page 520), and that there might be redundancies where stores could not be properly staffed on Sundays (page 521);
b. None of the claimants who gave evidence disputed that their Sunday rostering was due to the store receiving Sunday deliveries, and that new staff were recruited to cover that work for the shifts that they had opted out of doing;
c. The Lee Circle store, according to Mr MacDonald, would have struggled to operate without rostering the claimants to work on Sundays;
d. Mr Shackleton's evidence was that stores' wage budget was determined by its sales and so as sales decreased, overtime was less available;
e. The claimants were not asked to work on Sundays where there was sufficient staff budget to cover them another way, or when the claimants' roles were not required on a Sunday;
f. There was a long gap between the giving of opting out notices and the rostering to work on Sunday, which is said to indicate that one did not cause the other;
g. The claimants were not rostered to work on Sundays more frequently than staff who had not opted-out; and
h. It is erroneous to argue there is detriment simply because the new approach was brought about in response to the impact of Sunday opt outs.

119. In terms of the allegation that overtime was withheld from the claimants as a result of them opting out of working Sundays, Ms Barrett submitted that:

a. Only Ms Clarke complained that she thought she was not given overtime because of opting out of Sunday working, but she did accept in cross examination that she had caring responsibilities and financial arrangements which meant her store managers likely had the view that she could not accept overtime for those other reasons; and
b. The rosters disclosed by the claimants on the first day of the trial showed that some claimants did do overtime when it was available.

120. I see the logic in Mr Patel's contention that the introduction of the new approach to Sunday working, in response to the number of staff opting out, must mean that the approach as a whole was materially influenced by the claimants' exercising

their rights to opt out. Unless there are good business reasons for the decision to roster all staff on Sundays (as well as the claimants), then I consider it would be possible, or indeed likely, that such a strategy could amount to a detriment falling foul of *section 45*. Here, though, there are other business reasons why the respondent behaved in the way that the claimants now complain of.

121. It is plain to me that the decision to adopt the new approach was done for business reasons, and not as a result at all of the claimants' opting out of Sunday working. In my view, there was a genuine business need for all staff to work on Sundays. This was driven by an effective 'pinch' for the respondent. It needed to move to a seven day delivery model in order to ensure efficient operational practices, but it did not have the budget to avoid using the claimants to cover Sundays because the trading conditions did not allow that. I consider there is indeed sufficient evidence to show this, both in terms of the documents in the bundle (such as the operational plan) and in terms of what the respondent witnesses said in their evidence. The claimants were treated no differently to their colleagues who had not opted out of Sunday working.

122. When the requirement for the claimants to work Sundays ceased, they were not rostered to work on Sundays. When the requirement for all staff to work on Sundays returned, the claimants were rostered on. Where overtime shifts were available, those were made available to the claimants in accordance with the term I have found is included as part of their contract. The claimants have not offered any cogent evidence to change my view based on what is in the bundle and what the respondent witnesses have said.

123. Consequently, in my judgment, the claimants have not been subjected to any detriment as is prohibited by *section 45*. It follows that this claim falls to be dismissed.

Disposal

124. I have concluded that the claimants' original contracts allowed the respondent to roster them to work on Sundays notwithstanding that they had elected to opt out of Sunday working. I have concluded that the remuneration policies confirming this position were incorporated into the claimants' contracts. I have concluded that the Collective Agreement was agreed, and this further confirmed that the respondent was able to act as it has done albeit that it should also redistribute hours to the claimants across the rest of the week where business allows. The claimants have not proven on the balance of probabilities that the respondent has failed to redistribute hours when business allows, and the evidence indicates that hours have been redistributed as overtime.

125. I have also concluded that none of (1) the act of rostering the claimants to work on Sundays, (2) the fact the claimants are facing a reduction in pay, (3) the fact that hours are not automatically redistributed, or (4) how the respondent has approached distribution of overtime, amount to the claimants being subject to a detriment on the grounds of their opting out of Sunday working.

126. I therefore conclude that the respondent has not unlawfully deducted from the claimants' wages or subjected the claimants to any detrimental treatment on the grounds that the claimants have opted out of working on Sundays. The respondent has at all times acted within the bounds of the relevant legislation and the claimants' contracts.

127. Consequently, the claimants' claims are dismissed.

Employment Judge Fredericks

14 June 2022

Sent to the parties on:

…….

For the Tribunal Office:

……..…….