Press Summary

20 November 2024

Secretary of State for the Department for Environment, Food and Rural Affairs (Respondent) v Public and Commercial Services Union (Appellant); Commissioners for His Majesty's Revenue and Customs (Respondent) v Public and Commercial Services Union (Appellant); Secretary of State for the Home Department (Respondent) v Public and Commercial Services Union (Appellant)

[2024] UKSC 41

On appeal from [2023] EWCA Civ 551

Justices: Lord Reed (President), Lord Sales, Lord Burrows, Lady Rose, Lady Simler

Background to the Appeal

The issue in this appeal is in what circumstances does a trade union have the right to sue as a third party for breach of a contract of employment between an employer and employee. Section 1(1)(b) and (3) of the Contracts (Rights of Third Parties) Act 1999 ("**the 1999 Act**") establishes a presumption that where a term of the contract confers a benefit on a third party who is expressly identified in that contract, that third party may in its own right enforce that term. The appeal raises a fundamental question concerning the interpretation of section 1(2) of the 1999 Act which provides that the presumption is rebutted if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

The Respondent employers are three Government departments. Some of their employees, including the individual claimants in these proceedings, are members of the Public and Commercial Services Union ("**the Union**"). The Union is recognised for collective bargaining purposes by the Respondent departments. The individual claimants chose in the past to have their union subscriptions deducted from their salary at source through the pay roll system. The sum deducted would then be paid over to the Union by the employer. This is referred to as a check-off arrangement. The origins of the check-off arrangements lie in collective agreements reached between the Government and the relevant trade unions in the 1960s. It is common ground that these collective agreements are not legally enforceable as they contain no provision to the contrary as required by section 179(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("**TULRCA**"). It is also common ground that the Union is

sufficiently identified as a third party in the individual contracts of employment and that the check-off term confers a benefit on it.

In 2014 and 2015, in breach of contract the Respondent departments unilaterally stopped the check-off arrangements, leaving the employees to make their own arrangements for paying their union subscriptions. The individual employees brought actions against the Respondent departments for that breach. However, the person who had really suffered the loss was the Union as the withdrawal of the check-off arrangements led to a substantial reduction in their subscription income. The Union therefore also brought its own claims against the Respondent departments, claiming to be entitled to rely on the third party right provided by section 1 of the 1999 Act to enforce the term of the contracts of employment containing the check-off arrangements. Both the individual employees and the Union succeeded against the Respondent departments in three separate actions in the High Court. Appeals brought by the Respondent departments from all three judgments were heard together by the Court of Appeal. The Court of Appeal unanimously dismissed the appeals as regards the individual claimants and confirmed the Respondents' liability to them. But by a majority they allowed the appeals as regards the Union's claims under the 1999 Act. The majority held that, under section 1(2), on a proper construction of the contracts of employment, the employer and the employee who are the parties to that contract did not intend the check-off arrangements to be enforceable by the Union. The Union now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal. It holds that the contracts of employment did not demonstrate that the joint intention of the parties was that the check-off arrangements should not be enforceable by the Union such as to rebut the presumption. Lord Sales and Lady Rose give the leading judgment, with which Lord Reed and Lady Simler agree. Lord Burrows gives a concurring judgment agreeing with the leading judgment.

Reasons for the Judgment

The task of the court under the 1999 Act is first to gather together the express terms of the contract. The court's task is then to construe those express terms and to consider whether any additional terms should be implied. However, the test for implication of a term is a demanding one **[88]-[89]**. Where the criteria in section 1(1)(b) and (3) of the 1999 Act are satisfied, a strong statutory presumption arises that the relevant term in favour of the identified third party is enforceable by that party **[96]**. Where that presumption arises, that is the starting point for the analysis pursuant to section 1(2). In order for the presumption to come into play, it does not have to be shown that the parties positively intended that the relevant term should be enforceable by the third party **[97]**. Instead, to defeat the presumption it has to be shown that, on the usual objective approach to the interpretation of contracts, the parties had a positive common intention that the term should *not* be enforceable by the third party **[98]**.

On the facts, the consequence of the adoption of the check-off provision as a term in the individual contracts of employment is that, unless the contract demonstrates the joint intention of the employees and the Respondent departments to be different, the term is enforceable by the Union. The individual contracts of employment did not include any indication that the joint intention of the parties was that the term should not be enforceable by the Union **[101]**.

Furthermore, no term can be implied in fact in those contracts so as to rebut the statutory presumption. Applying the demanding test for implication of a term, it is not at all clear that an objective bystander would have concluded that the parties to the individual contracts of employment must have intended that the check-off arrangement should not be legally enforceable by the Union. If anything, in the circumstances existing when the contracts of

employment were entered into, the more natural assumption of the parties and an objective bystander would probably have been that the Union should be able to enforce the arrangement **[107]**. In addition, the subsequent actions of the employees and the Respondent departments, in particular the findings made by the High Court judges to the effect that the employees had not waived the Respondent departments' breach of contract by continuing to work because they were relying on the Union to enforce the check-off rights on their behalf, similarly militate against the implication of a term **[111]-[117]**.

It is also not possible to derive any determinate guidance from traditional industrial relations practice. There is no policy embodied in section 179 of TULRCA that the Union should not have rights; even in relation to a collective agreement it all turns on the parties' intentions **[108]-[110]**.

It is not relevant to consider the position of other organisations that may benefit from check-off arrangements under the individual contracts of employment. Those arrangements may raise different issues from the issues raised by the deduction of union subscriptions, with each organisation performing a different role to a trade union **[120]-[122]**.

Lord Burrows agrees with the judgment of Lord Sales and Lady Rose. In his view, the collective bargaining context is part of the admissible factual background in interpreting the express terms of the individual contracts of employment that have been incorporated from the collective agreement, which includes the check-off term, as well as determining whether there are any implied terms **[146]**. Taking that background into account, the statutory presumption has not been rebutted **[147]**. There is no inconsistency between recognising that a collective agreement is unenforceable as between employer and trade union and allowing a trade union a right of enforceability against the employer under an employment contract by reason of the 1999 Act **[148]**.

References in square brackets are to paragraphs in the judgment.