EMPLOYMENT TRIBUNALS (SCOTLAND)

5	Case Nos: S/4105163/16, S/4105162/16, S/4105601/16	
5	Held in Glasgow on 22, 23, 24 & 28 March 2017	
	Employment Judge: F Jane Garvie)
10	1. Mr David Kidd	1 st Claimant <u>Represented by:</u> Mr J O`Donnell - Solicitor
20	2. Mr Paul McCabe	2 nd Claimant <u>Represented by:</u> Mr J O`Donnell - Solicitor
25	3. Mr Iain MacMillan	3 rd Claimant <u>Represented by:</u> Mr J O`Donnell - Solicitor
30	Oil States Industries (UK) Limited	Respondent
35		Represented by: Ms L Marsh - Advocate Instructed by: Mr J D Chalmers – Solicitor
40	JUDGMENT OF THE EMPLOYMENT TRIBUNAL	
45	The Judgment of the Tribunal is that these claims should be	dismissed.

REASONS

E.T. Z4 (WR)

Background

- 1. These claims were combined and originally each claimant was separately represented. Mr O'Donnell became the representative for all 3 claimants 5 shortly before the Final Hearing commenced. The claims were lodged separately for each claimant given they were at the time represented by 3 different solicitors. The respondents lodged responses for each of the claims. Employment Judge Ian McPherson directed that the claims should be considered together and an Order to that effect was issued dated 9 November 2016. There is then a further Order issued by Employment 10 Judge Nicol Hosie dated 23 January 2017 which refers to the 3 claimants whereas Judge McPherson referred only to the first and second claimants. In relation to the third claimant a complaint of unfair dismissal was withdrawn and a judgment to that effect was issued on 29 November 2016. An Order was issued by Judge Hosie dated 9 December 2016, directing 15 the claimants to provide, amongst other things, a quantification of how their claims were calculated and directing that the Final Hearing would take place before an Employment Judge Sitting Alone.
- 20 2. The parties provided 3 agreed bundles of productions. They are separately tabbed so that, for example, the first item being the claim for the second claimant is set out under Tab 1 at pages 4-5 and so forth. For ease of reference in this judgment, the documents are referred to only by page number not also the Tab number.
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The Final Hearing

3. At the start of the Final Hearing the representatives explained that they had prepared a Statement of Agreed Facts. Below this there is a heading entitled, *"Methodology"* although it was explained that the Agreed Facts were not entirely agreed and so where there was disagreement the claimants had added in red ink additional facts which they offered to prove and which were not agreed by the respondent.

- The claimants each gave evidence and evidence was given on behalf of the respondent by Mr Neville Gall who is the respondent's Area HR Manager.
- 5. Very little of the evidence in this case was in dispute and as will be seen 5 below the issue for determination is set out in the very detailed closing submissions provided by the representatives. In addition, both representatives referred the Tribunal to a considerable number of authorities. The submissions were heard on Tuesday 28 March 2017, it having been agreed that the representatives wished to address the 10 Tribunal orally. In addition, the representatives agreed to provide their submissions in writing and these are set out as they were provided in written format. Both representatives addressed the Tribunal on their written submissions on 28 March 2017 in order to amplify some of the points set out by them as well as to make specific reference to the various 15 authorities to which they referred.

Findings of Fact

- 20 6. The Tribunal found the following essential facts to have been established or agreed.
- 7. The respondent engages in the provision of products for the oil industry. It operates worldwide with facilities in many countries. In May 2014 the respondent announced the construction of a new manufacturing facility at Heartlands, West Lothian, (referred to as "Heartlands"). This would ultimately result in the closure of the respondent's existing facility at Altens, Aberdeen which was long established. The respondent recognised two unions there, Unite and GMB. During May 2014 the respondent commenced relocation consultation with its workforce in Aberdeen and Notes of a meeting held on 22 May 2014, (pages 133) were provided. Regular meetings were held and copies of these were issued, (pages 133 to page 199 inclusive). Two union representatives are mentioned as

attending these meetings, a Mr Murray Reid of Unite and a Mr Pat McNamee representing the GMB.

Construction work at Heartlands began in 2014. The minutes of the
 meetings were always signed by Mr Gall. A Note signed by him on 11
 November 2014 from a meeting held on 6 November, (page 148) records:-

- "3. Status of <u>Heartlands Employment Contracts</u>: NG stated that, following discussions with Bathgate employee representatives, the contract is ready to be issued to Aberdeen staff who have intimated a willingness to move. It is expected these will be issued before the end of November."
- 9. The respondent also has a facility in Bathgate which was well established before work started at Heartlands.. The respondent's intention was that if Aberdeen employees i.e whose who had always worked at Altens were prepared to move to Heartlands then this could be accommodated.
- In the autumn of 2014 Mr Gall drafted Terms and Conditions of Employment for hourly paid employees who were to be employed at Heartlands. At the time of drafting these documents Mr Gall assumed, as did the respondent's Senior Management, that Heartlands would become operational either in the first quarter or the very early part of the second quarter of 2015.

The First Claimant – Mr David Kidd

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11. In September 2014 the first claimant was looking for alternative employment in Scotland, having returned from spending time working in both Australia and elsewhere. He saw an advertisement for the respondent's new operation at Heartlands which is about 7 miles from his home in Livingston. The first claimant was aware of the construction work

having started at Heartlands as he could see this when driving on the M8 motorway. The first claimant attended an interview at Hillcroft Hotel in Whitburn. He was interviewed by Mr Eric Mills who subsequently became his Line Manager, a Mr James (Jim) Dunsmuir and Ms Peciak.

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- 12. The first claimant applied for a position as Non Destructive Test Technician, (referred to as NDT Technician).
- 13. The first claimant was not informed of the outcome of his interview
 immediately but had to wait until around the end of December 2014 or
 early January 2015 before being informed that his application had been successful.
- 14. The first claimant was aware from the interview that, if successful, he
 would be required to work at the respondent's Aberdeen site for a period of
 between 6 and 8 weeks. He agreed to do so. He understood, however,
 that after this period he would transfer to Heartlands.
- 15. The first claimant received his Terms and Conditions and the Schedule 20 before he started work in Aberdeen. The first claimant's are set out at pages 50/61. His name is provided, then the job title, the employer (being the respondent) and the place of work Heartlands, Whitburn, West Lothian is designated.
- 25 16. Clause 3 of the Terms and Conditions states:-
 - "3. PLACE OF WORK
 - 3.1 Your normal place of work is Heartlands Business Park, Whitburn, West Lothian. You may from time to time be required to work from client premises or sites elsewhere in the United Kingdom or abroad.

- 3.2 You agree to travel on the company's business, (both within the United Kingdom and abroad) as may be required for the proper performance of your duties.
- 5 17. You will not be required to work outside the UK for any continuous period of more than one month during the terms of your employment."
 - 18. In the case of the first claimant the agreement was signed by an Associate/Assistant in the HR Department, a Ms Anna Peciak, (page 62).
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- 19. The final clause of the Agreement reads:-
 - "21. ENTIRE AGREEMENT
- 15 21.1 This agreement and any document referred to in it constitutes the whole agreement between the parties (and in the case of the Company, as agent for any Group Companies) and supersedes all previous discussions, correspondence, negotiations, arrangements, understandings and agreements
 20 between them."
 - 20. A Schedule was also prepared by Mr Gall. This is set out for the first claimant at pages 64/67 and has on it a revision date of December 2014. The Schedule is headed:-

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"Schedule 1 – Working Hours, Overtime & Related Matters

Heartlands Hourly Paid Employee."

30 21. Under Clause 1, Working Hours the normal working week for Day Shifts or Night Shifts was 37.5 hours and employees could be scheduled to work either Day or Night Shifts.

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22. When scheduled to work Day Shifts, the normal working hours were 07:30 hours to 16:00 hours Monday to Thursday, with half an hour unpaid lunch break, taken to suit operational requirements (aggregate of 8 hours each day) and 07:30 to 13:00 hours, on a Friday with no lunch break (aggregate of 5.5 hours).

23. Night Shift normal hours were 21:30 hours to 07:30 hours, Monday to Wednesday with half an hour unpaid meal break, taken to suit operational requirements (aggregate of 9.5 hours each day) and 22:00 hours to 07.30 hours on a Thursday with half an hour unpaid meal break, taken to suit operational requirements (aggregate of 9 hours).

- 24. There was also a clause dealing with Overtime and for Weekend Overtime.
- 15 25. Clause 5 is entitled, "Out Station Allowance". It is extremely important in the circumstances of these claims and so is highlighted here. It reads:-
 - "5.1. Excepting when you are working offshore, when on Company business and required to stay away overnight:-
 - (a) The Company will arrange and pay for overnight accommodation, breakfast and if appropriate, an evening meal.
 - (b) The company will also reimburse the cost of travelling in accordance with allowance thresholds as available by the Finance Department. Further details of the company's reimbursement process is provided in the expenses procedure.
 - 5.2 Subject to prior approval by senior management, travelling time may be reimbursed at rates available by the Finance Department."

- 26. The terms and conditions of employment in the Schedules were identical for all 3 claimants. They are set out for the second claimant at pages 12 to 29 and for the third claimant at pages 89-101. Clause 5 is referred to as the Out Station Allowance.
- 27. The first claimant arrived in Aberdeen on 26 January 2015 at 8am or his first day with the respondent. The claimant had been informed that serviced accommodation would be provided and paid for by the respondent while he was working in Aberdeen. Having met Mr Mills and been shown round the site, he was taken at about 2pm by Ms Peciak to see the 10 accommodation where he was to stay for what he thought would be 6 to 8 weeks. This was a house in Aberdeen and so about 2 or 3 miles from the respondent's facility. The first claimant was not particularly pleased when he saw the accommodation as he considered it was more suited to students. There were 5 or 6 bedrooms, one cooker in the kitchen and 2 15 showers between the 5/6 bedrooms. He explained his concern to Ms Peciak who said he should take the matter up with his Line Manager, Mr Mills. The first claimant was told that this accommodation was already occupied by 5 other employees who were salaried employees of the respondent, working in test labs at the Aberdeen facility. They are referred 20 to as the Test Lab staff. These Test Lab staff had started work with the respondent some time before the first claimant and the other two claimants joined the respondent. They were salaried employees, unlike the three claimants, who were all hourly paid staff.
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28. When the first claimant later met the Test Lab staff at the end of the first day he understood from them that they were in receipt of £20 per day for food and meals. He was also advised that they required to produce receipts to the respondents showing what they had purchased by way of food or if they bought take away meals or ate out. He assumed the payments were to cover their costs for breakfast and evening meals. The claimant was not in receipt of any such daily allowance. He was not happy about this so he enquired as to the position at the end of the first week.

The first claimant asked Mr Mills whether he would be entitled to the £20 per day allowance and he advised the first claimant to contact Ms Peciak. He did so by sending an email to Ms Peciak, (page 71). This is dated 29 January 2015 and in it he enquired how he should go about reclaiming his expenses and possibly what his entitlements were whilst "I'm working on secondment in Aberdeen". Below that he refers to "Parking Tickets, Weekly Fuel, (to and from Aberdeen) and Meal allowance".

29. He sent a further email on 3 February 2015, (again page 71). Ms Peciak replied on 3 February 2015, (again page 71). Her reply was as follows:-

"Hi David,

Sorry it took a couple of days for me to respond. I hope you are settling well into the work and the house.

As per your pervious (sic) enquiry about expanses (sic) and allowances. You will be eligible for the below:

- 1. Travel Allowance will be added to your salary through payroll 20 therefore taxable. 2. Parking Tickets – if you require a refund for the car park at Springbank during your working week, please take the receipts to Eric.
- The gents with whom you are currently living have been employed 25 on a different contract and therefore they are eligible for meal allowances.

All new starts are only eligible for travel allowance mentioned above.

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Again, sorry it took a couple of days to respond but I hope it clarifies what allowances are available."

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- 30. The first claimant acknowledged this by email of 16 February 2015, (page 72) in which he thanked her for the information and sought her mobile number. He explained that he was now car sharing with another employee who lived near him. He asked if he could stay in the same accommodation where this employee was living. The respondent later agreed to this request. This property was more to the claimant's liking as it meant he was only sharing with the one other individual in a two bedroom flat rather than the 5 or 6 bedroom house, (pages 200A 200B).
- 31. At the end of the first claimant's first week in Aberdeen he received his payslip. This indicated under the heading, "Travel" that he was receiving £63 which was taxable. The effect of this was that the claimant received £42 net. It was explained this amount was for both Travel and Food.
- 32. As indicated above, the 5 Test Lab staff were salaried employees and had 15 been recruited and started work in Aberdeen prior to the 3 claimants commencing work there. Copies of their documentation in relation to Terms and Conditions and Schedules were not provided. Initially, when the Test Lab staff commenced employment in Aberdeen this had also been intended to be for a limited period and so the respondent arranged for them 20 to stay during the week in a Premier Inn. Since they were to stay in hotel accommodation arrangements were made for these 5 individuals to be reimbursed by up to £20 per day to cover the cost evening meals. They did not automatically receive £20 for each day and they required to provide 25 receipts for their purchases to the Finance Department. This allowance was made since they had to purchase evenings meals although Mr Gall thought that breakfast was provided for them at the Premier Inn. The respondent found it was becoming increasingly expensive to accommodate these 5 individuals in hotel accommodation and therefore enquiries were made about finding serviced accommodation for them in Aberdeen. They 30 were then relocated to the house where the first claimant later joined them when he first started work.

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- 33. As also indicated, it was from discussions with them that he discovered they were being paid what he thought was £20 per day although Mr Gall was clear that the allowance was up to £20 per day, (Tribunal's emphasis). Once these 5 individuals were living in serviced accommodation the allowance of up to £20 per day daily allowance was continued to cover the cost of groceries and or meals eaten out or takeaways. They continued to have to provide receipts to the Finance Department for their purchases. It was a time- consuming exercise for the Finance Department to audit the receipts but as there were only 5 Test Lab staff it was a limited number and so it could be done. In contrast, there were considerably more hourly paid employees, including the 3 claimants. There were a total of 35 hourly paid employees. Test Lab staff were degree qualified and were more difficult to recruit than employees, qualified as the 3 claimants were, to HNC level.
- 15 34. In relation to the Allowance paid to the 3 claimants, the respondent's position was that the payslips referred only to Travel rather than Travel and Food Allowance because the field in their Sage Pay Roll system did not allow more than one word to appear in that field or column.
- At no time was the first claimant asked to provide receipts for groceries and 35. 20 staples purchased by him while he was living in the serviced accommodation in Aberdeen. This was because the Travel/Food Allowance paid to him and the other 2 claimants was a fixed amount and so the respondent did not require to see receipts unlike the lab test staff 25 who did require to produce receipts. The first claimant also accepted that there is no specific reference in Clause 5 to an entitlement to £20 per day or indeed £15 per day if that was the alternative figure. The first claimant would generally buy his breakfast the day before or collect something en route to work. He did not generally use the staff canteen but would usually take something for his lunch or, occasionally use a local chip van which 30 parked close to the Altens site. In the evenings, the first claimant would occasionally eat out, perhaps once a week. Since the first claimant had worked away from home for 7 years he was not in the habit of cooking.

- 36. Mr Gall asked Ms Peciak to contact Pricewaterhouse Coopers to make enquiries as to whether the Allowance being paid to the 3 claimants should be taxable or not. There was email correspondence from them with her, (pages 330/331). As a result of the advice received from them, the respondent increased the 3 claimant's Allowance to £100 per week tax free to each of the 3 claimants. This took effect fairly soon after the 3 claimants started work. The first claimant provided a payslip for the period to 14 January 2016. This shows the Travel Allowance was the £100 amount.
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37. During the first 2 to 3 weeks of the first claimant's employment he continued to understand that he would only be based in Aberdeen for between 6 and 8 weeks. After about a month, on or around 26 February 2016 the first claimant made further enquiries through the shop floor representative, Mr McNamee. The respondent's position appeared to be *"very vague"* according to Mr McNamee. All that the first claimant could glean was that there were problems with the contractors at Heartlands and the construction work was not progressing as quickly as it should have been.

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- 38. It was not until around May 2015 when regular updates were being provided on the proposed move that it was becoming of more concern to the first claimant that he was still working in Aberdeen. This meant that he had to tell his family and his fiancée why he was not back home yet by which he meant why he was still working in Aberdeen.
- 39. On occasions when he enquired of either Mr McNamee or Mr Mills if there was any update, the reply he received was that they had as much information as the first claimant.

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40. By this time all the Heartlands employees, including the first claimant, accepted that the 6 to 8 weeks' timescale had expired. There were ongoing discussions among the 3 claimants as to what was happening as they were

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all understandably keen that they should move to Heartlands as soon as possible. All 3 claimants were aware that they were working alongside Aberdeen colleagues (i.e. individuals who had always worked for the respondent at the Altens facility and who lived in the Aberdeen area). These employees who were permanently based at Altens were being advised that they were under threat of redundancy as that facility would ultimately close once Heartlands was up and running.

- 41. The first claimant was reluctant to raise the issue of the Allowance again because of what he saw as the "threat of repercussions" from management. The first claimant understood from Mr Mills that there would be repercussions if issues were raised. He also understood that Mr McNamee took a similar view, albeit he was a union representative. The first claimant decided that he would "not put himself out there" but said he occasionally contacted Mr McNamee face to face to have a discussion but did not take matters beyond that.
- 42. He was aware that the second claimant took up the issue of the Allowance with Mr Gall and Mr Mills. The first claimant did not recall seeing the email sent to the second claimant from Mr Gall on 20 February 2015, (page 34). He did not understand that the weekly Allowance was to cover subsistence and travel as he did not understand it ever to have been "put across in those words". So far as the first claimant was concerned, he was never paid in accordance with the Out Station Allowance at Clause 5 of the Schedule. The first claimant heard the second claimant being told by Mr Gall that if he did not like it (i.e. what was being paid as the weekly Allowance) then he should leave. Mr Gall did not recall doing so.
- 43. The attraction for the first claimant when he applied to join the respondent
 was that working at Heartlands would be approximately 7 miles from his
 home and so would involve a very short daily drive of between 11 and 12
 minutes as it was almost on his doorstep.

44. Working in Altens meant that the first claimant had to set out early on a Monday morning to arrive at Altens in time for the start of the dayshift. On Fridays, when on dayshift, employees had a half day off and so could set off for home by lunch time.

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- 45. Initially, the claimant drove to and from Aberdeen in his own car but one of his friends started mid-February 2016 and lived within half a mile of the first claimant's house and they discussed the possibility of car sharing. However, he soon discovered this was impractical as they worked different shifts and had different overtime. The claimant decided it was not feasible and therefore he purchased a newer car. From then on he drove to and from Aberdeen on his own.
- 46. The first claimant continued to commute in this way throughout the rest of
 2015. By the start of 2016 there was no change in the position and so he
 was still driving 127 miles each way from home to Aberdeen. He did not
 ever consider relocating to live in Aberdeen as he was always expecting
 there would be news that a move to Heartlands would happen.
- 20 47. On one occasion the first claimant was asked to travel to a client's site at Craigrowan to carry out work on the respondent's behalf. He claimed and was reimbursed the mileage for doing so. In order to claim the mileage he completed an expenses form. He was aware that the respondent had an expenses procedure, (page 209). There was also an occasion when he travelled from Altens to carry out work in Edzel on the respondent's behalf for a client there. Again, he was paid his mileage for driving to and from that client's premises. The first claimant was never sent on any training away from Aberdeen.
- 30 48. The first claimant accepted that he was effectively on a temporary secondment although he would not necessarily have used that word. Nevertheless he did accept that he himself made reference to being "on

secondment to Aberdeen" in his email to Ms Peciak of 29 January 2015, (page 71).

49. He also accepted that the phrase "*temporary secondment*" appeared at Section 8.2 of his claim, (the ET1) as set out at page 43.

- 50. A note of the meeting held on 3 July 2015, signed by Mr Gall on the same date, (page 157) refers to the "*Heartlands Facility Status of Construction*".
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- 51. By then it was anticipated that the welding operations would start moving to Heartlands by the end of July. It also refers to the winding down and cessation of operations in Aberdeen, giving various dates from third to fourth quarter 2015 through to the first quarter 2016 under the heading, "At *Risk Employees*".
- 52. The Notes of the meeting held on 30 October 2015, (pages 167/168) again provide a further update, indicating the move was to commence from 18 January 2016, (page 167).
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53. There is a section entitled, "Feedback from Request". This states:-

"At the last meeting on, 9 October 2015, various requests were put to the Company for consideration. Here are the request and the Company's response *(which is set out in italics)*

A.. Review of current Heartlands rates while employees are in Aberdeen.

30 There will be no change to current rate for Heartlands employees.

B. Review of current allowance for Heartlands employees while in Aberdeen.

There will be no change to the current weekly travel and subsistence allowance for Heartlands employees."

- 54. It then goes on to deal with Aberdeen employees and the review of the redundancy protocol. In attendance at that meeting were the union representatives, Mr McNamee and Mr Reid.
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55. An earlier meeting held on 3 July 2015, (page 157) referred to the status of construction at Heartlands and again the anticipated dates for winding down/cessation in Aberdeen. A further Note from 20 July 2015, (page 158/159) states at the end:-

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"Please note that only official updates should be taken as a true reflection of status. As was pointed out at the meeting, this latest update is late so we will revert to at least fortnightly updates going forward.

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- 56. The respondent arranged for these Notes to be distributed to the supervisors as well as being placed around the various buildings in Aberdeen and on the Canteen Notice Board. The first claimant accepted that this was done and particularly that the Note from 3 July 2015, (pages 157/159) was duly disseminated to the workforce.
- 57. The first claimant was not aware that there were problems with the contractor who was constructing Heartlands as a result of which there are now ongoing litigation in the Court of Session.

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58. The first claimant was not aware that Mr Gall had taken into account the stresses and strains on people living away from home and the consequent strain on relationships. So far as the first claimant was concerned he

wanted to see the outcome, namely moving to Heartlands because it was so close to home, having worked away for 7 or 8 years. He never contemplated finding alternative employment as he wanted to hold on to what he thought would be being based at Heartlands. He accepted that although information was provided there was nothing tangible given as to a date for the move. All he understood was that the date for the move kept slipping which was no fault of his nor of the respondent.

- 59. As a result of the ongoing problems with the construction of Heartlands none of the 3 claimants who had all been employed on the basis that their permanent place of work would be Heartlands worked anywhere but Aberdeen. They never moved to Heartlands.
- 60. By letter dated 27 June 2016, (page 73) Mr Gall wrote to the first claimant. The subject of the letter was "Provisional Selection for Redundancy 15 Meeting". This referred to a workforce announcement made on 6 June 2016. It attached the first claimant's score sheet and indicated that he was at risk of redundancy. He was invited to a meeting on 29 June 2016 with Mr Mills and Mr Gall and could be accompanied if he wished.
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- Subsequently, the claimant received a letter dated 29 June 2016, (page 61. 75/76) confirming that the respondent was serving notice to terminate his employment and, since he was not required to work his notice period, he was now on garden leave. His employment was to terminate by reason of redundancy on 17 July 2016 and on that date he would receive 2 weeks pay in lieu of notice.
- 62. The first claimant then consulted a solicitor locally in Livingston. A letter was sent on his behalf, (page 79). It is dated 19 July 2016 and refers to the Out Station Allowance, indicating that the respondent was to pay "not 30 only for overnight accommodation but also for breakfast and if appropriate an evening meal". It also referred to the same clause requiring the

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respondent to reimburse the first claimant's costs of travelling. A spreadsheet was attached to that letter.

63. By letter dated 22 July 2016, (page 80) Mr Gall replied. The second
paragraph reads as follows:-

"The Company's facility at Heartlands Business Park, Whitburn, West Lothian ('Heartlands') is still under construction. It is not operational. Prior to the commencement of operations at Heartlands
it was agreed that your client's place of work would be the Company's facility at Altens Industrial Estate, Aberdeen ('Aberdeen'). It was agreed that during the period of time your client's place of work was Aberdeen the Company would provide: (i) serviced accommodation; and (ii) a weekly allowance. Your client was not working "out of station" nor was he away on Company business; he therefore does not have a contractual right to payment of the Out Station Allowance Your client's claims for payment of allowances/time spent travelling are not accepted."

- 20 64 The first claimant accepted that, as at October 2015 the Notes of that meeting, (page 168) refers to feedback from requests and states, "there will be no change to the current weekly travel and subsistence allowance for Heartlands employees".
- 25 65. The first claimant found alternative employment in August 2016.

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66. So far as the first claimant was concerned he considered that he was on Company business *"all the time"* while he was working in Aberdeen because he was required to live away from home. Apart from Clause 5 in the Schedule he was not aware of any other information from the respondent as to his contractual terms in relation to working at Altens.

The second claimant - Mr Paul McCabe

- 67. The second claimant became aware of the respondent through radio adverts in or around September or October 2014. He understood they 5 were looking to employ welders, platers, and inspectors at a new factory at Whitburn. This was of interest to the second claimant at he had been working away for over 10 years which involved his going backwards and forwards from home. The second claimant looked at the respondent's website and then completed various forms. This was in about September/October 2014. He was invited to an interview at Hillcroft Hotel 10 in Whitburn which he attended. Ms Peciak was present as were Mr Mills and Mr Dunsmuir. Before attending for the interview the second claimant looked at the information provided on the internet by the respondent. He understood from the interview that he was to be based at Heartlands as was clear from the advertisement and the interview. However, he 15 understood that he would have to go to Aberdeen for between 6 and 8 weeks. He was asked if he would have any problems with doing so. He understood the purpose of this was for training although he did not see why this was necessary as he was already qualified and had all the relevant skills. He took it that he was to be trained in the way the respondent's employees work.
 - 68. In any event, he understood from the interview that the site at Heartlands was still under construction and so he would be working in Aberdeen where training would be undertaken.
- 69. Heartlands is approximately 35 to 40 miles from the second claimant's home. The distance from his home to Aberdeen is approximately 170 Had the second claimant been working at Heartlands he would miles. have travelled from home each day which he anticipated would take him 30 less than an hour to do as he would be driving on motorways for most of the journey.

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- 70. At his interview he asked if everything was taken care of by the respondent because he knew there would be additional expenses associated with being in Aberdeen. He understood that the respondent, *"looks after its workers"*. He understood from this that everything was taken care of by the respondent. He thought this would cover travel, accommodation and food.
- 71. The second claimant was informed that he was successful in his application from an email. He completed various documents. He received the Terms and Conditions around Christmas 2014. The second claimant's Terms are set out at pages 12/29. Schedule 1, Clause 5 appears at page 29. The second claimant understood his place of work would be Heartlands and noted that there was no reference to Aberdeen in the documentation.
- 15 72. The second claimant recalled looking at Clause 5 and, so far as he was concerned, this covered everything. He thought everything was covered by which he meant all expenses for accommodation, travel, breakfast and evening meal. He also though it would cover the cost of his travelling time from home to Aberdeen.

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- 73. Later on, once he was working in Aberdeen the second claimant asked if there was a Handbook. He did this by approaching Mr Mills and Mr McNamee and was told that there was no Handbook yet for Heartlands employees. There was only one for Aberdeen employees but that did not cover the Heartlands employees.
- 74. When the second claimant arrived in Aberdeen to start work he discovered that the long established employees there (i.e. Aberdeen employees) were being under threat of redundancy. The second claimant commenced employment in Aberdeen on 16 February 2015. He arrived in the morning and reported to the workshop where he met his new colleagues. Later on that day Ms Peciak and Mr Kidd took him to view the accommodation which was provided for him. This was the in a 6 bedroom house. There

were 5 people already in it. The second claimant did not expect this as he had never shared with that number of men before. He mentioned this to Ms Peciak when he saw the accommodation but he did not receive an offer to locate elsewhere. He remained in that accommodation for about a year always sharing with the same individuals who were also Heartlands employees. They were the Lab Test employees referred to above under the section for the first claimant.

- 75. The second claimant spoke to Mr Mills as his Line Manager about the weekly allowance. He then received an email from Mr Gall which was copied to Ms Peciak and is dated 20 February 2015, (page 34). This referred to conversations they had had about the Allowance. Mr Gall's email reads:-
- 15 *"Hi Paul*

I refer to our conversations this week about the allowances that you are receiving and I'm sorry that you are not happy with the arrangements.

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You have been employed to work at the Company's facility at Heartlands Business Park, Whitburn, West Lothian ("Heartlands"). As you are aware Heartlands is currently under construction. It is not operational. In the period prior to commencement of operations, you are attending the Company's facility at Altens Industrial Estate, Aberdeen for training and to carry out work ("Aberdeen Secondment"). It has been agreed that during the Aberdeen Secondment, you will be provided with: (i) serviced accommodation; and (ii) a weekly allowance of £65, For the avoidance of doubt, Out Station Allowance (OSA) does not apply during the Aberdeen Secondment. Accordingly, no further allowances are due and payable to you. OSA may apply once you commence working at

Heartlands, if you are required to stay away overnight on an ad hoc basis."

- 76. The conversations referred to in that email were conversations the second claimant had with Ms Peciak and Mr Gall by telephone during his first week of employment. The second claimant subsequently met Mr Gall and he understood from him that Ms Peciak would look at matters and come back to him. What was provided was the information set out in the above email.
- 10 77. The reference in the email to the "Aberdeen Secondment" was the first occasion that the second claimant had seen any such reference.
- 78. On receipt of the email the second claimant telephoned Mr Gall, explaining he wanted a face to face meeting. He thought that there was a meeting which probably took place later that day. So far as the second claimant was concerned, he had not agreed and never did agree, to what was set out in that email. In his discussion with Mr Gall he referred again to his Terms and Conditions and the reference to Out Station Allowance. He understood Mr Gall to say that he would not be paid it (i.e. the Out Station Allowance) and, if the second claimant did not like it, then he could feel free to leave. The second claimant felt quite taken aback by this as he wanted to retain his job so that he could eventually be working much nearer to his home at Heartlands and travelling to and from that location each day.

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79. On the occasions when the second claimant spoke to Mr Mills about the weekly Allowance he understood that Mr Mills did not want an unhappy workforce. The second claimant took it from this response that he should not be causing trouble as he did not want to look as though he were a troublemaker.

- 80. During the second week of his employment the second claimant again spoke to Ms Peciak and she reiterated that he should feel free to leave. He understood this to mean that he would not be paid in accordance with Clause 5, the Out Station Allowance although he did not understand why this decision had been taken.
- 81. The second claimant accepted that he received a weekly Allowance which he understood was a travel allowance. At first this was paid as £65 taxable and then latterly as £100 non-taxable. The non-taxable payments appear to have started with effect from March 2015, (page 32).
- 82. The second claimant was aware that the respondent in their response (ET3) to his claim (page 8) at paragraph 11 referred to "*Aberdeen Secondment Allowance*" which was then specified as covering accommodation and a weekly allowance for travel and subsistence.
- 83. So far as the second claimant was concerned everyone on the shop floor, by which he meant the people who were Heartlands employees were "not happy". The second claimant decided not to persist in raising the issue about the weekly Allowance as he did not want to say anything to make himself out to be a troublemaker or looking like being a troublemaker. He was happy in the job and, long term, he wanted to move to Heartlands so he did not wish to jeopardise his employment. Unfortunately, the move to Heartlands never materialised.
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- 84. Again, so far as the second claimant was concerned, "all avenues were closed to us". By this he meant that there was "nothing that could really be done".
- 30 85. The second claimant never considered moving to Aberdeen permanently.
 - 86. He was made redundant in the summer of 2016.

- 87. The second claimant considered that he was always a Heartlands employee. In relation to the Note of the meeting in October, (pages 167/168) the second claimant was aware of requests being made to management. The second claimant had not himself gone back to Mr Gall as he did not see any point in doing so. He thought he may have spoken again to his Line Manager Mr Mills but nothing in an official capacity was done by him.
- 88. The second claimant continued commuting to Aberdeen each week. He was never able to car share as there was no one who lived close to him in 10 Greenock and, in any event, people worked different shifts. He sometimes worked overtime and needed his car in Aberdeen to go the gym and play golf.
- 89. The second claimant did on occasions travel to Edzell and also Craigrowan 15 just as the first claimant had done. The second claimant completed a mileage expenses form and was duly reimbursed for that mileage. The second claimant did also travel to a client of the respondent called Babcock Doosan in Renfrew to carry out work there on the respondent's behalf. The second claimant was willing to do this since it meant he was able to travel 20 there from his home rather than commute to Aberdeen. This was however, for a short time lasting only for the time it took to carry out the work required by the client.
- 25 90. The second claimant received a Memorandum regarding provisional selection for redundancy dated 27 June 2016, (page 35). At the redundancy meeting which the second claimant attended he handed over a grievance letter to the respondent. The meeting was attended by Mr Gall and Mr Mills. There was no discussion about this letter. The second claimant thought he might have received a response about two days later. 30 Following the redundancy meeting, he received a letter confirming the termination of his employment, (page 37/38). Mr Gall did not recollect receiving a grievance letter from the second claimant. On balance, the

Tribunal concluded that it would have been unlikely that had a letter been given to Mr Gall he would not at least have acknowledged it when confirming the claimant's employment was being terminated.

- 5 91. The second claimant instructed a solicitor who wrote to Mr Gall on the second claimant's behalf by letter dated 12 July 2016, (page 40). He was aware of the terms of that letter and the reference to shared accommodation with other employees and, while recognising these were "staff members" (presumably a reference to the Test Lab salaried employees) who worked on what were termed Heartlands contracts, they were paid rates of £20 a day to cover meals. Reference was made to the cost of subsistence which the second claimant calculated as being £7,600. In addition, there was the round trip from Greenock to Aberdeen of 336 miles. The second claimant also understood that a claim was being made in relation to travelling time, (again see page 40).
 - 92. The second claimant was aware of the reply from Mr Gall to Mr O`Donnell of 22 July 2016, (page 42). In the second paragraph this reads:-
- 20 "The Company's facility at Heartlands Business Park, Whitburn, West Lothian ('Heartlands') is still under construction. It is not operational. Prior to the commencement of operations at Heartlands it was agreed that your client's place of work would be the Company's facility at Altens Industrial Estate, Aberdeen
 25 ("Aberdeen"). It was agreed that during the period of time your client's place of work was Aberdeen the Company would provide: (i) serviced accommodation; and (ii) a weekly allowance. Your client was not working 'out of station' nor was he away on Company business; he therefore does not have a contractual right to payment of the Out Station Allowance."

- 93. While the second claimant did not want to be seen as a troublemaker he did not suggest that Mr Gall was in any way threatening to him and he accepted that Mr Gall had been reasonable in his dealings with him.
- 5 94. The second claimant did not know if there was any discussion amongst colleagues to put in a collective grievance. He was not aware if Mr Mills had at one time been a GMB representative. The second claimant accepted that, if he had an issue about his employment, then his first port of call would have been his supervisor.
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95. The second claimant explained he was "*not a very good cook*". He would sometimes order takeaways or purchase snacks and, on occasions, he purchased a pizza to eat in the evening. The second claimant was aware it was costing him more to have evening meals than it would have done at home given he does not cook. He was aware that some of his colleagues in the serviced accommodation with whom he shared did cook.

- 96. So far as the second claimant was aware, updates about Heartlands were given but the starting date there seemed to be put back a month each time it was mentioned.
- 97. Following termination of his employment on the ground of redundancy the second claimant secured alternative work which took approximately two months. His current role is in the Renewable Energy Field rather than the Oil and Gas Industry.

The Third Claimant - Mr lain McMillan

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- 98. The third claimant saw an advertisement in November 2014 as result of a suggestion from a former colleague with whom he had worked at Burntisland Fabrications. He looked online and found the advertisement from the respondent. He attended an interview at Hillcroft Hotel in Whitburn. He understood the post he had applied for would be based in

Heartlands but that he would be expected to spend between 6 and 8 weeks training in Aberdeen. He was happy with this proposal.

99. The third claimant's Terms and Conditions are set out at pages 89/101.
⁵ He understood the place of work would be Heartlands, (Clause 3 of the Terms and Conditions at page 90). He signed this document on 13 January 2015, (page 101). In terms of his claim, (the ET1) his starting date with the respondent was 16 February 2015 and his employment ended on 17 July 2016, (page 81).

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- 100. The third claimant arrived in Aberdeen for his first day at work. He was later taken to see the serviced accommodation that was being provided. There were several new employees who started work with the claimant on 16 February 2015. Two individuals were sent to one flat and two to another flat. The third claimant was to share a 2 bedroom flat with another colleague. The third claimant knew that he would be based in Aberdeen from Mondays to Fridays. It was not possible for him to commute daily from his home in Kinning Park, Glasgow.
- 101. At his interview the third claimant had asked what the position was regarding expenses. He understood from Ms Peciak that he would be "more than looked after" by the respondent. The third claimant's experience was that individuals were usually treated quite well by employers and, sometimes, the expenses payable would be a bit more than anticipated. He did not expect to be out of pocket. The third claimant had no objection to working in Aberdeen on the basis that he understood it would be for the 6 to 8 weeks. Had he been based immediately in Heartlands he would have been able to travel by car from home to there in approximately 30 minutes.

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102. On the second day of his employment at Aberdeen the third claimant found the workshop to have "*a grim atmosphere*". He realised this was because the Heartlands employees (i.e. those who were ultimately to be working at

Heartlands) were effectively doing the jobs of those who had been in Aberdeen for many years. These individuals were referred to as the Aberdeen employees by all 3 claimants.

- 5 103. The third claimant assumed that the weekly Allowance would cover fuel, supplies and food as well as overnight accommodation.
- The distance between the flat where the claimant stayed and Altens was 104. approximately 3 miles. The third claimant found the accommodation to be "quite nice" and was all he needed as he was sharing with only one other 10 At the end of his second week of employment, the third colleague. claimant received his first wage slip and noted that the Allowance provided was £65 and was taxable. He drives a Volkswagen Golf GTI and it was costing him a lot more than this in fuel. He therefore requested a meeting with Ms Peciak and said he was not left with enough money given the 15 amount of the Allowance. She said she would get back to him. He sent an email to her on 24 March 2015 and received a reply the following day, (page 106). He enquired why his travelling expenses were being taxed each week. He was advised in the reply that the travelling expenses were a benefit and so were taxable and, in relation to an enquiry about gym 20 membership, was told that the waiting time was not within the respondent's control and the third claimant would have to contact the gym organisation direct. The third claimant thought that around this time he was by then receiving £100 untaxed each week and so he did not follow matters up 25 again with Ms Peciak. His view was that it was not worth his doing so as "my job was worth more than the question of expenses. I would rather I had a wage coming in."
- 105. The grounds in the third claimant's Paper Apart to his ET1 were prepared for him by a solicitor in Glasgow whom he instructed, (pages 81/82). In relation to seeking a £20 per day allowance the third claimant did so because he understood that was what other employees were receiving. He understood the respondent had some form of expenses sheet to

complete although he had never seen one. His understanding of the calculation set out at pages 104/105 was in relation to travel only.

- 106. On average, it took the claimant 2.5 hours to commute from his home to Altens each week and, on occasions, it could be longer as it would 5 sometimes take 3 hours on a Friday to return home because of the volume of traffic.
- 107. The third claimant did not speak again to Ms Peciak or anyone else after he received the reply to his email as he did not want to keep "harping". So 10 far as he was concerned the job was worth more than "being a pest in the workshop".
- By the summer of 2015 a fellow Heartlands employee was dismissed by 108. the respondent. The third claimant did not know the reason for this 15 individual's dismissal but he thought this caused "the fear factor" for all the employees in the workshop. The individual who was dismissed had started at the same time as the third claimant and had also been a welder.
- His understanding was that his hourly paid colleagues felt it was better to 109. 20 "keep our mouths shut", do their jobs rather than get a "tap on the shoulder". The third claimant decided that he did not want his job to be at risk as he hoped that, once he was working at Heartlands, he could be there for 10, 15 or 20 years.
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110. The third claimant sent an email to Mr Gall on 8 July 2016, (page 111). In this he indicated that he was formally raising a grievance with the respondent regarding the "Out Station Allowance". He referred specifically to Clause 5.1(a) and (b) as well as Section 5.2. This email was sent after the claimant had received a Memorandum from Mr Gall dated 27 June 2016 advising him of his provisional selection for redundancy and a meeting he was to attend, (pages 107/108). Subsequently, the claimant

received a letter of 30 June 2016, confirming termination of his employment with effect from 17 July 2016, (pages 109/110).

111. The third claimant received a reply from Mr Gall dated 22 July 2016, (page 112). This confirmed that a meeting had been arranged to discuss his grievance and was arranged for Wednesday, 27 July 2016.

112. By this time the third claimant had found alternative employment and he was therefore not available to attend nor did he wish to take up the opportunity to attend the meeting by way of a telephone call of Skype. This was confirmed to Mr Gall in an email dated 25 July 2016 and acknowledged by him on 26 July 2016, (page 113/114). Then, by letter dated 27 July 2016, (page 114) Mr Alex Leiper, the Fabrication Manager wrote to the third claimant, confirming that the terms of his grievance had been considered. The outcome was set out in that letter as follows:-

"The Company's facility at Heartlands Business Park, Whitburn, West Lothian ('Heartlands') is still under construction. It is not operational. Prior to the commencement of operations at Heartlands it was agreed that your place of work would be the Company's facility at Altens Industrial Estate, Aberdeen ("Aberdeen"). It was agreed that during the period of time that your place of work was Aberdeen the Company would provide: (i) serviced accommodation; and (ii) a weekly allowance. Your were not working "out of station" nor were you away on Company business; you therefore do not have a contractual right to payment of the Out Station Allowance.

Your claims for payment of allowances/time spent travelling are not accepted. Accordingly, your grievance has not been upheld."

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113. The third claimant was given the right to appeal against the outcome of the grievance and to do so in writing by 4 August 2016, specifying the grounds on which he was appealing. No such appeal was presented.

- 114. The third claimant was never sent on company business away from Altens and so he did not have any expenses to claim from the respondent in relation to doing so. The third claimant's view was that the reason employees, including himself, stopped complaining about the weekly allowance issue was because one of their colleagues had been dismissed.
- 115. He could not comment on why, out of the 35 hourly paid staff, no collective grievance had been raised with the respondent about the weekly Allowance.
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- 116. It was never an option for the third claimant to car share with anyone as there was no one living close by his home in Kinning Park. In addition, the third claimant worked quite a number of Sundays and this would have meant it would not have been feasible to car share, even if there had been someone with whom he could have done so.
- 117. Finally, in relation to the 3 claimants it is relevant to note that in relation to travelling time none of the 3 claimants ever submitted such a claim. They all accepted that, in order to do, so they would have had to seek the approval of senior management. As indicated above, the first and second claimants did do some work away from the Aberdeen site at Craigrowan and Edzell and in the case of the second claimant at Babcock Doosan's premises in Renfrew. The third claimant did not so any work other than in Aberdeen and so he did not claim mileage from the respondent since he had not been out of/away from the Aberdeen site working for the respondent at client premises.

Mr Gall -the Respondent's Area HR Manager

30 118. Mr Gall is responsible for four sites in the United Kingdom as the respondent's HR Manager. These were Aberdeen where 85 staff were employed, Heartlands where 55 staff are now employed, Bathgate where a further 55 individuals are employed and Barrow-On-Furness where 53 staff

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are employed. The respondent is a worldwide company with operations in Texas. Louisiana, Oklahoma, Brazil, Singapore, Thailand, India and the United Kingdom. The Altens site employed 35 hourly paid staff as well as the 5 salaried Test Lab engineers. Originally, it was intended there would be a regular newsletter produced by a third party. One was produced in July 2014, (pages 139/143). That July a memo was sent to all hourly paid personnel who were long established in Aberdeen asking if they would be interested in moving to the new site in Heartlands, (page 144). From August 2014 onwards the respondent held regular meetings with the workforce union representatives, Mr Murray Reid of Unite and Mr McNamee of the GMB and Notes were produced and signed by Mr Gall, (pages 145-199 inclusive), covering the period from 29 August 2014 to 7 December 2016.

- 15 119. As a result of problems with the contractor at Heartlands the site took much longer to be completed than had been anticipated. Eventually, the contractors were dismissed and the work was completed by a third party. The relocation to Heartlands did not happen until January 2017.
- 20 120. When the salaried Test Lab staff were recruited they too were to be based in Aberdeen since the Heartlands site was not ready. A decision made was that they should be placed in hotel accommodation such as Premier Inn. In addition to the hotel accommodation these employees would be offered a payment of up to £20 per day together with a mileage allowance. All purchases made had to be vouched for by receipts. When it became apparent that the Heartlands site was not going to be available consideration was given to looking at offering relocation to Bathgate but that plant was, at the time, working at full capacity.
- 30 121. Clause 5 of the Schedule was intended to be used very rarely, for example, if someone was sent on an ad hoc training course or undertook periods of time away from the factory site (at Heartlands) on company business.

122. Mr Gall considered whether it would be appropriate to issue a variation of terms of employment to the Heartlands employees, (including the 3 claimants) under Section 4 of the Employment Rights Act 1996. This was not done as he thought it would be difficult to do because there was no entry date for the move to Heartlands.

123. As indicated, regular updates were provided at the meetings attended by union representatives and management. In particular, at the meeting of 30 October 2015, (pages 167/168) information was provided by way of feedback from requests, confirming that there was to be no change to the current weekly travel and subsistence allowance for Heartlands employees which included the 3 claimants.

None of the Test Lab staff ever suggested that they were entitled to the
 Out Station Allowance which was set out in the hourly paid terms, (for example page 29 for the second claimant). In any event, they did not have such a Schedule attached to their Statement of Terms and Conditions.

125. Mr Gall had no recollection of suggesting to the second claimant that he should feel free to leave if he was unhappy with the amount of the weekly Allowance. So far as Mr Gall was concerned, the respondent did not wish to create a climate of fear. After the Allowance was increased to £100 tax free per week he was unaware of any complaints from then on from any of the hourly paid staff, including the 3 claimants. Mr Gall thought that had there been the level of fear suggested by the 3 claimants then workplace representatives would have alerted management to this ongoing concern. His understanding was that Mr Mills was aware of "some grumblings" about allowances but it was his view that sufficient had been provided by way of the tax free weekly Allowance which was intended to be cost neutral.

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126. The Test Lab staff who had also been recruited from the Central Belt, as were the 3 claimants, did not receive travelling time payments.

- 127. In relation to the £100 weekly Allowance Mr Gall thought that approximately £65 would cover the cost of travel on a round trip from the Central Belt to Aberdeen. In his view, the remaining balance would have been sufficient to cover the cost of food shopping. He accepted that he himself is as a fairly frugal shopper. He also accepted that not all the Heartlands employees would be used to cooking meals for themselves.
- 128. The respondent was perhaps more generous in the weekly amounts given to the five Test Lab staff but this was because the respondent found it very difficult to recruit appropriately qualified individuals. So far as the hourly paid staff were concerned, he considered that what was offered as the weekly tax free Allowance should have created a cost neutral situation. Mr Gall accepted that the respondent's documents were perhaps "paper light". He was not present at the various interviews for recruitment of hourly paid staff at the hotel near Whitburn. 15
 - 129. Mr Gall accepted that, in hindsight, it might have been helpful to have included a Section in the contract, explaining that the workplace was currently Aberdeen but this was not put in place. When the Statement of Terms and Conditions was drafted by him and then later issued to the 3 claimants and other hourly paid employees, it was anticipated that they would be working in Aberdeen for only about 6 to 8 weeks. He accepted it would have been helpful to have indicated in the offers of employment or the Terms and Conditions that initially they would be located in Aberdeen.
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- 130. So far as ongoing complaints were concerned, Mr Gall's recollection was that these were mostly in relation to individuals being away from home and the impact this was having to employees and their families.
- So far as Mr Gall was concerned, it had been explained that the workplace 30 131. for now was Aberdeen since they could not be relocated to Heartlands as it was not yet ready or operational.

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132. Clause 5 would have been intended to apply if someone was required to stay away overnight on company business. In practice, that did not happen.

5 Quantification of the 3 Claims

- 133. Considerable time was spent during the Hearing dealing with how this had been calculated. All 3 claimants accepted that their calculations were inaccurate. After discussion, a revised version was prepared and accepted by all 3 claimants as being accurate rather than the original version prepared by the first claimant and the format of which had been adopted by the second claimant. The Heads of claim are for subsistence, fuel and travelling time.
- In relation to travelling time as has already been noted, none of the 3 134. 15 claimants ever submitted such a claim. They all accepted that, in order to do so, they would have had to seek the approval of senior management. As indicated above the first and second claimants, did do some work away from the Aberdeen site at Craigrowan and Edzell and in the case of the second claimant at Babcock Doosan's premises in Renfrew. The third 20 claimant did not any work other than in Aberdeen and so he did not claim mileage (or travel time) from the respondent since he had not been out of the Aberdeen site for work. The first and second claimants indicated that in the event there claims succeeded they would seek to have an award for 25 subsistence calculated on a daily rate of £15 whereas the third claimant considered that a daily rate of £20 would be appropriate.
- As indicated above, both representatives provided their submissions orally to the Tribunal on 28 March 2017 as well as setting them out in writing. The
 written submissions are very detailed and the Tribunal decided they should be set out in full.

Claimant's Closing Submission

136. Submissions -

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5 This is a claim for damages in regard to breach of contract raised by the Claimants against the Respondents. Their claim directly alleges the Respondents breached the terms of Clause 5 of Schedule 1 to their Statement of Terms and Conditions under reference specifically to what is termed "Out Station allowance".

Each of their cases centre on Clause 5 and their submission they were due specific allowances in terms of Clause 5 having entered contracts of employment that recorded their place of work as being Heartlands. The Respondents argue that Clause 5 variously does not and cannot apply. They submit the Claimants were not at any time "Out of Station" and submit that despite the terms of each of the Statement of Terms and Conditions the Claimants place of employment was Aberdeen and not Heartlands. The argument goes if their place of employment was not Heartlands but rather Aberdeen then, by definition, they would not be entitled to "Out Station allowance".

In considering the case from the Claimants' position I would submit that in construing Clause 5 the Tribunal would be entitled to have regard to the pre-contract discussion at the job interviews for each applicant. I would submit at these interviews the subject of allowances was raised and assurances were given in general terms that the particular subject of allowances would be covered by the Respondents. It is not disputed the Claimants were not due to start work at Heartlands immediately but were being sent to Aberdeen for training and to get used to the Respondents' work practices. Accordingly, from the outset each of the Claimants knew they would start work in Aberdeen which for them increased the significance of allowances because for each of the three working in Aberdeen Monday to Friday meant they would be living away from home.
Allowances for fuel, travel and subsistence were always regarded as material terms by the Claimants. The Claimants had been told they would be in Aberdeen for a period between 6 and 8 weeks.

No detail was given in regard to specific monetary payments they would receive while working in Aberdeen but equally no specification was provided by the Respondents at the job interviews as to what they later claim would be the flat rate weekly allowance that was paid to the three Claimants and to the other workers who had been recruited at the same time referred to by the Respondents' as "workshop hires". Thus far the facts are straightforward and free of complication. The interpretation of the Statement of Terms and Conditions and Contract of Employment has proved problematical because at no time did the Claimants ever work at Heartlands and were based throughout their employment with the Respondents at Aberdeen.

My opening remarks are made to underline the fact that in interpreting the Statement of Terms and Conditions (hereafter the Contract) the allowances issue had been raised at the pre-contract interview. It was therefore the expectation of the Claimants that particular issue would be covered.

Before turning to consider the terms of the contract in regard to allowances I would submit the Tribunal would have no difficulty in making a number of findings of fact:-

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- The Claimants contractual place of employment was Heartlands. Their terms and conditions and rate of pay were based on Heartlands rates.
- b. There is a concession properly made there was no mobility clause in the Contract.

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As Mr Gall himself stated on 24 March 2017 there would have been no case open to the Claimants if there had been a mobility clause. That goes deeper in my submission than underlining the obvious. It goes somewhere fairly close to an acceptance that, regardless of all issues concerning Heartlands, the Claimants had been required to work at a location throughout the whole period of their employment which they had not agreed to in their Contract of Employment save other than for an initial temporary period. They had plainly entered into a contract with the Respondents to work at Heartlands, not Aberdeen. The Respondents' position as clarified by Mr Gall is tantamount to accepting the Claimants signed up for a contract which required them to work at the location not mentioned in their contracts.

The fact they received allowances (adjusted after 7 weeks to a flat rate sum of £100 per week – regardless of personal circumstances) – makes it clear (if there was any doubt in the first place) the Respondents acknowledge the actual principle of making payment to the Claimants for the losses they would otherwise have been incurring in having to work in a different part of Scotland, resulting in their residence away from home Monday to Friday for 76 weeks. In therefore approaching the whole issue of the contractual right to allowances it has to be recognised and acknowledged the principle of the Respondents' making payment of allowances cannot be challenged. That is what they did for each week each of the Claimants was based in Aberdeen and required to work in Aberdeen.

The acknowledgement of the principle by the Respondents that they were contractually obliged to pay allowances has further consequences in light particular of Mr Gall's evidence. As stated, it was acknowledged by him there was no mobility clause. Secondly he acknowledged no Section 4 notice was ever served on the Claimants in regard to their place of employment and / or in regard to allowances. Thirdly, he acknowledged there was no evidence of express agreement from the Claimants they had accepted their place of employment had changed to Aberdeen. While one can understand that Mr Gall was unwilling to address the contractual

consequences of the fact the Claimants were working for the Respondents at a place that had not been agreed to (and which is not mentioned anywhere in their contract) by not addressing the matter in any formal sense and by continuing to pay weekly allowances, the Respondents in my submission lose the right to argue (as you will no doubt hear today) that if 5 Aberdeen had to be taken as their place of work then by definition they could not have been eligible to Out Station allowance in terms of Clause 5. In fact they would not have any contractual right to allowances at all. The reason for that is self evident. It is contradicted by the self-evident fact the Respondents paid weekly allowances - as they claimed - for travel and 10 subsistence – to each of the Claimants right to the end of their employment. The only logical consequence which comes from that is the fact the Respondents at no time can be deemed to have acknowledged the Claimants' place of employment had changed to Aberdeen. If that is their case they would have had no reason to pay allowances to the Claimants for 15 travel and subsistence in the first place. It is totally inconsistent, in my submission, with the argument that Aberdeen had become their place of employment. That in my view is an argument of convenience made retrospectively in an attempt to elide the Respondents' liability under Clause 5. 20

> To make my position clear I am not submitting there is a challenge to the plain fact each of the Claimants travelled each week to Aberdeen (absent holidays) and worked in Aberdeen. That is self- evident. That, however, in regard to this case is irrelevant for two basic reasons.

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- Their contractual rights can only be determined under reference to the Statement of Terms and Conditions they had been given which clearly stated Heartlands was their place of work, with a salary structure based on Heartlands' hourly rates and
- 2. Throughout the whole period of their employment they worked elsewhere and were paid a weekly allowance by the Respondents in

acknowledgement they were working elsewhere, – at a location that does not feature in their contracts.

Any argument advanced by the Respondents that at some unidentified point in time they must (by default) be deemed to have agreed to a change in their place of employment is totally inconsistent with the fact the Respondents never believed that because they continued to pay allowances to the three Claimants right up to their redundancies on the basis they were working away from their contractual place of employment.

On that simple analysis of fact it seems to be clear from the outset the challenge made by the Respondents to these claims cannot be based on the three Claimants having no contractual entitlement to allowances (paid in recognition of the fact the three were having to work in a different part of Scotland from what all parties had agreed would be their place of work at the outset) when the Respondents plainly did pay allowances in recognition of the fact they were not working at the location specified in their contracts. It is therefore not an issue of entitlement to but rather what is the correction quantification of those allowances.

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Mr Gall was clear and I will consider this in detail hereafter those allowances were paid to cover "travel and subsistence". The allowances were referred to in the payslips as for travel only. These differences are, however, for present purposes immaterial. The material fact is and remains allowances were paid by the Respondents in recognition the Claimants were working elsewhere than the place referred to in their Statement of Terms and Conditions. They were having to stay away from home and any argument that their place of employment had changed to Aberdeen is totally at odds with the fact they continued to be paid allowances.

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As stated in my submission the argument in truth is not about the entitlement to these allowances but rather whether the Respondents paid what they should have done under contract. The Claimants say they did

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not. The Respondents' case insofar as I understand it, is variously there was no contractual entitlement under Clause 5 (the terms of which I will consider shortly) and an argument by the Respondents that Clause 5 was not engaged at all because it was meant for some other undefined purpose. The Respondents presumably believe we should not be looking at Clause 5 in the first place. Their case is that allowances were discussed <u>after</u> the contracts were entered into and they would argue that nothing further is due to the Claimants because the Respondents paid them what the Respondents decided to pay. Mr Gall accepted in evidence there is no evidence (apart from payment and receipt by the Claimants) that the Claimants ever expressly agreed to the specific amounts paid and indeed the basis for those payments – i.e. travel and subsistence.

The Claimants say that Clause 5 regulates the matter and their claims are based on it. If the Tribunal formed the view that Clause 5 was not part of their contract or if the Tribunal took the view that it was to use the vernacular - in their contract – but of no further relevance because Aberdeen was their <u>contractual</u> place of employment – not just physically their place of work – but their place of work contractually – then there could be no claim under Clause 5.

I would submit however the Tribunal will have no difficulty in concluding that regardless of their physical location – they were classed as and paid under Heartlands' rates by the Respondents – and were paid allowances that acknowledged they were not working at Heartlands. The problem is the Claimants say the Respondents did not pay the correct sums due under Clause 5. The Respondents say they were not obliged to make any payment at all under Clause 5.

Accordingly, it becomes necessary once again to consider the exact terms of Clause 5, bearing in mind the statement of terms and conditions in which Clause 5 is found recorded the Claimants place of work as Heartlands.

CLAUSE 5

It is headed "Out Station Allowances". That particular phrase is not referred to anywhere else In the document and does not feature in paragraph 20 of the document itself which is the Definition Clause.

The eligibility to Out Station allowance is three fold:-

- Firstly, it does no cover an employee working off-shore. That plainly does not apply here.
 - 2. The employee has to be "on Company business" and
 - 3. The employee is "required to stay away overnight".

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In regard to eligibility and to quote the IDS handbook – Contracts of Employment – page 95:-

"The contract should be interpreted not according to the subjective view of either party but in line with the meaning it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

25 The first case I wish to refer to is:-

Spectrum Agencies -v- Benjamin -

As the case report makes clear the appeal concerned a short point of construction of a written term of a Contract of Employment relating to bonus payments and the bonus term. The details are not important. However I would like to make reference at paragraphs 9 and 10 of the Spectrum report

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to the Judgment of Lord Hoffman in the case <u>Investors Compensation</u> <u>Scheme Limited –v- West Bromwich Building Society</u> –

To borrow Lord Hoffman's analysis I would submit the words in Clause 5 in regard to eligibility should be given their "natural and ordinary meaning". I would submit that the construction advanced by me is plainly and unarguably correct. The Claimants each met the three noted qualifications to Out Station allowance – were not working off shore, were plainly on Company business and were required to stay away overnight. They are in summary eligible for that allowance.

I recognise where a term of a contract is ambiguous or it does not cover all the matters on which the parties can be presumed to have agreed a Tribunal may take into account the surrounding circumstances when construing the terms of the Employment Contract. In that regard I would refer to the case:-

Pedersen -v- Camden London Borough Council 1981 ICR 674

At page 678 of the Judgment the Court made clear that in construing the contract they could take into account not only the terms of a letter of 23rd August 1973 sent to the Claimant appointing him to the job but also could take into account what had led to the Claimant applying for the job which was on offer. In the particular circumstances of that case the advertisement showed clearly that the primary function of a successful applicant would be that of Bar Steward and not as the Court found as a Catering Assistant.

To quote further from the IDS handbook at page 101 – as a caveat – "It is important not to deduce from these cases any suggestion a Tribunal is entitled to draw upon surrounding evidence in order to create the bargain between the parties itself. In the absence of an express term it is not, for example, entitled to imply a term into a contract based on an assessment of

what it thinks would be a fair bargain". In support of that statement I would make brief reference to the case:-

Vision Events (UK) Limited -v- Paterson

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At paragraph 44 – page 19 of the Judgment Lady Stacey – in the particular circumstances of the case – said "we have come to the view that the contract between the employer and the employee while poorly drafted and not very clear does not include any Clause which shows that it was the intention of the parties that a person not entitled to overtime would be paid for his flexi hours on leaving. The Employment Tribunal had purported to consider whether such a term required to be implied into the contract. They found that such a term should be implied but the majority of the EAT had come to the view that there is no requirement to imply such a term. It is not necessary for business efficacy and it is clearly not a term which both parties believed should be implied.

It can be observed that in construing a Contract of Employment the Tribunal's proper role is confined to that of an interpreter. Accordingly, the use of evidence drawn from sources other than the contractual documentation itself is appropriate as a need to interpreting express terms only insofar as it assists the Tribunal to discern what the actual intention of the parties was when they signed up to those terms.

I would submit the essential exercise in all of this is to determine what the parties agreed at the time the contract was concluded and in that regard consider the express terms used in Clause 5. I would submit the Tribunal should avoid the temptation to revisit the contractual position of allowances with the benefit of hindsight, based on the knowledge that the Claimants never did work in Heartlands. The important thing is to determine what was agreed at the time the parties entered into the contract and what (if any) variation to that contract was agreed (if ever) before each of the Claimants was made redundant in July 2016.

One other consideration applicable to the facts of this case is the fact the Statement of Terms and Conditions is subject to an "Entire Contract Clause". It is found at Clause 21, page 24 in Volume 1.

5 Again, guoting from the IDS handbook page 101;

> "As previously stated it is rare that the express terms represent the sole source of all the terms relevant to a Contract of Employment however there is nothing to prevent the parties from inserting a Clause – known as "an entire contract" or "entire agreement clause" which stipulates that the entire bargain or agreement between them is contained within the four corners of the written contract. The purpose of such a Clause is to ensure that any oral or written representations and/or terms that might otherwise be incorporated from extrinsic sources do not form part of the Contract of Employment."

As stated there is such a Clause here. There immediately followed that clause an invitation to the Claimants to sign and return the Statement of Terms and Conditions which all three did. In my submission once that was 20 done the contract was concluded and that plainly included Clause 5 with the provision for Out Station allowance payments. That Clause was at no time ever the subject of any formal variation. It was never discharged. The closest the Respondents came to all or any of this was the email sent to Mr McCabe – and only to Mr McCabe – by Mr Gall on 20th February 2015 found 25 at page 34 of Volume 1.

That email did not state that Clause 5 was being removed from the contract - from the Statement of Terms and Conditions. Mr Gall's error was to assume that Clause 5 could not apply at all in the particular circumstances the Claimants found themselves in having signed a contract to work at Heartlands but being required to work in Aberdeen. In short the Claimants are entitled to hold the Respondents are contractually bound to honour

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Clause 5 because there is and was no other contractual provision that governed the issue of allowances. The Respondents plainly entered into Contracts of Employment with Clause 5 in place.

- ⁵ I now wish to consider the Respondent's position which in term seeks to import an implied term to the contract which would change for contractual reason the Claimants place of work from Heartlands to Aberdeen please see, in particular, paragraph 15(a) at page 10 of Volume 1.
- 10 Generally in regard to implied terms I recognise if these do exist these can form a binding part of the contract. Generally, in regard to the issue of implied terms I would make reference to the following case:-

O'Brien & others -v- Associated Fire Alarms Limited 1AER page 93

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This was a Judgment of Lord Denning the terms of which have a certain familiarity to the facts of the present case.

In determining the role of any implied terms in this case it must be stressed that a Court or Tribunal will only look at the presumed intention of the 20 parties at the time the Contract was made. While it is proper to say that an implied term is as much a part of the Contract as an express term it is a general principle of contract law that an implied term cannot override the clearly expressed intention of the parties. In considering the legal test for 25 incorporating implied terms into a Contract of Employment I would observe a Tribunal or a Court will not imply a term simply because it is a reasonable one. Nor will a Court or a Tribunal imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the Court or Tribunal can presume that it would have been the intention of the parties to include it in the Agreement. I certainly recognise the 30 Respondents in this case argue that on grounds of business efficacy it must be taken there was an implied term that the "normal place of employment" for the Claimants was Aberdeen. If that was held to be the case it would of

course provide the complete defence to the Respondents because, if true, the Respondents while working in Aberdeen could not for obvious reasons be eligible to a Out Station allowance.

5 I recognise there is a general presumption that the parties to a contract intended to create a workable agreement. I recognise if it is therefore necessary to imply a term in order to give business efficacy to the contract and make it workable a Tribunal or Court will consider this and be prepared to do so. I would however remind the Tribunal that there is no need in this case to start importing implied terms particularly for reasons of business 10 efficacy in defining the place where the Claimants were required to work. I would remind the Tribunal in this case there was an express term that recorded the Claimants place of work - i.e. Heartlands. The parties had concluded the contract and agreement with that specific expressed term. Their wages and hourly rates were Heartland rates, which were lower that 15 Aberdeen rates. The Claimants were given allowances in recognition they were not working at the place of employment recorded in their Contract but rather were based in Aberdeen. There was no evidence of any express agreement by the Claimants they had agreed to a change of place of employment and of course no attempts were made to utilise the variation 20 process in Section 4 of the 1996 Act. In truth, the argument that there was an implied term the place of performance had moved to Aberdeen is really an attempt retrospectively to re-write the contract to disentitle the Claimants from seeking payment under Clause 5.

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I wish to consider some of the leading cases that have come before Tribunals and Courts where consideration has been given to the issue of terms being implied into an employment contract for reasons of business efficacy defining the place where the employee can be required to work. The first case is :-

Jones v Associated Tunnelling Company Limited 1981 IRLR page 477

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At page 4 of the copy Judgment produced the Court's starting point is laid out. The conclusion is recorded at the top of page 5. The distinguishing feature in that particular case in comparison to this case was the fact no place of work had been recorded in Mr Jones contract. The approach in Jones was followed by the Court of Appeal in the following case:-

Courtaulds Northern Spinning Limited v Sibson & another 1988 ICR page 451

In that case an HGV driver resigned and claimed constructive dismissal 10 when his employer required him to work from a different depot. In holding the employee had been constructively dismissed an Employment Tribunal implied the term – which was subsequently upheld by the EAT – that the employer could require him to change his place of work provided it did so for "genuine operational reasons". On the employers' appeal the Court of 15 Appeal held there was no need to imply such a restriction. In particular there had been no need or justification for the Tribunal to import a requirement that the employers request to the Employee to work elsewhere must itself be "reasonable" and for "genuine operational reasons". It ruled that since the employee spent most of his working day "on the road" the 20 location of the depot from which he worked was not of major important, provided it was within reasonable daily reach of his home. The Court therefore concluded that the term that should have been implied in order to give business efficacy to the Contract was one enabling the employer to 25 direct the driver to work, for any reason, at any place within reasonable daily reach of his home, as such a term was what the parties would probably have agreed had they directed their minds to the issue at the outset. On this basis the employer had acted within its contractual rights in requiring the driver to transfer to a depot within easy daily travelling distance of his home and the Court accordingly substituted the finding that the employee 30 had not been constructively dismissed. The distinguishing feature in this case is clear. In this case the place of employment was recorded and the wage rate set accordingly. Allowances were due to be paid because the

Claimants were not working at their contractual place of employment. That much was conceded by the Respondents. There is no question of implying any change to the Claimants' workplace. It was always going to be Heartlands. The fact it was not Heartlands in the time they did work for the Respondents opposition to the claims is irrelevant. The Respondents case in my view is irrelevant. The Respondents are only arguing for a place of employment in Aberdeen to elide responsibility for payment under Clause 5.

The next case I wish to cite is :-

Luke v Stoke-On-Trent City Council EAT Judgment and Court of Appeal Judgment reported 2007 ICR 1678

The issue in the case was whether it was necessary to imply a term allowing an employer temporarily to redeploy an employee outside a particular "unit" where she normally worked in circumstances where she refused to accept the employers reasonable terms for returning to her usual job. She was a special needs teacher and had complained of bullying and harassment at the hands of the Head Teacher and was subsequently off work sick with stress and it was agreed she would not return to work until her allegations had been investigated. She refused to accept the Council's terms on which to return to work following the investigation of her bullying complaints and, moreover, rejected offers of a temporary placement at a different location. She therefore remained off work and eventually the Council stopped paying her salary. She brought a claim for unlawful deduction of wages.

Both the Employment Tribunal and the EAT rejected her claim on the basis that, by virtue of an implied term, the Council required her to work outside the unit. However, they differed on the exact scope of the mobility clause to be implied. The Employment Tribunal held that her rejection of any temporary redeployment outside the unit entitled the Council to stop paying her. In so holding the Tribunal relied upon the Court of Appeal's decision in the Courtaulds case as authority for the proposition that an employer can

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reasonably require an employee to work at a location other than that specified in the Contract so long as the employee does not suffer a detriment and the place is within reasonable travelling distance of home. On Appeal the EAT considered that the Tribunal had gone too far in assuming that the kind of implied term found in Courtaulds would be appropriate in all circumstances and had failed to appreciate the difference in facts between that case which focused purely on geographical location and the Luke case which involved a change in the type of work the Claimant was being asked to do.

In the EAT's opinion where a contract clearly defines an employee's duties the employee is entitled to assume that he or she is not obliged to undertake different duties. In such a case an obligation to undertake duties "outside the Contract" can only be implied, if at all, where (a) the circumstances are exceptional; (b) the requirement is plainly justified; (c) the alternative work is suitable and entails no detriment in benefits or status and (d) the change is only temporary. Applying those criteria to the facts the Employment Appeal Tribunal held that the Tribunal had, nonetheless, arrived at the correct decision. Luke appealed to the Court of Appeal.

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The Court of Appeal also dismissed Luke's wage claim but held that it had not been necessary for the Tribunal or the EAT to go down the road of implied contractual terms. Rather, the case was a straightforward one of "no work no pay". She was not working in the unit and so was not entitled to be paid. The Council's insistence on implementing the action plan before Luke returned to work was reasonable, according to the Tribunal's findings. Therefore her failure to accept this entitled the Council to stop paying her until she returned to work. Lord Justice Mummery noted in passing that the EAT had been right in stating that the facts of the case were not covered by the reasoning in Courtaulds. The Luke case was about employment as a particular kind of teacher at a particular kind of educational institution, rather than at a particular geographical location. However the issue because irrelevant in light of the Tribunal's findings that Luke was simply not working

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according to the express term of the employment Contract. Lord Justice Mummery declined to offer any further opinion on the correctness of the implied term suggested by the EAT.

I would distinguish the fact of this case from the Luke v Stoke-On-Trent case. It is not relevant that the place where the Claimants were working was different from that recorded in their Contracts of Employment. The Respondents in this case acknowledged that much and paid them allowances. The issue is whether they paid the correct and full amount of the allowances due to the Claimants. There is no need to import any implied term that the place of their work had changed whether by business efficacy or any other reason. They would have presumably been transferred to Heartlands as and when it had opened – if they had not been made redundant beforehand. Aberdeen was never chosen nor agreed to be their actual place of employment.

The Respondents also submit that by the conduct of the parties the Tribunal should imply a term into the Claimants' Contract of Employment to the effect they must be deemed to have agreed to a contractual change in their place of employment. As stated if the Claimants were not just physically but contractually bound to carry out their work in Aberdeen and not in Heartlands they would plainly lose the right to claim anything under Clause 5 – Out Station Allowances.

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Dealing specifically with the conduct / performance issue put forward by the Respondents as justification for an implied change and in effect importing a direct mobility term, there are two contrasting cases on the subject. These cases are:-

30 Stevenson v Teesside Bridge & Engineering Limited 1971 IDR page 44

In this case a Steel Erector was dismissed for refusing to work at other sites. There was no express mobility clause but the Contract clearly

envisaged travel as an essential feature of the job; travelling and lodging allowances, for example, were spelt out in detail. In implying a countrywide mobility clause the Divisional Court considered it relevant that Stevenson had agreed to work away from home when he applied for the job and had done so for a considerable part of his employment.

The other case on the subject is:-

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Mumford v Boulton & Paul (Steel Constructions) Limited 1971 ITR 10 page 76

In this case the Court of Appeal refused to imply a wide mobility clause into a Steel Erector's Contract. It was relevant in that case that the employee had never worked outside the London area during his employment. The employer was therefore found to be in breach of contract in transferring him outside London to a place some 77 miles away.

I would invite the Tribunal to resist any invitation to import an implied term changing the Claimants place of Employment in this case. I would submit that with all implied terms what is relevant are the intentions of the parties 20 when the contract was first made. It is legitimate for the Tribunal to examine parties' conduct and performance to ascertain this. It follows that since the issue of implied terms is based on the parties' actual conduct - in the sense of working in Aberdeen - it has to be the parties' actual intentions that are 25 relevant. In follows - as the argument goes in this case - that if the subsequent conduct of the parties – the Claimants in turning up for work in Aberdeen on a weekly basis – is the result of a change of mind on their part by way of acceptance that Aberdeen had become their contractual place of Employment – extreme care should be taken before implying such a term on the basis of that conduct. The difficulty relates to the fact that subsequent 30 performance of work done in Aberdeen can, by definition, only have come at a time long after what the parties had in mind at the time the original contract was formed. It does not seem unreasonable to observe that a party

wishing to rely on subsequent conduct, who cannot establish by itself an implied term from the beginning of the contract, really has to demonstrate an implied variation of the original term during the currency of the Contract. There is plainly a difference between importing an implied term into the contact at the beginning and importing such a term during the Contract. It is accordingly to that subject i.e. implied variation of a contract that I now turn.

Generally, on the subject of variation of individual Employment Contracts it is axiomatic to observe there are only so many ways such a variation can be established in the absence of evidence that the terms were varied as a result of express agreement. There is no such evidence of express agreement in this case. That much is clear. The claimants plainly never expressly agreed to a variation of the contracts such that Aberdeen became their contractual place of employment with he inevitable loss of allowances they saw as being their entitlement under Clause 5.

The Tribunal will accept the basic legal position that the terms of an Employment Contract are determined at its formation and strong evidence of mutual agreement is required to establish those original terms have been lawfully varied. The Tribunal has my submission that never happened in this case, i.e. there was never any mutual agreement by the Claimants to vary their contractual place of employment to Aberdeen.

In the absence of express agreement can it be said there was implied agreement to variation?. The Tribunal has my submission the Respondents, even on their evidence, paid what they classed as "travel and subsistence allowance" right to the end and it does not sit lightly with those facts that when faced with a claim for payment of what the Claimants say they are properly due under Clause 5 of the Contract, the Respondents argue they must be deemed to have agreed at some undefined point to a variation in their place of work thus disentitling them from any payment at all under Out Station allowances.

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Dealing with the anticipated argument that there are circumstances here where agreement to vary the original conduct can be implied from the conduct of the parties which, in this case, was the merely fact the Claimants had continued working in Aberdeen and had not issued formal grievances, I would invite the Tribunal to follow the approach taken in two particular cases these being:-

<u>Solectron Scotland Limited v Roper & others 2004 IRLR</u> and <u>Khatri v</u> <u>Co-operative 2010 IRLR page 715</u>

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In paragraph 30 of the Solectron Judgment Mr Justice Elias in considering employees conduct writes as follows:-

"The fundamental question is this; Is the employees conduct by continuing to work only referable to his having accepted the new 15 terms imposed by the Employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have, by their 20 conduct, after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights. But sometimes the alleged variation does not require any response from the employee at 25 all. In such a case if the employee does nothing his conduct is entirely consistent with the original contract continuing; it is not only referable to his having accepted the new terms. Accordingly, he cannot be taken to have accepted the variation by conduct.

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That approach was accepted in the case <u>Khatri v Co-operative 2010 IRLR</u> <u>page 715</u>. At paragraph 50 of the Judgment Mr Justice Elias' approach in Solectron was approved (see paragraph 51). Applying the exact same

terminology I would submit the conduct of the Claimants in continuing to work at Aberdeen and continuing to accept the allowances they were receiving was not referable to them having "accepted" those terms regulating allowances but, rather, was referable to the fact none of the Claimants wanted to be seen as trouble makers. They were all holding out for their posting to Heartlands and did not want to be dismissed from their temporary position in Aberdeen pending that. That is far closer to the truth of the matter than any suggestion that they must be held to have impliedly agreed to a variation in regard to the place of their work and the allowances the Respondents decided to pay.

Much on the same subject I wish to cite the case decided by the Privy Council to the effect that silence does not imply consent. That was the case:-

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Adamas Limited v Cheung 2011 IRLR page 1014

In that case it was held the mere fact that an employee continued to perform her original contract duty after her employer attempted to impose a change was held not to amount to an implied acceptance of the new term. Cheung, 20 an Assistant Shop Manager, was asked to deliver duty free goods to the Airport. She refused, stating in a letter to her employer that she considered this to fall outside her contractual duties. Some 5 months later she refused a further request to deliver goods and was dismissed for gross misconduct. 25 The Privy Council rejected the employer's argument that by continuing in employment after the first request she had accepted the new term whereby she would be required to make deliveries as and when requested. It was held there was no basis in which it could be said that she had agreed, either expressly or impliedly, to vary the scope of her Contract – see paragraph 32 of the Judgment. The case which does serve to show the limits on implied 30 Flexibility Clauses particularly in regard to relocation is:-

Prestwick Circuits Limited v McAndrew 1990 IRLR page 191

In that case the Court of Session agreed there was an implied term allowing the employer to transfer the employee to a different place of work. However, the Court of Session held it was necessary to imply a further term that reasonable notice of any transfer would be given. The Court rejected the employer's argument that the Tribunal and the EAT had erred in implying what they considered to be a reasonable condition instead of a necessary one. There were no grounds for interfering with the Tribunal's decision that the notice given to the employee of four days, later extended by a further week, was insufficient.

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It could be said such Clauses i.e. implied Flexibility Clauses, are rare since Tribunals and Courts are reluctant to give employers the power to vary a Contract to the detriment of a an employee without the clear agreement of the employee. For example in the case:-

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Security and Facilities Division v Hayes & others 2001 IRLR

The Court of Appeal gave short shrift to the argument that a term should be implied into a contract permitting the unilateral variation of terms governing the payment of subsistence allowances. In that case the employer, despite 20 the availability of provisions for reaching consensual variations, purported unilaterally to vary the amount of the employee's subsistence allowance. The employer argued that the employee's basic contractual right was to be reimbursed their expenses. There was, the employer contended, an 25 implied contractual term that the fixed rate of the subsistence allowance could be varied from time to time provided that the basic right to reimbursement of expenses was honoured and the rate was not varied capriciously. The Court rejected that contention. In its view, it was going too far to imply a term into a Contract of Employment that allows unilateral variation of its terms. The employer was not able to cite any authority in 30 support of the submission and the Court thought that it was improbable that any such right was intended by the parties nor could the Court see any ground for implying such a term on the basis of necessity.

The next case in regard to the restriction of flexibility clauses implied into a Contract to cover relocation is the case:-

United Bank Limited v Akhtar 1989 IRLR page 507

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In this case Mr Akhtar was instructed in accordance with a mobility clause in his Contract to transfer from his employer's Headquarters in Leeds to a branch in Birmingham. The employer as well as giving him very little notice of the transfer, chose not to exercise the discretion set out in his Conditions of Service to provide him with relocation expenses. The Tribunal held this amounted to a fundamental breach of three implied terms, namely, that the employer would give him reasonable notice to any transfer, that the employer would not exercise the discretion to provide relocation expenses in such as way as to make the performance by the employee whose obligation to move impossible and that the employer would not act in such a way as to undermine the mutual trust and confidence of the employment relationship. All three terms were upheld by the EAT on the basis they were necessary to give the contract business efficacy.

In this case it is not accepted there was a flexibility clause in the Contract of Employment for the Claimants that covered any change in their place of employment. Any ambiguity should be resolved against the employer since it is a well established rule of construction in contract law that any ambiguity will be resolved against the party who seeks to rely on it to avoid obligations under the contract. That principle was demonstrated in the case of:-

Bainbridge v Circuit Foil UK Limited 1997 ICR page 501

In that case Mr Bainbridge was entitled under his Contract to the benefit of a long term sickness scheme which was supported by a Health Insurance Policy. The scheme provided that if he was dismissed while in receipt of sick pay the Insurers would pay his the benefits due to him until his 65th

birthday. The scheme also contained a Termination Clause which stated that the employer reserved the right to terminate or amend the scheme at any time "without prior notice". He became ill and was unable to return to work. He received sick pay from November 1985 to March 1993 when he was made redundant and the payment ceased. Only then did his employer tell him that the Health Insurance Policy had been terminated in 1982 and that the Company had been paying the sickness benefit itself. The Court of Appeal accepted his argument his employers were in breach of contract as his contractual right to long term sickness benefit had not been terminated by the employers' cancellation of the Health Insurance Policy in 1982. The Court pointed out that any provision which purports to take away important rights from an employee must be drafted in clear and unequivocal terms.

Drawing all of these matters together I have the following final submissions to make dealing specifically with the Respondents' position in this case and that under reference to their form ET3 pages 6 – 11, Volume 1.

At paragraph 7 the Respondents concede the place of work in the Claimants' Contract was Heartlands. The same conclusion can be inferred from paragraph 15 because otherwise the reference to the "variation" would be redundant. Having established the contractual place of work was Heartlands can the Respondents show that the Claimants consented to change that place of work to Aberdeen?

No case is made by the Respondents that the Claimants expressly agreed to change the place of work. The question therefore becomes whether or not their consent to that change can be inferred from their conduct. They certainly willing travelled to Aberdeen to work. There is nothing however in the evidence which shows they did or said anything which unequivocally evidenced a willingness to vary their contractual place of work. In my submission mere attendance for work in Aberdeen alone did not provide that evidence because it was equally explained by reasons that had nothing to do with the contractual place of work and was simply based on their

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desire to stay in employment and to move to Heartlands as soon as possible a wish plainly shared by the Respondents entire management team.

5 In my submission the Respondents' reliance on business efficacy is unsound. Business efficacy can only be deployed to instruct a contractual term by implication is there is a vacuum in the parties' express agreement. It has no role to play where there is already an express term as here. The Respondents' pleadings read as if they are truly saying that they had a compelling business need which permitted the imposition of a contractual 10 change. If so, that defence should fail. The Claimants Contracts did not allow the Respondents to impose such changes unilaterally. The Respondents could have written its Contract in such a way as to allow flexibility of location. They chose not to do so. In regard to the Respondents' case founded on the absence of protest, that in my 15 submission only matters if by not protesting the Claimants conveyed to the Respondents they had agreed to the change in their place of work. In my view the Tribunal in these cases would be slow to draw that inference. There is certainly no obligation to protest. With regard to the plea of mora taciturnity and acquiescence in my submission that plea is simply used as 20 another way of arguing that the Claimants should be treated as having consented to the change by virtue of their delay in protesting against it. In my view the periods in Aberdeen in question are not long enough to compel the Tribunal to this conclusion. It cannot be ignored either that the Respondents themselves could not wait to close their facility in Aberdeen 25 and move to Heartlands.

With regard to the Respondents reliance on stated methods for claiming expenses and on infrequency of claims - paragraph 10 - these arguments are by themselves irrelevant when it comes to establishing whether or not the Claimants had a contractual entitlement to be paid. In my submission the Respondents' case in regard to their grounds of opposition to the claim for payment based on Clause 5 is unsound and not supported by the

evidence led in the case. I would invite the Tribunal to hold the Respondents' defence is without merit and should be dismissed.

Respondents Closing Submission

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137. Submissions

I. INTRODUCTION

- The claimants, former employees of the respondent, have brought breach of contract claims for monies in respect of travel and subsistence, over and above the allowances which they were paid, which they now say are due, by reason of a clause contained in a schedule appended to their contracts of employment, which they aver applied and which the respondent failed to obtemper.¹ The respondent contends that that clause concerned is inapt to apply in the circumstances relied upon by the claimants; in the alternative, if the tribunal finds the clause apt to apply, that the claimants affirmed the respondent's breach, by reason of *mora*, taciturnity and acquiescence.
 - 2. The claimants having had their employment terminated by the respondent, by reason of redundancy, on the 17th July 2016, entails these claims are competent in the employment tribunal by reason of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994² articles 3 and 7(a) insofar as the matter to which the claims refer was 'outstanding' on the termination of their employment and the claims were presented timeously.

¹ The claims therefore are not for unliquidated damages, but for a sum claimed as due, ie a debt; the correct characterisation being necessary for the correct treatment of mitigation. Notwithstanding that the claimants all secured alternative employment shortly after being made redundant; David Kidd as an NDT Technician on August 16th 2016; Paul McCabe in the Renewable Energy sector in September 2016 and Iain McMillan, with Burntisland Fabricators in July 2016.

3. The layout of these submissions is as follows: In the next section, section II, entitled 'The Evidence' I preface discussion of the evidence, by a chronology setting out the main events of relevance to these claims. In section III, 'The Law' I deal with the issues of law arising, under applicable sub-headings and relate facts adduced in evidence to the relevant law. I conclude with submissions on disposal.

II. THE EVIDENCE

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4. The chronology relevant to these claims is presented in the undernoted table; it is not believed the facts stated therein are in contention:

15 **Figure 1.**

Date	Event and Narrative	Document
May 2014	Announcement that Oil States is to open a new plant for manufacturing at Heartlands, West Lothian.	Vol 2 Document 35 page 139-143
Quarter 3 & 4 2014	Recruitment Campaign in the Central Belt to recruit initially salaried 'Test Lab Hires' and latterly hourly paid 'Workshop Hires'.	
September 2014	Five 'Test Lab Hires' commence employment with Oil States – starting at the Altens, Aberdeen site as Heartlands not yet finished.	
Quarters 1-2 2015	A total of 35 'Workshop Hires' are recruited. David Kidd starts employment	

 2 SI 1994/1624 made pursuant to the power contained in section 131(2) of the Employment Protection (Consolidation) Act 1978 (see now the Employment Tribunals Act 1996 section 3(2).

26 January 2015	with Oil States at Altens, Aberdeen.	Vol 1 Document 12 page 50-67
16 February 2015	Paul McCabe and Iain McMillan start employment with Oil States at Altens, Aberdeen.	Vol 1 Document 3 page 12-29 & Vol 1 Document 22 page 89-101
7 January 2015	Brent Crude dips below \$50 a barrel with consequential serious effects to employment in the 'oil and gas' sector of the economy.	Vol 3 Documents 40, 41,42, pages 216-329
16 June 2016	Redundancy consultation commences.	Vol 2 Document 33 page 128-130
27 June 2016	Claimants are advised they have been provisionally selected for redundancy and are invited to a meeting on the 29 th June.	Vol 1 Document 7 page 35-36; Document 17 page 73-74 & Document26 page 107-108
29 June 2016	Claimants individually attend redundancy selection meeting. Paul McCabe and David Kidd notified that their employment is being terminated by reason of redundancy.	Volume 1 Document 8 page 37-39; Document 18 page 75-77
30 June 2016	lain McMillan is notified that his employment is being terminated by reason of redundancy.	Vol 1 Document 27 page 109-110
8 July 2016	lain McMillan intimates grievance that he should have been paid 'Out Station' allowances in accordance with clause 5 of the Schedule appended to his contract of employment	Vol 1 Document 28 page 111
17 July 2016	The claimants' employment is terminated by reason of redundancy.	Vol 1 Document 8 page 37-39; Document 18 page75-77 & Document 27 page 109-110
22 July 2016	lain McMillan is invited to a Grievance Hearing to be held on the 27 July.	Vol 1 Document 29 page 112

25 July 2016	lain McMillan intimates he will not attend a grievance hearing or participate via Skype/ or teleconference call.	Vol 1 Document 30 page113
27 July 2016	Following consideration of lain McMillan's grievance in his absence, he is advised by letter that it has not been upheld. He is invited to appeal, but does not.	Vol 1 Document 31 page114
Quarter 4 2016	Oil States employees start transferring from Aberdeen to Heartlands .	Vol 2 Document 35 page 196-199
23 December 2016	Altens Facility vacated	Vol 2 Document 35 page 198
4 January 2017	Heartlands becomes operational	Vol 2 Document 35 page 198

 The claimants gave evidence on the 22nd, 23rd and 24th March 2017 and Mr Neville Gall, Area HR Manager for Oil States Industries (UK) Limited gave evidence on the 24th March 2017.

The Evidence of the Claimants

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6. The evidence of the claimants, like their claim can be summarised succinctly, insofar as they rely on their contracts of employment identifying Heartlands as their place of work in both the headnote of the contract of employment and in paragraph 3 'Place of Work' which at paragraph 3.1 states "Your normal place of work is Heartlands..."[Emphasis added]. They also rely on clause 5 (the 'Out Station Allowance') in the schedule that was appended to their contracts of employment, for recovery of sums claimed due in respect of travel, subsistence and travelling time. The respondent contends that that clause whilst incorporated by reference into their contracts of employment, was inapt to apply to the particular circumstances relied on by the claimants, when Aberdeen, not Heartlands became *de facto* their normal place of work, when the

respondent could not take possession of, far less commence operations in the plant at Heartlands.

- 7. The claimants all admitted accepting at interview, that they would spend the first 6-8 weeks of employment with the respondent at Altens, Aberdeen, for the purpose of training and familiarisation, the evidence suggests that their case is predicated on them averring that beyond that time they gave no express agreement for their employment to continue in that location.
 - 8. The claimants were all consistent insofar as they said they believed the Out Station Allowance at clause 5 of the schedule appended to their contracts of employment applied to them albeit none could say that they had ever been told that it did apply. Also it was unclear whether or not they accepted that the Out Station Allowance was not applied to the Test Lab Hires either. What was evident was that all felt aggrieved that another class of employee seemed to be getting something they did not.
- 9. The claimants all admitted that the respondent provided them with accommodation in Aberdeen; only one claimant, David Kidd complained about the quality of his accommodation and requested to move to another location, which was granted. (See Volume 1 Document 16 page 72; the e-mail stating that the claimant sought to stay in the location he identified so he could car share with Stuart McDonald).
 - 10. As regards car sharing, whilst acknowledging that car sharing was permissible and would not affect receipt of the allowance paid by the respondent, all claimants stressed the "inconvenience", including citing different shifts as a reason (and it was established in cross examination that the 2 shift patterns start and finish times, such as would impact directly on travel were day shift: Monday 0800 to

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Friday 1300 and night shift: Monday 2000 to Friday 0300).

11. The claimants David Kidd and Paul McCabe both admitted to travelling 'on company business' to Edzell and Cairnrobin and completing a mileage expenses form and claiming mileage at 40pence *per* mile. Both claimed to have never seen the *Expenses Procedure* document extracted from the employee handbook at **Volume 2 Document 38 page 209** until the tribunal.

- 10 12. All the claimants conceded in cross examination that the sums claimed under all three heads of claim (subsistence; fuel and travelling time) were wrong; this was subsequently addressed and the revised quantification appended to these submissions as Annex 1 was agreed as accurate by the claimants.
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- 13. Notwithstanding there was no documentary evidence other than that at Volume 1 Document 6 page 34 and Volume 1 Document 25 page 106 and no witness evidence from any source other than each other, the claimants maintained that they continued with their protests at the failure to pay them the Out of Station Allowance, but not in writing for fear of "repercussions". For the same reason they stated they did not grieve or complain, individually or collectively after the first few weeks until after they were selected for redundancy. At that point a formal grievance was lodged by lain McMillan (Volume 1 Document 28 page 11) albeit he did not engage with the process, as by the date the grievance hearing meeting was scheduled, he said, in cross examination, that he had secured new employment, in Campbeltown.
- Insofar as they did not register their protests in any formal way or in writing until after they were advised they had been made redundant, the reason relied on was that there was the risk of repercussions or, by the time it got to the evidence of the third claimant, lain McMillan,

that there was a 'climate of fear' in the workplace and that it was 'every man for himself'. This escalation of the fear factor, from the relatively measured evidence of David Kidd to the evidence of lain McMillan whereby he claimed that after the dismissal of one employee he *"made the decision there and then never to complain"* for fear of being sacked and that this was what happened (in general) within the industry was in the respondent's submission far from convincing – in much the same was as his figures of 24 or 26 mpg for a 2 litre Volkswagen Golf GTi.³ In the respondent's submission, this witnesses evidence was in certain areas neither credible nor reliable. He was of course the final witness for the claimants, who having been present throughout, had clearly learned to 'read the case' and attempt to promote that which would best assist the conjoined claimants' case.

15. In the respondent's submission David Kidd was generally a credible witness and indeed was clearly the person who had attempted to address the quantification for both himself and Paul McCabe and the fact that the figures showed over-claiming is not taken by the respondent as evidence of any attempt to knowingly deceive, rather that it was a failure by those advising him to address the matter of quantification. Likewise, the respondent accepts that the claimant Paul McCabe, was by and large truthful albeit there are certain areas of concern in his evidence, most notably the claim that at the redundancy selection meeting he handed Mr Neville Gall a letter grieving about the rate of allowances, when no such letter was lodged in the productions.⁴ Similarly, his allegation that at the meeting between him and Neville Gall (which led to Neville Gall writing the response dated 20th February 2015 at **Volume 1**

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³ The manufacturers own data for the 2 litre petrol version is an average of 44 mpg, comprised of 55mpg on 'highway' driving and 36 mpg in city driving. Even allowing for the fact that manufacturers' figures tend to be unachievable by most drivers in production cars the disparity between what the manufacturer says is possible (and indeed the figures cited on 'petrolhead blogs') and the performance claimed by Mr McMillan, in my submission is not credible.

⁴ Or found by the respondent in the preparation for the case and the compiling of the bundle of documents.

Document 6 page 34 explaining the nature of the allowances the Workshop Hires were being paid) that Neville Gall said to him "you will not be paid these allowances; feel free to leave" a statement which when put to Neville Gall in cross examination he stated "I don't remember saying that – that would go against the grain." That conflict of evidence will be for the tribunal to determine when set against the rest of the evidence of these witnesses.

The Evidence of the Respondent

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16. Mr Neville Gall was the only witness called by the respondent. He explained in detail the background to the development of a new manufacturing plant at Heartlands; how the problems of completion of the new build meant what had originally been intended as a relatively short term secondment to Aberdeen for new hires (both the salaried monthly paid 'Test Lab Hires' and the weekly hourly paid 'Workshop Hires') was through no fault of the respondent unavoidably extended, so that for these claimants the Altens plant at Aberdeen remained their normal place of work for the whole time they were employed by the respondent. He explained the measures that were put in place to enable the new hires to live in Aberdeen during the week. in good quality self-catering, serviced accommodation and the provisions made for travel and subsistence, which after the weekly allowance increased from £65.00 per week taxed to £100.00 per week tax free, until the claimants were notified to be at risk of redundancy had apparently been accepted without question; he explained how certain salaried employees (with whom the claimants sought to make comparisons) had been treated as regards travel and subsistence under different and more onerous vouching provisions. He also explained the purpose of the clause now relied upon by the claimants and how it had hitherto been interpreted. I set out in more detail below the main points made in Mr Gall's evidence.

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- 17. Mr Gall described the nature of Oil States business, globally and in the UK by reference to Volume 3 Document 32 page 115-127. He explained how the respondent operated a manufacturing facility from its premises at Altens Industrial Estate, Aberdeen and how in May 2014, they announced the construction of a new manufacturing facility at Heartlands, West Lothian which would result in the closure of the Company's existing operations in Aberdeen and at a later stage Bathgate. He explained how some Aberdeen employees indicated a willingness to relocate to Heartlands, but the majority did not – only 18% agreeing to relocate, hence, anticipating that the plant would be operational by July 2015 (Volume 2 Document 35 page 141) in guarter 4 of 2014 a recruitment campaign was commenced for prospective employees in the central belt of Scotland, in a range of disciplines, including welders, technicians and inspectors to work at the new facility; these hourly paid employees he called the 'Workshop Hires'.
 - 18. Mr Gall explained that all 35 Workshop Hires (including the claimants) knew they would start working for the respondent in Aberdeen, as that was where their training and familiarisation was to take place and when it became evident that the Heartlands project was delayed, they continued to be seconded to work in Aberdeen until Heartlands was completed and thus during that period, their normal place of work was Aberdeen, there being no other place in Scotland where they could work in their respective roles. He further explained that all employees were kept up to date with information on the progress, or lack thereof, of the Heartlands plant construction; that there were regular meetings with union representatives (Volume 1 Document 35 page133-199) and that information notices were placed in and around the Altens plant.

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- 19. He explained that when the Workshop Hires commenced employment they were issued with standard terms of employment for hourly paid employees, which he had drafted with a view to employment at Heartlands. He stated that these contracts were issued because, initially, it was not thought that the construction delay would last more than a few weeks or months, but he admitted that the respondent should have issued the 'Heartlands Employees' with a written temporary variation to their contracts of employment (in terms of section 4 of the Employment Rights Act 1996) to cover the time they were working in Aberdeen, awaiting the completion of the Heartlands facility. He explained the omission by referring to the fact that employees were concerned they were spending time away from their families and this was straining relationships and in that context he thought that asking them to sign a section 4 agreement with an 'open-ended' commitment to remaining in Aberdeen until the facility was ready, at some unknown date, would have inflamed matters even more. Notwithstanding that, he stated that there was no guestion but that the Workshop Hires, including the claimants were all aware that to remain in employment with the respondent they would have to work at the Aberdeen plant until Heartlands was constructed and became operational.
 - 20. He explained that the schedule attached to the contract of employment provided for "*Working hours, Overtime and Related Matters*" (Volume 1 Document 3 page 26-29 and Document 12 page 64-66) and that it was drafted on the basis of working practices to be followed at Heartlands, not Aberdeen, stating that the intention was to harmonise conditions across the plants. He further explained that clause 5 of the schedule provided for what was referred to as an 'Out Station Allowance' which was only applicable to hourly paid employees, not salaried employees and which had been taken from the contracts issued for the Bathgate plant. For ease of reference the clause is set out below:

"5. OUT STATION ALLOWANCE

- 5.1 Excepting when you are working offshore, when on Company business and required to stay away overnight:-
 - (a) The Company will arrange and pay for overnight accommodation, breakfast and if appropriate, an evening meal.
 - (b) The company will also reimburse the cost of travelling in accordance with allowance thresholds as available by the Finance Department. Further details of the company's reimbursement process, is provided in the expenses procedure.
 - 5.2 **Subject to prior approval** by senior management, travelling time **may** be reimbursed at rates available by the Finance Department." [Emphasis added]
- 21. Mr Gall explained in some detail how the clause and in particular the terms emphasised in bold above had been and were intended to be applied. He explained how the claimants when travelling to and from their *de facto* place of work in Aberdeen to their homes, were not 'on company business' in the way intended by that clause that they were travelling between their homes and place of work, what he called *"their commute"*; by reference to 5.1(a) he explained the context of that provision in terms of staying in a hotel, where no cooking facilities would be available. He explained that in terms of clause 5.2 payment for 'travelling time' under that clause would require the approval of senior management, and that there were only 12 persons who could approve that. He explained that <u>no</u>

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employees on Heartlands contracts (Test Lab Hires or Workshop Hires) had ever had their payment for travelling time to and from their homes in the central belt to Aberdeen approved by senior management during the time they were on secondment in Aberdeen.⁵

- 22. Further, he explained, how the Out Station Allowance could be incurred, having checked with a colleague who said it happened *"once in a blue moon"* such as when an employee was authorised to attend a training course which involved staying in a hotel and where there would be no self-catering facilities. He further observed that Workshop Hires were a class of employee that would seldom be on 'company business' overnight as covered by this clause, not least because most training is arranged on site with trainers coming onto Oil States premises to provide training on Oil States machines. He further stated that if an hourly paid operative was travelling somewhere for training, and travelling to a venue in their own time, then they might get authorisation for payment for travel time, that it was a discretion and would be a rare occurrence.
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23. Mr Gall explained that the difference in treatment between the Test Lab Hires and the Workshop Hires occurred mainly because when the former were recruited, commencing employment a number of months before the Workshop Hires were recruited, for the first few months they were accommodated in hotels, mainly the Premier Inn on the outskirts of Aberdeen, on a bed and breakfast basis which was paid for directly by Oil States and that they were permitted an allowance of up to £20.00 *per* day so as to be able to buy dinner somewhere. He stated that once the company provided them with shared self-catering accommodation, and which some subsequently shared with Workshop Hires, they did not change the arrangement regarding food (which he described as a "hangover" or "legacy") but

⁵ On that basis alone it is submitted there could be no reimbursement under that head even if the tribunal

that once established in the self-catering accommodation the average weekly spend by the 5 Test Lab Hires was significantly less than £20.00 *per* day and averaged out at between £50.00 and £60.00 *per* week. He explained that all food and non-alcoholic drinks purchased had to be vouched for by the production of receipts and the completion of the relevant forms and that this, because of strict audit procedures (internal and external) would have become too onerous an exercise if it had been applied to the numerically greater number of Workshop Hires.

- 24. Mr Gall also explained the regime of allowances as it applied to the Workshop Hires and how it contrasted with the allowances regime put in place for salaried staff, explaining that whereas the Test Lab Hires, who could only claim a mileage allowance if they actually used their car (i.e they could not receive money for car sharing) and were required to submit mileage expenses forms, the Workshop Hires received a single allowance to cover travel and subsistence and that if they car shared they still received the full allowance which had started at £65.00 per week subject to tax, but which, partly because of initial complaints from some of the Workshop Hires, including Mr McCabe, he was able by March 2015 to increase to £100.00 subject to deduction of tax and NI and which subsequently, having received helpful tax advice from PwC (Volume 3 Document 43 page 330-331) he was able to pay tax free.
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25. Mr Gall said that for the period the Workshop Hires were seconded to Aberdeen they were provided with the high quality, self-catering serviced accommodation as shown in **Volume 2 Document 36 page 200-204**. He stated that the Workshop Hires received a flat rate weekly allowance, to cover travel between Aberdeen and home (which usually involved travelling up to Aberdeen on a Monday and returning home on a Friday) and subsistence in respect of which
vouching was not required. He explained that the claimants would automatically receive the allowance even if they car shared and hence incurred no fuel costs, thus car sharing, which he said was encouraged, was known to occur, (as illustrated in the e-mail from David Kidd in **Volume 1 Document 16 page 72**) and which would provide them with a potential element of profit.

- 26. Mr Gall explained that although shortly after commencement of employment some Workshop Hires raised questions and sought clarification about the allowances being paid (as illustrated in the email from David Kidd at Volume 1 Document 15 page 71) and that he had one or more visits to his office by Paul McCabe who complained that employees ("the Test Lab guys") he was sharing with had their meals paid for whereas he didn't. He explained his response to the conversations with Paul McCabe, as illustrated by his reply at Volume 1 Document 6 page 34 and said that after the rate was increased to £100.00 per week the complaints subsided. He also observed that when the union representatives had brought requests in October 2015 that there should be a review because some of the hourly paid staff were looking for an increase to the allowance, that at the 'Shop Committee Meeting' on 30th October 2015 the position of the company was made clear (Volume 2 Document 35 page 167); that there would be no increase. He further stated that that no formal grievance was raised by any Workshop Hire about payment of Aberdeen secondment allowances and/or that the respondent was failing to pay the claimants the 'Out Station Allowance' prior to the claimants receiving intimation that they were being made redundant, after which lain McMillan raised a grievance (Volume 1 Document 28 page 111).
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27. The productions show, and by the time Mr Gall gave evidence, it was a matter of concession by the claimants that they received these weekly allowances even if on sickness absence and also

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during the periods they were on holiday if it was less than 5 days duration. (See **Volume 1 Document 5 page 32-33** in respect of Paul McCabe; **Volume 1 Document 14 page 69-70** in respect of David Kidd and **Volume 1 Document 24 page 104-105** in respect of lain McMillan and the Annex to these submissions, being the amounts agreed between agents and the claimants that they would receive under each head of claim if successful).

- 28. Mr Gall stated that he had briefed the temporary employee, Anna Peciak, who had been hired to facilitate recruitment in the central belt, on the matter of the weekly allowance and what it was to cover and that he was in no doubt that she understood it and would have conveyed it to the employees concerned. He further explained that the reason that the word 'Travel' rather than 'Travel and Subsistence' appeared on the pay slips was because of the limitation of the 'field size' (within the accounting payroll system).
 - 29. Mr Gall also stated that he had set the fuel and subsistence allowance for the workshop hires on the basis of what appeared to be reasonable rates for staples such as would be purchased at supermarkets like Tesco and the spend on fuel in an average sized car and that the allowance was intended to be *"cost neutral"*⁶ by reference to what he considered to be reasonable expenditure on transport and food and non-alcoholic beverages, and which after the initial period he was able to set at the inclusive allowance rate of £100.00 *per* week for Workshop Hires, who could car share and who were living, during the working week, in high quality 'executive accommodation' with good kitchen facilities; this sum in his opinion should have been sufficient to cover their outlays on travel and food ⁷

⁶ By 'cost neutral' it is believed the witness meant the expenditure leaving the claimant neither out of pocket nor making a profit.

⁷(*Cf* the data contained in the Office for National Statistics at **Volume 2 Document 39 (A)-(C) page 210-215** which was put to the claimants.

- 30. By reference to data extracted from the *Oil and Gas UK Economic Report 2016* ('OGUK') and the *Oil and Gas Survey November 2016* by Aberdeen and Grampian Chamber of Commerce and University of Strathclyde ('OGS') (**Volume 3 Documents 40-42 pages 216-329** inclusive) Mr Gall explained how the effect of the fall in the price of Brent crude below \$50 a barrel had impacted on businesses in the oil and gas sector in Aberdeen and beyond, and that consequent on the global slowdown in the oil and gas industry, Oil States need for certain types of employee diminished and hence another redundancy exercise was commenced in June 2016 which required the shedding of staff as shown in **Volume 2 Document 33 page 128-130**.
- Notwithstanding the claimants had insufficient service to claim they had been unfairly dismissed by reason of redundancy Mr Gall, *inter alia* by reference to Volume 1 Document 33 page 128-130 explained that there had been proper collective consultation and all employees provisionally selected had been interviewed before redundancy was confirmed.⁸ He explained that the three claimants were amongst the Workshop Hires at risk of redundancy in the Altens plant (Volume 2 Document 33 page 128-130) and that a total of 9 Workshop Hires including the claimants, were subsequently made redundant effective from 17th July 2016.
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32. Mr Gall explained, that it was only after the claimants had been advised on the 27th June that they had been provisionally selected for redundancy and invited to a meeting to discuss their selection (Volume 1 Document 7 page 35-36; Volume 1 Document 17 page 73-74; Volume 1 Document 26 page 107-108) that a grievance stating that the 'Out Station Allowance' should have been

⁸ In David Kidd's ET1 at the penultimate paragraph at 8.2 it is claimed that the selection procedure was defective, specifically it is stated there was :"[N]o consultation, no matrix was used in the selection process, failure to follow ACAS Guidelines."

applied during the time the Oil States facility at Altens, Aberdeen, was their *de facto* place of work was raised by one of them, namely lain McMillan (**Volume 1 Document 28 page 111**). Further Mr Gall stated that having been invited to a grievance meeting (**Volume 1 Document 29 page 112**) Mr McMillan replied saying that he would not attend a grievance hearing in person or participate by Skype or teleconferencing (**Volume 1 Document 30 page 113**). As a result the grievance was determined in his absence and by letter dated 27th July 2016, Alex Leiper, the Fabrication Manager, did not uphold the grievance (**Volume 1Document 31 page 114**).

In the respondent's submission, Mr Gall was a credible and reliable witness.

15 **III. LAW**

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- 34. Whilst it is accepted that the relevant express term in question states that the claimants' place of work was to be Heartlands and at paragraph 3.1 of the claimants' contracts of employment it is stated *"[Y]our normal place of work is Heartlands Business Park"* it is patently clear that until the construction of Heartlands was complete and a 'habitation certificate' issued by the local authority, the claimants could not have worked at that location in the capacities in which they had been hired, or indeed in any capacity. On one analysis their contracts were 'frustrated by impossibility' or at the very least performance was suspended for as long as it was impossible to work there.
- 35. Given the foregoing circumstances, of the options available to the respondent in February 2015, it is submitted that the one most favourable to the claimants was that which was agreed if not expressly by the claimants, then 'by performance' by way of a

temporary secondment⁹ to the Oil States plant at Altens, Aberdeen, which would be their normal place of work until Heartlands became operational. The issue in law is how that is to be characterised, when the claimants were not provided with a written section 4 Employment Rights Act variation of contract. In the first instance, that requires addressing the relationship between express and implied terms.

The relationship between express and implied contract terms

36. It is a well-established principle of contract law that express terms take precedence over implied terms. In **Johnson v. Unisys Ltd** [2001] ICR 480 HL, the House of Lords held that implied terms can supplement the express terms of a contract but cannot contradict them, as only Parliament can override what the parties have agreed (*per* Lord Hoffman at paragraph 37). This principle makes sense since an express term reflects what the parties have actually agreed, whereas an implied term reflects what the parties are taken to have agreed, or would have agreed, had they directed their minds to the matter. There is also authority that in certain circumstances, implied terms may be used to qualify express terms, or at least restrict the way in which express terms are applied in practice; see for example **Johnstone v. Bloomsbury Health Authority** [1991] ICR 269 CA.¹⁰ In my submission analogous reasoning may be

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⁹ The use of the term 'Aberdeen secondment' or 'temporary secondment' was not only used by the respondent, it was also used by the claimants; see David Kidd's e-mail of 29th January 2015 (Volume 1 Document 15 page 71) and in his ET1 at para 8.2 (Volume 1 Document 10 page 43). The relevance of the terms are explicable and are beneficial to the claimants by reason of the tax treatment as explained in the e-mails from Price Waterhouse Coopers at Volume 3 Document 43 page 330-331.

¹⁰ In **Johnstone v. Bloomsbury Health Authority** [1991] ICR 269 CA, Sir Nicolas Browne-Wilkinson VC stated that, although on the principles of contract law an express term of the contract had to take precedence over any implied term, the contract in this case (that of a junior hospital doctor whose contract required that he be available for up to 48 hours' overtime per week) gave the employer a discretion as to how many hours' overtime it could require the doctor to work. In exercising that discretion, the employer was bound by its duty to care for the employee's safety. Accordingly, the right to require the doctor to work up to 48 hours' overtime had to be exercised in the light of the implied term that the employer would provide a safe system of work. Lord Justice Stuart-Smith viewed the legal mechanics slightly differently. He said that the employee's duty to work the hours expressly stipulated by the contract and the employer's implied duty to provide a safe system of work could be reconciled by making the express term subject to the implied one.

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applied in the instant case; Heartlands was always to be the normal place of work, when construction was completed, but until then, by implication or with the agreement of the claimants (express or implied by performance), until that occurred the claimants normal place of work, on a temporary basis, would be Altens, Aberdeen. In my submission that constituted a 'necessary implication' without which the contract would have been frustrated at the end of the 6 to 8 weeks when the claimants had expressly agreed that they would attend Altens for training and induction and when at the time of contracting it was believed the move to Heartlands would occur. When it was impossible to move to Heartlands at the end of that period, on the claimants' argument the contract would be frustrated, or at least unworkable absent some variation.

37. Implied terms form a binding part of the contract and are those 15 which the parties are taken to have agreed by virtue of the circumstances in which the contract has been made or performed and whether a particular term should be implied into a contract is a question of law and, as such, can be challenged on appeal - but it must be stressed that a court or tribunal will only look at the 20 presumed intention of the parties at the time that the contract was made and although an implied term is as much a part of a contract as an express term, it is a general principle of contract law that an implied term cannot override the clearly expressed intention of the parties. In this case, it is submitted that at the time of contracting the 25 intention of the parties was that the claimants would transfer to work at Heartlands after the initial 6-8 week period in Aberdeen; in my submission there was never any intention to override that by substituting an alternative place of work on a permanent basis. At the time of contracting, it is self-evident that the parties did not 30 address the question 'what if' Heartlands was not going to be operational at the intended time or shortly thereafter, because of a

defaulting principal contractor, any more than they addressed 'what will we do if the plant burns down'. Thus, there was a lacuna, because the parties did not address circumstances which they had no reason to believe would transpire. On that analysis, that the claimants (and others on 'Heartlands contracts') continued working in Aberdeen after the date when it was anticipated that Heartlands would become operational was the only way the keep the contract of employment alive, by avoiding its frustration, and as a result, that Aberdeen should thus be the *de facto* or normal place of work until Heartlands was ready, was in the respondent's submission a 'necessary implication' until the expressed intention of the parties was capable of being achieved.¹¹

38. Before considering the legal tests for implying terms into a contract of employment, it should first be noted that the question of whether a particular implied term applies in the circumstances of a case is separate from whether there has actually been a breach of that term. Further, a court or tribunal may not imply a term into a contract simply because it is a reasonable one; nor may they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the court or tribunal can presume that it would have been the intention of the parties to include it in the agreement. In order to make such a presumption, the court or tribunal must be satisfied that: -

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- (i) the term is necessary in order to give the contract business efficacy, or
- (ii) it is the normal custom and practice to include such a term in contracts of that particular kind; or

¹¹ This is the epitome of *casus omissus* when, say in a contractual document, the contracting parties have failed to foresee something or provide for certain contingencies, thus opening the way for the application of the 'doctrine of necessary implication'.

- (iii) an intention to include the term is demonstrated by the way in which the contract has been performed; or
- (iv) the term is so obvious that the parties must have intended it.

In the instant case (i) and (iii) are of relevance and I consider each below.

Business efficacy

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- 39. As regards business efficacy, there is a general presumption that the parties to a contract intended to create a workable agreement. If, therefore, it is necessary to imply a term in order to give business efficacy to the contract and make it workable, the courts will be prepared to do so (see Reigate v. Union Manufacturing Co (Ramsbottom) Ltd 1918 1 KB 592 CA per Scrutton LJ at 605 lines 6-12). A term may only be implied on this basis if it is necessary to make the whole agreement workable. In the respondent's submission it was necessary to substitute, temporarily, the normal place of work in order to make all other aspects of the contract workable on the basis if the new plant was still under construction and the old plant was the only place the employees could undertake the work for which they had been contracted, then the implied term should be given temporary effect, until the express term could be applied.
- 40. The Supreme Court confirmed the tests of business efficacy and obviousness in Marks and Spencer plc v. BNP Paribas Securities Services Trust Company (Jersey) Ltd and anor 2015 UKSC 72 SC.¹² The Court observed that some academics and judges had mistakenly understood the Privy Council's decision in Attorney General of Belize and ors v. Belize Telecom Ltd and anor 2009

1 WLR 1988 PC¹³ to have diluted the business efficacy test, such that a term could be implied if it was merely reasonable (not necessary) to do so. Lord Neuberger, at paragraphs 14-21 and with whom Lords Sumption and Hodge agreed, pointed out that the test is not one of "absolute necessity" and suggested that it might be more helpful to say that a term can only be implied if, without the term, the contract would lack "commercial or practical coherence". In the instant case, in my submission, there would have been no practical coherence to the claimants' contracts unless and until the Heartlands construction was completed because they would not be capable of performance at any place in Scotland other than at the Aberdeen facility.

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There is

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"We can accept that if an employer, under the stresses of the requirements of his business, directs an employee to transfer to other suitable work on a purely temporary basis and at no diminution in wages, that may, in the ordinary case, not constitute a breach of contract."

also authority for the proposition that, in exceptional

circumstances, the courts and tribunals may imply a 'temporary'

mobility clause into a contract of employment, and on this basis I

would argue, by analogy the court may imply a temporary 'normal place of work' clause. In **Millbrook Furnishing Industries Ltd v.**

McIntosh and ors [1981] IRLR 309 EAT the Employment Appeal

Tribunal, stated, albeit *obiter* at paragraph 11:

42. These comments were subsequently considered by the Court of Appeal in Luke v. Stoke-on-Trent City Council [2007] ICR 1678CA, a case concerning the aftermath of a bullying and harassment

¹² This was not an employment related case, it concerned the law of landlord and tenant, but the principles adumbrated are equally applicable.

¹³ As above, this likewise was not an employment case, but a commercial case concerning an implying a term into a company's Articles of Association.

complaint by the claimant. An external investigator had devised an 'action plan' to return the claimant to her role in the Council's Assessing Continuing Education (ACE) unit. However, the claimant refused to agree to the plan, even though the Council was of the view that she could not return to the ACE unit unless she did so. It proposed redeploying her so that there would be no loss of salary, but again there was no agreement - the claimant was unwilling to work outside the ACE unit. When her pay was stopped, she brought a claim for unlawful deductions from wages. When the case reached the Employment Appeal Tribunal, Mr Justice Underhill expressed agreement with the *obiter* comments in **Millbrook**, but cautioned that employers should not be permitted to resort to an implied term in order to impose what is in truth a unilateral permanent variation of the terms of the contract. In the Employment Appeal Tribunal's view, an obligation to undertake duties 'outside the contract' can only be implied where the circumstances are exceptional, the requirement is plainly justified, the alternative work is suitable and entails no detriment in benefits or status, and the change is only temporary (emphasis added; cf paragraph 8 of the judgment). Since all the conditions were satisfied, it found an implied term entitling the Council to redeploy the claimant until such time as she agreed to the action plan or an alternative solution was reached.¹⁴

43. In the instant case there was no question that the Aberdeen secondment was to be undertaken on anything other than a temporary basis and the fact that the claimants were made redundant before the Heartlands facility became operational is nothing to the point.

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¹⁴ However when the case reached the Court of Appeal, Lord Justice Mummery found that it had not been necessary for the tribunal or the Employment Appeal Tribunal to go down the road of implied contractual terms. Rather, he found that the case was a straightforward one of 'no work, no pay' - the claimant was not working in the ACE unit and so was not entitled to be paid. Mummery LJ was unwilling to offer further *obiter* views on the correctness of the implied term found by the Employment Appeal Tribunal, thus leaving open the possibility that such a term did in fact exist.

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Inclusion of the term is demonstrated by contract performance

- 44. In my submission another way by which the tribunal may imply a term into an employment contract is to look at how the parties have operated the contract in practice, including all the surrounding facts and circumstances (see Mears v. Safecar Security Ltd [1982] ICR 626 CA¹⁵). This approach may demonstrate that the contract has been performed in such a way as to suggest that a particular term exists, even though the parties have not expressly agreed it. Whilst this might be considered as an argument of acquiescence, in my submission it is in this case distinguishable, because I only argue the acquiescence point in the context of the acceptance of the travel and subsistence arrangements, whereas the contract performance argument supports the implied term of the temporary, 'normal place of work' being Aberdeen in the context of that term being necessarily implied in order to achieve business efficacy when there was only one plant in Scotland undertaking the work the claimants were employed to undertake and that for 17 months they undertook work exclusively at the Aberdeen facility.¹⁶
 - 45. In the instant case, the section 1 Employment Rights Act statement can be seen as incomplete, because in the absence of a mobility clause it did not provide for the eventuality that did occur; there was no section 4 variation to cover the contractual lacuna as to what was to happen after the 6-8 weeks when the claimants had agreed to train and work at Aberdeen, when Heartlands was not ready and when the respondent did not have legal control of the site, and when in the absence of a 'habitation certificate' it would have been

¹⁵ In this case the Court of Appeal applied this test where the point at issue was whether there was an implied term that the employer would pay sick pay. On the evidence, it had never paid sick pay to anybody in the past and the claimant had never asked for it, despite having been off sick for about half of his 14 months' employment with them. Therefore, the only term that could be implied from the conduct of the parties was that employees were not entitled to sick pay. The Court of Appeal went on to say that if a tribunal is unable to determine, from the facts and circumstances, what would have been agreed, it must determine what should have been agreed.

unlawful to access or enter the premises for the purpose of any work.¹⁷ Given the contract of employment was thus rendered incomplete in the absence of a section 4 Employment Rights Act variation, setting out what was to happen in the event of Heartlands being incapable of occupation or being operational after the 6-8 week period¹⁸ then in my submission what is said in **Mears** at 648 C-F and 649 C-F and in particular 652 A-C is apt and applicable in this case.

- 46. In my submission the tribunal should find that there was no breach 10 of contract, by reason that the express contractual term stating the place of work, was moderated or gualified by an implied term, necessary to give the contract business efficacy, namely that until Heartlands was constructed and operational the normal place of work would, temporarily, be the Oil States facility at Altens 15 Aberdeen and that was demonstrated by performance, thereby avoiding frustration of the contract by reason of impossibility (of performance) and if that was the case, then pari passu clause 5 of schedule 1 appended to the claimants' contracts of employment could not have been engaged, even on the claimants' case taken at 20 its highest.
 - 47. In addition to the claimants contending that they are contractually entitled to payment in respect of clause 5.1(a) and (b) of schedule 1 they also seek to recover under 5.2¹⁹ for time spent travelling –

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¹⁶ In my submission the contract performance argument also supports the existence of an implied mobility clause.

¹⁷ The effective control of the site rested with Lagan Construction until the contract was terminated – see **Volume 2 Document 35 page 176-184**.

¹⁸ The evidence demonstrated that at the time the Workshop Hires, including the claimant, were interviewed in the last quarter of 2014, the expectation was that the Heartlands plant would come on line in the manner set out in the '*Gateway & Heartlands Developments Newsletter: Issue 01 July 2014*' at **Volume 2 Document 35 page 141** (final paragraph). As explained by Neville Gall said Newsletter was discontinued after the first issue because of the effect the positive promotion of the new development in the central belt was having on Aberdeen staff who were not prepared to move to Heartlands and thus would be made redundant.

¹⁹ Which states "*Subject to prior approval* by senior management, travelling time **may** be reimbursed at rates available by the Finance Department" [Emphasis added].

irrespective of the fact they had never sought it until the claim was presented and thus there could have been no "*prior approval by senior management*". In this regard the respondent's agent was notified by Mr Jim Warnock, who initially represented Mr David Kidd, that it was his intention to rely on the judgment of the Court of Justice of the European Union in **Federación de Servicios Privados del sindicato Comisiones obreras v. Tyco Integrated Security** C-266 14 [2015] ICR 1159 CJEU to establish independently of the terms of clause 5.2 that his client was entitled to payment for travelling time. Notwithstanding Mr Kidd's new agent, on the 22nd March stated he was not relying on **Tyco** I include a short submission here on the point it was believed was to be advanced by Mr Warnock.²⁰

15 Reliance on the 'Tyco' judgment?

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48. In my submission any attempt to rely on this authority in the context of these claims is entirely misplaced. Patently, nearly every worker with a fixed workplace has to spend time travelling to the workplace before starting work, and returning home after his or her work has finished. The time thus spent clearly does not meet any of the three elements of the definition of working time in the Working Time Regulations 1998;²¹ the worker is not working, but travelling to or from work; the worker is not at the employer's disposal—the employer cannot dictate how the worker gets to or from work; and the worker is not performing his or her tasks or activities.²² Equally clearly, a worker required to work at different places in the course of the working day must spend some of the time between the start and finish of the shift or working day travelling between places, such as David Kidd and Paul McCabe did when travelling 'on Company

²⁰ It should be noted that there appeared to be an assumption that the applicable rate should this clause be said found to apply was that of the claimants' normal hourly rate of pay; that is not what clause 5.2 says and Mr Neville Gall was not cross examined on what the actual rate would have been in 2015/2016. ²¹ SI 1998/1833.

²² See the definition of 'working time' at regulation 2(1)(a).

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business' to Cairnrobin and Edzell (and in Paul McCabe's case to the Babcock Doosan plant in Renfrew) and where they admitted to receiving expenses in accordance with the respondent's expenses policy, then it is more than likely that this time is sufficiently intrinsic to the performance of whatever work is to be done on arrival at the next location that it satisfies each of the three cumulative requirements set out at regulation 2(1)(a) and no authority to date has suggested otherwise. So in my submission the argument contended for that the claimants are entitled to payment for travelling time when they were simply travelling to and from their 'normal' or 'habitual' place of work can be disposed of on that basis alone.

- 49. Any reliance on Tyco is in my submission equally misplaced insofar as the case is simply not in point. Stated simply, in Tyco the CJEU held that in the case of workers who do not have a fixed or habitual place of work (such as care workers who visit patients in their own homes and service engineers who travel to see customers), the time spent travelling each day between their homes and the premises of the first and last patients or customers constitutes 'working time' within the meaning of the Working Time Directive. The rationale is that during such time the worker is at work, at the employer's disposal and carrying out their duties or activities. However, the CJEU also stated that, annual leave apart, the Directive does not concern itself with worker's pay so that whether a worker should be remunerated for such travelling time is entirely a matter for member states.
 - 50. I now consider the issues arising if the tribunal finds that there was a breach of contract. This focuses on matters concerning the accommodation, subsistence and travel arrangements that Oil States put in place for the Workshop Hires to facilitate their

temporary secondment to Aberdeen and the response and actings of the claimants in this regard.

Unilateral variation, mora, taciturnity and acquiescence

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- 51. The legal principles are well known to the tribunal so I will not labour them here, simply provide a summary: If an employer simply announces or effects a unilateral change in contractual terms, this will be a breach of contract; this breach may or may not be so serious as to amount to a fundamental or repudiatory breach of contract. If there is a breach, an employee can respond to that breach of contract in one of the following five ways:-
 - the employee can acquiesce in the breach by simply carrying on working under the revised terms;
 - (ii) if the breach is a fundamental breach going to the heart of the contract, the employee can resign and claim to have been unfairly constructively dismissed (assuming qualifying service);
 - (iii) the employee can simply refuse to work under the new terms if, for example, the new terms allow this – such as if they involve a change in duties or hours;
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- (iv) the employee can 'stand and sue' that is the employee can work on under protest and seek damages representing the loss arising from the employer's breach, or seek a declaration that the employer must abide by the original terms;²³

²³ It is well established, on high authority, that an employee who continues to work under protest after a unilateral variation by the employer will not be prevented from bringing a claim for damages for breach of contract (see for example **Rigby v. Ferodo Ltd** [1988] ICR 29 (HL); **Burdett Coutts v. Hertfordshire County Council** [1984] IRLR 91 QBD).

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- (v) where the change can be said to amount to a termination of the old contract and an introduction of a new contract, the employee can work under the new contract and claim to have been unfairly dismissed from the old one.
- 52. The situation is rendered somewhat different where a variation has no immediate impact on the employee and therefore does not require a response - for example, where there are changes to redundancy terms outside any imminent or actual redundancy situation. In such cases, if the employee does nothing, his or her conduct may be entirely consistent with the original contract continuing, and does not necessarily signify acceptance of the variation. This however does not apply in the instant case as the variation to the express place of work *per* the contract of employment had immediate effect, as did the travel and subsistence allowance regime applied to the claimants and all the hourly paid 'Workshop Hires'.
- 53. It is of course the respondent's position that that there was no breach, because the clause 5 'Out Station Allowance' provision did not apply to the circumstances affecting these employees, as explained by Neville Gall, but if the tribunal finds that clause 5 did apply, then the respondent relies on (i), and (iv) on the basis that the evidence shows that the claimants did not raise any formal complaint until after they were notified of having been selected for redundancy and then only one claimant, lain McMillan raised a grievance, albeit he failed to engage with the process, which he explained in cross examination, was because he had secured new employment. In the respondent's submission, this case is really predicated on the claimants having discovered that salaried employees on Heartlands contracts had different contractual arrangements (which inter alia did not include terms in the schedule appended to the claimants' contracts - hence the Out Station

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Allowance could not have applied to their arrangements either) which they perceived as more favourable than theirs as regards travel and mileage allowance and subsistence.

- 5 54. Given the factual circumstances, and should a breach of contract be found, the respondent submits that the claimants are personally barred based on the common law principles of '*mora*, taciturnity and acquiescence'. Stated shortly *mora* simply means delay, beyond what is a reasonable time²⁴ and taciturnity, the failure to speak out to make known the right or claim relied on.
 - 55. That this plea is competent in respect of claims within the employment tribunal's jurisdiction where there are statutory limitation provisions laid down, is, in the respondent's submission evidenced by **Henry & Ors v. London General Transport Services Ltd** [2001] IRLR 132 EAT and [2002] ICR 910 CA, a claim under section 13 of the Employment Rights Act for 'unlawful deduction of wages' and where the Court of Appeal held that by continuing to work at reduced rates of pay without stating at an early stage that they were doing so under protest, the employees had accepted the new pay rates (*cf* paragraphs 19-23 and the authorities cited therein).²⁵

²⁴ Abridged from the definition in *Bell's Dictionary and Digest of the Laws of Scotland*, published by Bell and Bradfute, Edinburgh 1890.

²⁵ The facts are as follows: London General Transport Services Ltd employed London bus drivers. A management/employee buyout was negotiated. The negotiations, in which the TGWU represented the employees, involved the bus drivers agreeing generally less favourable terms of employment. Some of the drivers refused to accept the wage reductions which were part of the negotiated package. Nevertheless they continued to work on. Initially they did not give any indication that they were doing so "under protest" but eventually made that position clear and some two years later lodged claims for unlawful deductions from wages. The employees won their claim before the London (South) tribunal in 1996. The employment tribunal found that although the TGWU negotiated agreement had been capable of incorporation into the employees' contracts, the employees concerned had not affirmed the amended terms and so they were not bound by them. The employer appealed to the Employment Appeal Tribunal which agreed with the employment tribunal that the custom and practice by which the TGWU negotiated the collective agreement fulfilled the three requirements needed to make it capable of being binding (ie the practice was reasonable, certain and well known) but, overruled the employment tribunal, on the affirmation/acquiescence point. The Employment Appeal Tribunal held that by continuing to work the employees concerned had accepted the new terms. If they had wished to work on without prejudicing their rights to complain they should have made that known at an early stage and on the 21st March 2002 the Court of Appeal upheld the Employment Appeal Tribunal's decision and on 3rd December 2002 the House of Lords rejected an application to appeal against this Court of Appeal decision (see [2003] ICR 88). The case having been remitted to the Employment Tribunal, dismissed the employees' complaints on 30th September 2003. The employees appealed again to

- 56. In Hendrick v. Chief Constable of Strathclyde Police 2014 SC 551²⁶ an Extra Division of the Court of Session having considered the development of the defence opined, as follows:
 - "[43] Finally, a more recent statement of the law comes from Lord President Hamilton in *Somerville v Scottish Ministers*²⁷ (paras 92-94). After reviewing the relevant cases, including *Singh v Secretary of State for the Home Department* (*No 1*)²⁸ (and in so doing, expressly quoting from *Assets Co Ltd v Bain's Trs*²⁹) the Lord President stated (para 94):-

'In considering the submissions we remind ourselves, in the first place, of the meaning of the words of the plea. *Mora*, or delay, is a general term applicable to all undue delay (see Bell, *Dictionary*, sv "*Mora*"). Taciturnity connotes a failure to speak out in assertion of one's right or claim. Acquiescence is silence or passive assent to what has taken place. For the plea to be sustained, all three elements must be present. In civil proceedings delay alone is not enough; the position in criminal proceedings may be otherwise (see *Robertson*

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the Employment Appeal Tribunal which dismissed the appeal on 26th April 2004 (see McLeod (formerly Henry) and ors v. London General Transport Services Ltd UKEAT/0973/03).

²⁶ The relevant facts are that in 2006 the petitioner, a police officer, was served with formal misconduct proceedings and the petitioner was ultimately dismissed. Appeals taken by him ended unsuccessfully in September 2010. Almost two years later, in July 2012, the petitioner raised proceedings for judicial review. He challenged several aspects of the disciplinary proceedings, in particular the admission of hearsay evidence, the alleged nondisclosure of a letter from the complainer withdrawing her complaint, and the standard of proof applied (namely, on a balance of probabilities). After sundry procedure, by interlocutor dated 26 April 2013, the Lord Ordinary dismissed the petition and on 19th February 2014 the Court refused the reclaiming motion.

²⁷ 2007 SC 140.

²⁸ 2000 SLT 533.

²⁹ (1904) 6 F 692 and 754.

v Frame, per Lord Rodger of Earlsferry, para 37). We have quoted the passage from Lord Nimmo Smith's opinion in Singh v Secretary of State for the Home Department, approved (albeit obiter) by Lord Hope in Burkett,³⁰ because counsel were agreed that this was the fullest treatment of the subject in judicial review cases. While we are content to adopt it, we would emphasise that prejudice or reliance are not necessary elements of the plea. At most, they feature as circumstances from which acquiescence may be inferred. By its nature, acquiescence is almost always to be inferred from the whole circumstances, which must therefore be the subject of averment to support the plea'.

- [44] In our opinion, the line of authority referred to above supports the proposition that the plea of *mora*, taciturnity and acquiescence may succeed if the first two elements are established (namely *mora* and taciturnity) and then either prejudice or acquiescence can be inferred from the facts and circumstances. So the inference may be one of acquiescence on the part of the person against whom the plea is taken, or prejudice suffered by the party relying upon the plea, or, of course, both acquiescence and prejudice." [Emphasis added]
- 57. Therefore, if the employee acquiesces in the employer's breach then he or she may be taken by his or her conduct to have impliedly agreed to a unilateral variation in the contract of employment and in

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³⁰ [2002] UKHL 23; [2002] 1 WLR 1593.

such circumstances, will lose the opportunity to sue for breach of contract. The longer the period over which the acquiescence occurs, (*mora*) the more likely a court or tribunal will find the breach has been affirmed. Employees will in many cases try to stave off acquiescence by making clear the lack of agreement (thus rebutting taciturnity) and working on 'under protest'.³¹ Conceptually the problem is in determining how long that can last, before the danger arises for the employee of being deemed to have acquiesced.³² Such a matter is self-evidently very fact sensitive, and seeking authority analogous on the facts to support a plea of *mora* taciturnity and acquiescence, will be of limited assistance.

58. However, an example of a case concerning the payment of travel expenses, which has some similarities with the present case is GAP Personnel Franchises Ltd v. Robinson EAT 0342/07. In this case the claimant was employed on a contract which stated that travelling expenses would be paid at 25 pence *per* mile. Shortly after he began working, GAP Ltd unilaterally varied the contract to the effect that mileage would be paid at 15 pence *per* mile. After the first month, the claimant subsequently submitted expenses forms claiming 15 pence *per* mile until he left GAP Ltd's employment, after which he brought tribunal claims for breach of contract and unlawful deductions from wages.³³ While a tribunal found that GAP Ltd had breached the claimant's contract, the Employment Appeal Tribunal disagreed. It held that, by submitting expense claims at the varied

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³¹ To do so the employee must be prepared to operate the new terms during this time see **Robinson v. Tescom Corpn.** [2008] IRLR 408 EAT.

³² One possibility (especially where the enforced change involves a measurable detriment, such as a decrease in pay) would be to work on for a short period and then bring a common law action for breach of contract, the damages being the value of the decrease for the period in question. This tactic was used successfully in **Rigby v. Ferodo Ltd** and **Burdett-Coutts v. Hertfordshire CC** to challenge unilateral pay cuts.

³³ It should be noted that it is impermissible to bring an 'unlawful deduction of wages' claim in respect of *"any payment in respect of expenses incurred by the worker in carrying out his employment"* by reason of section 27(2)(b) of the Employment Rights Act 1996. Somewhat surprisingly this point was not made by HHJ Peter Clark although it seems clear from the judgment that the mileage allowance expenses point was dealt with both by the employment tribunal and the Employment Appeal Tribunal as a breach of contract claim.

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rate for five months, the claimant may have affirmed the contract and thereby given his implied consent to the variation. However by reason of the employment judge [chairman] failing to make proper findings of fact, the case required to be remitted to a fresh tribunal for re-hearing. I set out the relevant part of the Employment Appeal Tribunal's judgment below:-

- "22. As Lord Denning MR made clear in Western Excavating (ECC) Ltd v. Sharp [1978] ICR 221 (CA) where the employer is in repudiatory breach of 10 contract the employee must make up his mind soon after the breach whether he wishes to treat himself as discharged, otherwise he may be treated as having affirmed the contract by acquiescence, thus terminating and waiving the breach. There is a wealth 15 of case-law on the question as to when the employee will be treated as having affirmed the breach: see Harvey on Industrial Relations Vol 1, D1 paragraph 5-23 and following; each case is fact sensitive.
 - 23. I do not accept that the mere fact that the unilateral variation is a 'fait accompli' (every unilateral variation by the employer may be so described) or that the employee raised no complaint because he did not wish to lose his job, prevents the Employment Tribunal from finding that at a certain point the employee may properly be taken to have affirmed the contract by acquiescence. Further, the absence of a written statement of variation, as provided for in clause 31 of the Claimant's contract and required by s4 ERA, to which I have been referred by Mr Robinson in his written submissions, is not necessarily fatal to the employer's affirmation contention.

Conclusion

24. I am unable to accept the Chairman's reasoning in full. Whilst it must be acknowledged that the Respondent 5 was in breach of contract in not paying the first month's travel expenses at the higher rate, it is equally clear that the Respondent thereafter (sic) made it known to the Claimant that it would not do so in future. The question then arises as to whether the Claimant continued to work under protest, as to which the 10 Chairman made no finding and if not, when the Claimant could properly be said to have affirmed the contract by acquiescence. The Chairman indicated that had this been a constructive dismissal case "it may well be that I would have concluded that the Claimant 15 had lost the right to resign in respect of a breach in which he had apparently acquiesced for six months" (Reasons paragraph 19). That suggests to me that, asking the correct question in relation to this breach of contract/unlawful deductions claim the Chairman, 20 properly directing himself in law, would have found that before the end of the employment in July 2004 the Claimant had affirmed the contract and that no breach occurred thereafter. If so, the Chairman made no 25 finding as to the date of affirmation.

<u>Disposal</u>

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25. It follows that the Respondent has satisfied me that the Chairman fell into error and that this part of the decision must be set aside, save for the differential in respect of the first month's proper mileage claim. That figure ought to be capable of agreement between the

parties, together with the 10 percent uplift which is not challenged in the appeal by either party.

26. As to the balance of the mileage claim it must be remitted to a fresh Tribunal Chairman for rehearing. I am not in a position to resolve the factual question as to whether or not the Claimant continued to work under protest after submitting the first month's expenses. Further, it is for the fact-finding Employment Tribunal, having heard the evidence, to determine the further, question should it arise, as to when, if at all, affirmation took place."

The above extract also demonstrates the importance of the employment judge setting out with clarity whether the claimant worked under protest (and the nature and extent of any protest) such as rebut affirmation of the contract by acquiescence and if finding that there was affirmation, when that occurred.

59. In the instant case, the respondent submits that affirmation 20 commenced, in the case of Paul McCabe at the latest, shortly after the 20th February 2015, after he received the e-mail from Neville Gall Volume 1 Document 6 page 34. In the case of David Kidd sometime around the 3rd February 2015 when he received an e-mail from Anna Peciak at Volume 1 Document 15 page 71 in response 25 to his query about expenses. In the case of lain McMillan at the latest by the 25th March 2015 after receiving the e-mail response from Anna Peciak at Volume 1 Document 25 page 106. No other documentation was produced to show the claimants' were doing anything to negate affirmation of the allowance as paid or that they 30 believed the respondent was in breach of contract (or withholding monies such as to constitute a breach of section 13 of the Employment Rights Act 1996) or that they believed they had an

entitlement to the 'Out Station Allowance' at clause 5 of the schedule appended to their contracts of employment after they had been advised that their employment was to be terminated by reason of redundancy.

60. Notwithstanding the foregoing, the claimants may seek to persuade the tribunal that the fact that in October 2015 there had been a request made to management that the allowances for hourly paid Heartlands contact employees, at that time being £100.00 per week tax free, should be reviewed (as evidenced by the minute of the 'Shop Committee Meeting' (Volume 2 Document 35 page 168) is indicative that they had not acquiesced. In my submission that is flawed for the following reasons: Firstly, no evidence was led that the claimants were in any way the instigators of the 'request'. Secondly, in my submission any reliance on grumblings of dissatisfaction on the shop floor, from employees who were feeling the strain of working away from home is simply insufficient to rebut taciturnity - as are allegations of a 'culture of fear' - which interestingly escalated in tone from the fairly measured averments of David Kidd to what in the respondent's submission were the totally 'over the top' assertions of Iain McMillan as regards the 'culture of fear' and an 'every man for himself' ethos that allegedly pervaded the plant. Thirdly, the evidence from Neville Gall was that after the allowance was raised to £100.00 paid gross the early disquiet subsided - which in my submission is also supported by the fact that within the volume of productions there is not a single document to show that any of the claimants expressed any dissatisfaction with the allowances other than the response to Paul McCabe's complaint in the week ending Friday the 20th February 2015 (Volume 1 Document 6 page 34) and David Kidd's query of the 29th January 2015 (Volume 1 Document 15 page 71).³⁴

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61. In my submission, should the tribunal find that the respondent was in breach of contract by not applying the 'Out Station Allowance' at clause 5 of the schedule appended to the claimants' contracts of temporarily, until employment, when. Heartlands became operational, the normal place of work was Altens Aberdeen, then given there was no formal complaint as to the arrangements for travel and subsistence, which were in place from the start of the claimants' employment, until they were notified that they had been provisionally selected for redundancy, a period extending from the 2nd February 2015 until the 27th June 2016, then the tribunal should find that they acquiesced in the breach as to their express terms or any variation as to their express terms and conditions of employment as originally contracted.

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CONCLUSION

For all the reasons set out above I respectfully submit that the tribunal should dismiss the claims of Messrs McCabe, Kidd and McMillan.

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Observations on the Witnesses

138. All 3 claimants gave their evidence clearly. There was limited conflict of evidence as to what happened during the course of their employment with the respondent with limited exceptions, for example, the second claimant maintaining that he submitted a grievance at his redundancy meeting

³⁴ To try and effect compliance with the Tribunal's Order of the 9th December 2016 the claimants then representatives were asked not only for the "*….written statement with supporting documentation setting out:- (i) How much is claimed in respect of each type of complaint with a detailed explanation of how each sum is calculated; ….."* (which in terms of the tribunal's Order should have been provided by the 30^{th} December 2016) but also, repeatedly, in the following months for any documents that they wished to add to a joint bundle – none was forthcoming, other than a couple of days before the hearing, after the bundle had been printed and bound, when the claimants' representative sought to lodge pay slips; the respondent had no objection and these were lodged as a separate 'volume'. Paul McCabe made reference to a document he allegedly handed to Neville Gall at the redundancy selection meeting, but Mr Gall was not cross examined on this and the respondent in good faith lodged all documents in its possession that concerned any of the claimants.

which Mr Gall did not recall. On balance, as indicated above, the Tribunal concluded it was unlikely such a grievance would have been overlooked by Mr Gall when writing to the second claimant to inform his of the termination of his employment.

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- 139. Another issue was whether Mr Gall did say to the second claimant at a meeting, after explaining that the Out Station Allowance did not apply and that he should "feel free to leave". Whether this was said or not there is no doubt that the terms of Mr Gall's email to the second claimant dated 20 February 2015, (page 34) which followed on from their meeting make it clear what was being provided, namely "(i) serviced accommodation and (ii) a weekly allowance" (at that time £65 which was later increased to £100). The email continued that, "For the avoidance of doubt, Out Station Allowance (OSA) does not apply during the Aberdeen Secondment."
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- 140. That email had already referred to the second claimant attending the respondent's facility in Altens for training and to carry out work which is then referred to as "Aberdeen Secondment").
- 141. It is also relevant to note that the first claimant in his email to Ms Peciak of
 29 January 2015 referred to "... whilst I'm working on secondment in
 Aberdeen", (page 71).
- 142. In the case of the third claimant it was suggested by Ms Marsh that his views were expressed in more exaggerated terms than those of his 2 colleagues. It was suggested this may be because he had had the opportunity to hear the evidence of his 2 colleagues before giving his own evidence. Whilst noting this comment the Tribunal found his evidence to be mostly credible.

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143. In relation to Mr Gall, he gave his evidence in a measured manner and accepted that the respondent could, with hindsight, perhaps have dealt with matters in a different way in that a Section 4 Variation in terms of the

Employment Rights Act 1996 could have been issued to the claimants. Against that, his reason for not doing so was that he did not consider it would have been appropriate to tie individuals to being based in Aberdeen for what would be an indefinite period at a time when it had become apparent that the Heartlands facility was not going to be available as anticipated.

- 144. The main area of conflict was in relation to the Out Station Allowance. It is instructive to note that, as indicated by Ms Marsh in her closing submission, none of the 3 claimants suggested that they were ever told in terms by the respondent that it would apply while they were working in Aberdeen. Nevertheless, she accepted they all believed that, since the Schedule in which it was contained was attached to their employment terms, it must apply.
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The Law

- 145. Section 3 of the Employment Tribunals Act 1996 confers jurisdiction on Employment Tribunals to hear a claim for damages for breach of contract if the claim is such that a court in England, Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.
 - 146. Subsection 3(6) specifies that:-
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- "(6) In this section reference to breach of a contract includes a ` reference to breach of –
 - (a) a term implied in a contract by or under any enactment or otherwise,
 - (b) a term of a contract as modified by or under any enactment or otherwise, and

(c) a term which, although not contained in a contract, is incorporated in the contract by another term of the contract."

5 **Deliberation & Determination**

- 147. The Tribunal was grateful to the representatives for providing such detailed submissions and for their careful analysis of the various authorities to which they referred. It is appropriate to mention that their attention was drawn to a fairly recent judgment of the Supreme Court, *Arnold –v-Britton & Others* [2015] UKSC36 reported at [2015] AC. Ms Marsh explained that one of the authorities provided by her *Marks & Spencer Plc –v- BMP Paribas Securities Services Trust Co (Jersey) Ltd & Another* [2015] UKSC72 SC at paragraph 17 mentions the test of "*necessary to give business efficacy*" to a contract by Lady Hale in Gays at paragraph 55 and by Lord Carnwath in *Arnold –v- Britton [2015]* 2 WLR 1593, paragraph 112.
- Ms Marsh further referred the Tribunal to paragraph 19 in the *Marks & Spencer* judgment where there is reference to *Phillips Electronique Grand Public SA –v- British Sky Broadcasting Ltd* [1995] EMLR 472,
 481 and, in particular, the quotation from of Sir Thomas Bingham MR at page 482:
- 25 "The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong. He then quoted the observations of Scrutton LJ in Reigate, and continued "[I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it,

unless it can also be shown either there was only one contractual solution or that one of several possible solutions would without have been preferred ..."

- 5 149. Having drawn the representatives' attention to *Arnold* neither of them wished to provide any further submission on it.
 - 150. In this case it was not in dispute that the 3 claimants' Terms and Conditions were set out in the documentation referred to above. Nor is it in dispute that, so far as the 3 claimants were concerned, the only clause which they thought could be relevant to the issue of an Allowance was Clause 5 in the Schedule, i.e. the "Out Station Allowance".
- 151. It was resolutely argued by Mr O'Donnell that they were always Heartlands employees. However, where the respondent fundamentally disagrees is that while all 3 claimants were recruited to work at Heartlands, that site was still under construction when they were first employed. They all agreed to work in Aberdeen, initially for a period between 6 to 8 weeks. It was only as the months rolled on that it became apparent that Heartlands was not going to become available and, on a month to month basis, updates were provided, each one continuing to explain that Heartlands was still under construction.
- 152. Mr O'Donnell submitted that the Tribunal should have regard to the precontract discussions at the interviews. All 3 claimants knew they would be starting work in Aberdeen and that made the significance of what allowances would be paid to them all the more important because they would be living away from home. There is no dispute that the 3 claimants were provided with serviced accommodation for which they were not charged throughout their employment in Aberdeen. Nor is it in dispute that they received a weekly Allowance which the respondent intended was to cover both Travel and Subsistence, albeit it was specified in their payslips as covering only Travel.

- 153. For the 3 claimants, it was submitted that the wording of Clause 5 should be given "the ordinary natural meaning" (see Investors Compensation Scheme Ltd, (above). Mr O'Donnell suggested that the Tribunal should avoid the temptation to revisit the contractual position with the benefit of hindsight, based on the knowledge that the 3 claimants never worked at Heartlands but look only at what was agreed in the contract.
- 154. Clause 5 he contends, makes it clear that, leaving aside working offshore which was never relevant here, when an individual was "on Company business and required to stay away overnight" then 5.1(a) and 5.1(b) would take effect.
- 155. The Tribunal could not see how one could interpret the first part, i.e. required to stay away overnight as meaning each and every night when the 3 claimants were staying away from home but based in the serviced accommodation provided for them in Aberdeen. That is a very different situation from what is envisaged in terms of the Out Station Allowance in the Schedule and, in light of information, provided by Mr Gall as to what it was intended to cover.

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156. It was apparent from Mr Gall that what he was anticipating was occasional situations when an individual employee was sent on company business and, in doing so, required to stay away overnight. That, in the Tribunal's view was very different indeed from a situation where the 3 claimants all accepted that they required to work from Aberdeen for at least the first 6 to 8 weeks of their employment with the respondent. While it is most unfortunate that due to circumstances beyond their control, the respondent was not in a position to relocate the claimants and indeed all the other Heartlands employees to the new facility at Heartlands. They could not do so as it was not ready. Instead, the respondent continued to provide the 3 claimants with serviced accommodation for the entire time that they were based/seconded to work in Aberdeen.

- 157. Looking at Clause 5 of the Schedule it is only when an individual is required to stay away <u>overnight</u> (the Tribunal's emphasis) that sub-clauses 5.1(a) and 5.1(b) become operative. It was not drafted to deal with the situation which arose when Heartlands was not ready to be occupied. The Tribunal noted all that was said by Ms Marsh and, in his evidence by Mr Gall, as to why a variation to the employment terms was not provided to the employees, including the 3 claimants.
- 158. Ms Marsh set out why the Tribunal then required to look at the position in law regarding express and implied terms. It cannot be in any doubt that 10 since Heartlands was not available, the normal place of work could not be Heartlands. The 3 claimants had agreed to be in Aberdeen for 6 to 8 weeks but once it became clear that this was to be their ongoing place of work then was there a variation of the contract. As Ms Marsh explained, express terms take precedence over implied terms. The Tribunal concluded that 15 her analysis was correct that until Heartlands was ready then, by implication, the only place of work was Aberdeen. The Tribunal concluded that she was also correct that this was a necessary implication without which the contract would have been frustrated. It is also understandable from the 3 claimants' perspective that they preferred to continue working 20 there as they all hoped that Heartlands would become operational. They each would have preferred to work there as it would have meant they could commute from home on a daily basis which was not feasible in Aberdeen.
- 159. The Tribunal noted the test set out for implying terms into a contract of employment and the need to be satisfied that the terms are necessary to give the contract business efficacy and that an intention to include the term was demonstrated by the way the contract was performed. The Tribunal concluded that it was necessary to imply that the place of work became
 Aberdeen since that was the only way in which the 3 claimants could continue to carry out the work for which they had been employed.

- 160. The Tribunal concluded, as it was invited to do by Ms Marsh, that there was no breach of contract by reason that the express contractual term stating that the place of work was Heartlands was in fact moderated or qualified by an implied term, necessary to give business efficacy to the contract so that while Heartlands was not operational the normal place of work was Aberdeen. By doing so, this avoided frustration of the contract.
- 161. While the Tribunal noted all that is said by Mr O'Donnell that the 3 claimants were always Heartlands employees where that was not available for them as it was not completed, the only other place of work was Aberdeen. While it was suggested that the 3 claimants never agreed to being anything other than Heartlands employees this does not sit easily with the first claimant saying in his email of 29 January 2015, "whilst I'm working on secondment in Aberdeen." The third claimant when asked where he told people he was working, readily accepted he would reply it was Aberdeen, albeit he would go on to explain that he would be moving to Heartlands once it was operational. The Tribunal did not understand the second claimant to demur from the reality that he was working for the respondent in Aberdeen given the Heartlands facility was not available.
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162. The Tribunal concluded that it could not say that the respondent was in breach of Clause 5 (the Out Station Allowance) since the Out Station Allowance was not drafted to cover a situation where employees were working indefinitely in Aberdeen. While the Tribunal noted the 3 claimants say that they did not accept the position as set out in the Note of the meeting of 30 October 2015 there is no doubt that they did all agree that they had accepted they would have to be based in Aberdeen as their de facto place of work as there was nowhere else to work since Heartlands was not available.

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163. In relation to the claim made for travelling time, while the Tribunal noted this is mentioned in Clause 5.3 this was subject to prior approval by senior management to agree that travelling time may be reimbursed at rates

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available by the Finance Department. Again, that was in relation to when an individual was working on company business and staying away overnight. There was no application made by 3 claimants, at any time, seeking to be reimbursed by the respondent for the travel time incurred in commuting from home to Aberdeen. They accepted this would have had to have been approved by senior management. In relation to travelling time the Tribunal concluded that Ms Marsh's submission was correct.

- 164. Had the Tribunal required to consider the argument in relation to
 acquiescence it would have held that this was also correct since the 3
 claimants had impliedly agreed to the unilateral variation in the sense that
 they had accepted that they had no alternative but to work in Aberdeen.
 They all made it clear that the reason they did not pursue the issue of the
 amount of the Allowance which was being paid to them each week, was
 because it suited them to continue to work in Aberdeen in the expectation
 and hope that they would eventually relocate to Heartlands. Heartlands
 would have suited all 3 of them as it would have meant that they were all
 working in a facility which was relatively close to their homes.
- 20 165. In all these circumstances, the Tribunal concluded that there was no breach of contract and so it follows that these claims must be dismissed.
- 166. Since the Tribunal has concluded that there was no breach of contract, it does not require to consider how the claims were calculated other than to note that it was accepted by the 3 claimants that their calculations as originally provided were overstated. Having spent considerable time looking at the calculations and the representatives reaching agreement as to what would be the appropriate revised amounts to be paid in the event the claims succeeded, the Tribunal indicated there was a concern that had it found there was a breach of contract, then the issue would have arisen as to how to quantify the value of the claims in relation to the first and second claimants who were seeking £15 per day as the amount payable with the third claimant who was seeking £20 per day, the sum originally

also sought by his two colleagues. The Tribunal raised this in light of the fact that there was no information as to what had actually been spent by each of the 3 claimants during the time they worked in Aberdeen for food and subsistence. No receipts had been kept for such purchases. It would, of course, have been for the claimants to satisfy the Tribunal as to the amount of any such award of to be made for this aspect of the quantification of their claims. However, this issue does not require to be determined since the claims have not succeeded.

10 167. In conclusion, it follows applying the law to the above findings in fact, that these claims must be dismissed.

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20 Employment Judge: F Jane Garvie
 Date of Judgment: 20 April 2017
 Entered in Register: 20 April 2017
 and Copied to Parties