Case No: 2301935/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr S Farrer

Respondent: Secretary of State for Justice

Heard at: London South **On:** 21 April 2017

Before: Employment Judge Morton

Representation
Claimant: Ms Waterman
Respondent: Mr T Kirk (Counsel)

RESERVED JUDGMENT

The Claimant's claims of unlawful deduction from wages and breach of contract fail and are dismissed.

REASONS

1. I apologise to the parties for the delay in producing this judgment which is due to circumstances beyond my control.

2. The proper Respondent to this action is the Secretary of State for Justice.

The claims

3. By a claim form presented on 7 October 2016 the Claimant brought a claim in relation to sums owed under his contract of employment. He did not specify whether he brought the claim as one of deduction from wages or one of breach of contract but his complaint related to the manner in which the Respondent had calculated a payment it made to him on his dismissal for medical inefficiency on 16 June 2016.

4. The Claimant gave evidence on his own behalf at the hearing and the Respondent's evidence was given by Jim Fraser, HR Policy Lead in the Human Resources Directorate of the National Offender Management Service ("NOMS") and Rebecca Canning, Head of Lewisham and Southwark Probation and the Claimant's line manager. Mr Fraser did not give oral evidence as he had to leave the hearing unexpectedly as a result of a family emergency. The Claimant was content to continue the hearing nevertheless, relying on Mr Fraser's written statement.

5. There was a bundle of agreed documents and references to page numbers in this judgment are references to page numbers in that bundle.

The law

6. Claims of breach of contract may be brought under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623 Article 3 of which provides:

> **Proceedings may be brought before an [employment tribunal] 1 in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if-**
>
> **(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;**
>
> **(b) the claim is not one to which article 5 applies; and**
>
> **(c) the claim arises or is outstanding on the termination of the employee's employment.**

7. The provisions on deductions from wages are contained in various sections of the Employment Rights Act 1996 ("ERA") including sections 13 and 27.

   Section 13 provides:

> **13.— Right not to suffer unauthorised deductions.**
>
> **(1) An employer shall not make a deduction from wages of a worker employed by him unless—**
>
> **(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or**
>
> **(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.**

   Section 27 provides:

> **27.— Meaning of "wages" etc.**
>
> **(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment.…**
>
> **but excluding any payments within subsection (2).**

(2) Those payments are—….. (c) any payment by way of a pension, allowance

or gratuity in connection with the worker's retirement or as compensation for loss of office…

I was also referred by Mr Kirk to two cases on the incorporation of terms into contracts of employment – Keeley v Fosroc International Ltd [2006] IRLR 961 and Alexander v Standard Telephones and Cables Ltd [1990] IRLR55. I return to those decisions in my conclusions below.

The issues

8. The agreed issues were as follows:

    a. What cause of action does the Claimant rely on: unlawful deduction from wages or breach of contract?

    b. What were the relevant rules governing the calculation of the medical inefficiency payment and in particular what is the meaning of "reckonable service"?

    c. What was the contractual status of these rules?

    d. Were these rules properly applied in the Claimant's case and, in particular, was his medical inefficiency payment correctly calculated?

Findings of fact

9. The facts of this case were substantially agreed. The Claimant was a probation officer and had been employed initially by the Inner London Probation and After Care Service. From 1986 he worked as a fully qualified Probation Office for the Inner London Probation Service. That service was subsequently incorporated into the National Probation Service which was managed by the Home Office until 2007 when responsibility for it moved to the newly created Ministry of Justice. The Claimant's employment transferred to the London Probation Trust when that was created the following year.

10. The Ministry of Justice instigated the Transforming Rehabilitation Programme in 2013 in which Mr Fraser assisted. The programme included a reorganisation of the way in which probation services were delivered. In 2014, as part of this process, the London Probation Trust was dissolved and on 1 June 2014 the Claimant's employment, along with that of all other London probation officers, was transferred to the National Probation Service (NPS), a newly created directorate within the National Offender Management Service (NOMS).

11. The transfer was effected by means of a staff transfer scheme (page 43) which largely but not entirely replicates the provisions of TUPE. The scheme preserved the terms and conditions of the transferring employees and confirmed that they would remain members of the Local Government Pension Scheme. Hence they did not join the Principal Civil Service

Pension Scheme (PCSPS). The document at page 160 (National Agreement on Pay and Conditions of Service) sets out the terms and conditions applicable to probation officers. There were no provisions in that document that provided for a payment in the event that an employee was not capable of continuing in employment because of ill health. The Claimant's employment was terminated on grounds of medical inefficiency on 16 June 2016.

12. A Management of Attendance Policy (PI 37/2014) was also introduced at the time of the transfer, although certain elements were excluded pending consultation with the Unions. A revised version of the policy (page 78) was issued on 2 December 2015 after consultation had taken place. The policy states: "This is a new policy specifically for the NPS which sets out the Management of Attendance arrangements in place". It also sets out in italics, a series of instructions which it describes as "mandatory actions" which must be "strictly adhered to". For the purposes of this case there are three paragraphs in the policy that are of particular importance (passages italicised as in the original):

> "*3.26 The payment of compensation must be considered for all members of staff dismissed due to Unsatisfactory Attendance in accordance with Cabinet Office publication 'Personnel Information Notice 40' available on My Services.*
>
> *3.42 Termination of employment from NOMS without compensation on the ground of capability caused by poor health must only be considered following a Capability Hearing and where there is no serious underlying medical condition and an Occupational Health Physician has confirmed that the Equality Act 2010 is unlikely to apply, and staff do not fit the criteria for early retirement on ill-health grounds, Tiers 1, 2 or 3 or termination of employment due to medical inefficiency.*
>
> 3.43 Staff need to have one year's Civil Service qualifying service to be eligible for a compensation payment (previous service with non-Civil Service employers does not count).
>
> *3.45 The Capability Hearing is mandatory. Staff must be informed that they are entitled to be represented by a workplace colleague or union representative at the hearing at least 10 working days prior to the hearing. Before the hearing an estimate of compensation must be obtained. If the decision is taken to dismiss the member of staff, a decision must be made regarding the level of compensation to be paid. Dismissal will be with notice. …the employee must be sent a letter confirming the decision taken with information regarding compensation to be paid and regarding the right to appeal if the decision is made to dismiss.* "

13. PIN40 (referred to in paragraph 3.26 above) states as follows (as far as relevant to the issues in this case):

> "Section 11.4 of the Civil Service Management Code reflects the discretion which departments and agencies have to pay compensation in cases where staff are dismissed on grounds of inefficiency. In the event of a decision to compensate, departments and agencies have to decide on the level of compensation which would be appropriate to reflect the degree of individual (or indeed department/agency) culpability. Guidelines for assessing compensation in such cases are attached at Annex A.
>
> The maximum level of compensation which may be payable if the employing department or agency decides that compensation is appropriate is set out in Section 11 of the Civil Service Compensation Scheme…..

…..the following paragraphs give some general guidelines relevant to the decision whether or not compensation should be awarded.

Poor attenders

Staff whose attendance is irregular may fall into two categories:
1. The long-term sick – staff who have been absent for a long period whose absence cannot continue to be covered or tolerated, but whose condition is not judged appropriate for medical retirement. Most such cases would normally qualify for full compensation where medical evidence exists or can be obtained to show that the inability to attend is beyond the control of the individual…"

14. The relevant provisions of the Civil Service Compensation Scheme state as follows:

Section 1: Application

1.13 The expressions "reckonable service" and "pensionable earnings" shall have the same meaning for the same purposes as under the PCSPS, except as otherwise provided in the scheme….

Section 3

3.3 …..a compensation payment may be paid… calculated as follows:

(a) two weeks' pensionable earnings for each of the first five years of reckonable service; plus
(b) three weeks' pensionable earnings for each of the next five years of reckonable service; plus
(c) four weeks' pensionable earnings for each year of reckonable service after the first ten years; plus
(d) two weeks' pensionable earnings for each year of reckonable service after the fortieth birthday.

3.3a …where early severance takes place on or after 1 April 1998, the calculation in rule 3.3 shall be on the basis that:

(a) in (a) in place of the words "for each of the first five years of reckonable service" use: "for each year of reckonable service during the first five years of qualifying service";
(b) in (b) in place of the words "for each of the next five years of reckonable service" use: "for each year of reckonable service during the next five years of qualifying service";
(c) in (c) in place of the words "the first ten years" use: "the first ten years of qualifying service"……

Section 11: Dismissal for inefficiency

11.1 If a civil servant is dismissed for inefficiency and:
(a) the employing department decides that payment of compensation would be appropriate; and
(b) the civil servant has served for at least one year,

Then…
(iii) if the dismissal occurs on or after 1 April 1998 the maximum compensation which may be paid is that calculated in accordance with rule 3.3 of this scheme…

11.4 In the case of new entrants and staff employed on a fixed term appointment any award made under rule 11.1 …. Shall be calculated by reference to current reckonable service and to current qualifying service and references in those rules to reckonable service and to qualifying service shall be construed accordingly.

15. The PCSPS defines "reckonable service" as follows:

> Reckonable service means service (in the Civil Service or elsewhere) which reckons towards a pension under this scheme. 'Qualifying service' means service which counts towards the qualifying periods for benefits; it is usually, but not necessarily, the same as Reckonable Service. Section 2 sets out the different kinds of service which are treated as reckonable or qualifying. In all cases reckonable and qualifying service are counted in years and fractions of a year….

16. Also relevant is the Civil Service Management Code which states:

> "**11.4 Dismissal for inefficiency**
>
> 11.4.2 Once a decision has been taken to dismiss a member of staff, departments and agencies must determine whether compensation should be paid and if so how much. The maximum amount of compensation that may be paid is set out in Section 11 of the Civil Service Compensation Scheme (CSCS). If departments and agencies consider that compensation should be paid, they must assess in percentage terms the extent to which, if at all, they consider the inefficiency to have been beyond the individual's control. The compensation payable should then be calculated by applying that percentage to the maximum that could be paid under the CSCS in that case. Guidelines for assessing compensation can be found in Personnel Information Notice (PIN) 40.

17. Finally there were two almost identical documents in the bundle at pages 93A and 94 which were both undated and both described as "Guidance for Managers: Compensation for Medical Inefficiency (NPS Directorate)". In the index to the bundle the document at page 93A was described as the "original version". It was agreed during the re-examination of the Claimant that Mr Fraser would be the person to explain the significance of the two documents. Unfortunately Mr Fraser had to leave the hearing before giving evidence and he was not therefore able to explain the reason for the existence of two versions of the guidance. However I accepted Ms Canning's evidence that the process she was following when arriving at a compensation figure for the Claimant was the one set out in the document at page 94, which envisaged that a figure would be obtained from HR Policy rather than the manager herself calculating the figure, (as envisaged the policy at page 93A, which included a formula at page 93B). Hence I find that the applicable guidance in this case was that set out at pages 94-96. At page 96 the guidance states "Head of Business Unit or Heads of LDU/Function must refer to PIN 40 and they must make a decision on the level of compensation to be paid (which will be based on their service as a Civil Servant)". I note that the words in brackets did not appear in the version at page 93.

18. I find on the basis of these documents that the management of the Claimant's absence was governed by the revised policy at page 78 (PI 37/2014), which was introduced six months before the Claimant's dismissal. That policy reflected certain provisions of the Civil Service Compensation Scheme. There were then three separate documents that provided guidance to managers on how to implement the policy – PIN40, the Civil Service Management Code and the "Guidance for Managers" document at page 94. The calculation of the payment due then borrowed the critical definition "reckonable service", required for determining the payment due from the PCSPS, of which the Claimant was not a member.

19. That there were uncertainties arising from the evolution of PI 37/2014 was clear from correspondence between the probation officers' union, Napo and Peter Firth, Deputy Director NPS HR. On 2 December 2015 Peter Firth, sent a letter to Dean Rogers, Assistant General Secretary of Napo (page 51). This letter sets out a response to various queries raised by Mr Rogers in an email that was not in the bundle. The letter states as follows:

> "Thank you for your email of 26 November in which you raised a number of issues in relation to compensation payments for NPS staff. Please see my response to each of your points below.
>
> The staff transfer was a 'TUPE-like' transfer and not a true TUPE transfer under s Staff Transfer Scheme. This means that whilst every attempt is made to echo TUPE conditions this isn't always the case.
>
> This notwithstanding, continuity of employment is guaranteed such that staff will not suffer a detriment from their existing terms and conditions. This compensation provision did not form part of the former Probation Trust staff's terms and conditions of employment prior to transfer and therefore there was nothing to transfer in this respect. The compensation scheme, therefore, is not a matter relating to pre-existing Terms and Conditions of former Probation trust staff.
>
> As civil servants, NPS staff are subject to the provisions of the Civil Service Code in the same way as everyone else who becomes a civil servant. This aspect of the Code applies to anyone who has been a civil servant for a year and is dependent on being a civil servant (NPS staff didn't' fulfil this requirement until 1 June 2015 having transferred on 1 June 2014) so to apply it from former Trust staffs' date of continuous employment would represent a benefit not afforded to any other civil servant.
>
> There is no mandatory entitlement to compensation. Staff have the right to request but each case will be considered separately. Guidance on the calculation aspect is being developed for NPS DDs and NPS HRBPs and will be shared with you shortly.
>
> The issue then is whether the staff in question should have been considered under any pre-existing former Trust provisions. There are no provisions for ill-health termination in the NNC handbook (but there may have been provisions applied by individual Trusts) so the base position is that there would be no compensation due. The LGPS early retirement provisions may apply but again this is a discretionary process".

This letter suggests that questions about the calculation of medical inefficiency payments to probation officers and the number of years of service that should be taken into account had arisen some months before the Claimant's dismissal.

20. Mr Farrer's continuous service with the NPS dated back to 1982. However his period of service with the Civil Service began on 1 June 2014. His employment came to an end on 15 June 2016 when he was dismissed on grounds of medical inefficiency. There is no dispute as to the Respondent's entitlement to terminate his contract for that reason under its Management of Attendance Policy or that the Claimant had a medical condition that meant that he would not be able to return to work within a timescale that was acceptable to the Respondent. The dispute concerns the number of years of service that were taken into account in calculating

the payment due to him on termination. It was the Claimant's case that some or all of his service with the London Probation Trust and its predecessors should have been taken into account in computing the payment and that it should have been based on paragraph (d) of the formula set out in paragraph 3.3 of the CSCS (two weeks' pensionable earnings for each year of reckonable service after the fortieth birthday - 18 years in the Claimant's case). It was the Respondent's case that he was only entitled to have his two years of service as a civil servant taken into account.

21. Ms Canning as the Claimant's line manager, was responsible for the decision to dismiss. The possibility of ill health retirement was explored with the Claimant but he did not want to take up that option, so in accordance with the Guidance at page 94 she asked the NOMS HR Policy team to provide her with a quote for the maximum payment that could be made to the Claimant under the policy. At page 64 is an email dated 19 May 2016 in which she notified the Claimant's trade union representative Mr Cohen that the payment the Claimant was entitled to was £5903.70 (a figure that was later revised upwards to £6395.66). At page 67 is an email dated 24 May from Mr Fraser to Ms Canning which explains how the figure was arrived at. The substance of that email was copied to Mr Cohen by Ms Canning in an email dated 25 May at page 65D. The email explains that the following formula was used:

> "The calculation is based on total reckonable service (as a Civil Servant) for the member. Then break it down into reckonable service in first five years of qualifying service, next five years of qualifying service, reckonable service after the first ten years and reckonable service after 40th birthday.
> Use full time pensionable pay….
>
> The calculation is then a+b+c+d.
>
> a) 2 weeks' pensionable pay for each year of reckonable service during the first five years of qualifying service
> b) 3 weeks' pensionable pay for each year of reckonable service during the next five years of qualifying service
> c) 4 weeks' pensionable pay for each year of reckonable service after the first ten years of qualifying service
> d) 2 weeks pensionable pay for each year of reckonable service after the 40th birthday.
>
> As NPS staff only became Civil Servants on 1 June 2014, b and c in the calculation do not apply."

Hence the Respondent's approach was to count only years of service after the Claimant became a civil servant – giving a total of eight weeks' pay under categories (a) and (d). The Claimant however believed that he was entitled to two weeks pensionable pay for each year of service after his 40th birthday regardless of his status as a civil servant during that time – a total of four weeks' pay under category (a) and 36 weeks' pay under category (d).

22. A meeting took place on 16 June and the minutes of that meetings were set out in a letter from Ms Canning to the Claimant at page 75. The Claimant, who had been accompanied at the meeting by Mr Cohen, had confirmed that he did not want to take up the offer of Tier 3 III Health Retirement. The meeting had then gone on to consider whether dismissal

on medical inefficiency grounds was appropriate in the circumstances. Ms Canning had confirmed that whilst she had no power to change the formula by which compensation for medical inefficiency was calculated, she did have the discretion to determine the percentage of that compensation that should be awarded. She confirmed that she would award 100 per cent of the available payment. The Claimant disputed the calculation at the meeting. The letter states

> "JC [Mr Cohen] said he disputed the calculation at Part D (the number of years the staff member was over the age of 40) but acknowledged this issues was part of a wider NAPO/NOMS dispute and was not for the capability hearing."

There was no further reference to this wider dispute either at the Claimant's dismissal hearing or at the hearing before me but I understand the Claimant's case throughout to have been that as he was aged 58 at the time of his dismissal he was entitled to 36 weeks' pay under category (d).

23. Ms Canning went on to confirm the decision to terminate the Claimant's contract for medical inefficiency with immediate effect and agreed to check and confirm how the compensation figure had been arrived at, which the letter suggests she went on to do. The figure payable remained £6395.66. The Claimant did not exercise his right to appeal against the decision to terminate his employment.

Submissions

24. The Respondent had prepared written submissions to which Mr Kirk added helpful oral submissions. It submitted that the Claimant's claim should be framed as one of breach of contract and that it could not properly be brought under s27 ERA. It submitted that the medical inefficiency payment was not one to which the Claimant had a contractual entitlement because the relevant documents were not incorporated expressly or by implication into his contract of employment. Even if they were, they were not apt for incorporation within the meaning of Keeley v Fosroc International Ltd [2006] IRLR 961 and Alexander v Standard Telephones and Cables Ltd [1990] IRLR55. It then went on to submit that even if the relevant documents had formed part of the Claimant's contract, the payment had been correctly calculated by reference to his "reckonable service". It also appeared to submit that as its first premise was that the payment was made on an ex gratia basis, the Respondent was at liberty to decide in what manner the payment for probation officers should be calculated (paragraphs 38 and 39 Respondent's skeleton argument). Finally it submitted that the doctrine of contra proferentem has no application in this case because there is (a) no contractual provision that requires interpretation and (b) there is no ambiguity in the provisions on reckonable service.

25. The Claimant submitted that the Management of Attendance Policy PI 37/2014 was contractual as it formed part of a collective agreement and contained a power on the part of a manager to terminate a contract of employment. He refuted the suggestion that the payment was ex gratia. He suggested that the position was unclear and ambiguous as a result of

the lifting of the formula from the CSCS and its insertion onto the guidance for managers. He submitted that the wording of paragraph (d) of the formula and the lack of a reference to qualifying service had been deliberately chosen to reflect the greater age of probation officers in this category. He made it clear that he was not seeking a payment based on his continuous service with the Respondent and its predecessors but a payment based on paragraph (d) of the formula that would provide him with two weeks' pensionable pay for each year of service after his 40th birthday. His submission on the importation of the term "reckonable service" from the PCSPS was that this rendered the construction of his contractual entitlement ambiguous because on the face of it "reckonable service" had no application to probation officers. Hence the entitlement should be construed contra proferentem to confer on him an entitlement to a higher payment based on his years of service after his 40th birthday as if the term "reckonable" were not included.

Conclusions on the issues

26. In my judgment the Claimant is precluded from bringing a claim under s27 ERA. I agree with the Respondent that medical inefficiency payments cannot be deemed wages for the purposes of s 27(1) ERA as s 27(2)(c) excludes "any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office". The Claimant's claim is therefore one of breach of contract.

27. I find on the basis of the documents I have reviewed above that the management of the Claimant's absence was governed by the revised policy at page 78 (PI 37/2014), which was introduced six months before the Claimant's dismissal. In my judgment the provisions of that policy set out at paragraph 13 above, most of which were described as "mandatory" were capable of having contractual force, even though they were contained in a policy which contained other provisions of a procedural or general nature that would not be apt for incorporation into the Claimant's contract of employment. I have had regard to Keeley v Fosroc International and I agree with Mr Kirk that it is distinguishable on its facts. In the case before me PI 37/2014 is not expressly incorporated into the Claimant's contract by words that clearly state that incorporation is intended, but the language of the policy at page 81 ("Application: all staff within the National Probation Service"; "All actions in this instruction are mandatory unless otherwise specified …All levels of management and all employees must ensure that they are aware of these mandatory actions and ensure that this policy is implemented and adhered to") are indicative of an intention that the Respondent and its staff will be bound by those provisions of the policy that impose specific obligations. I am therefore satisfied that the policy conferred on the Claimant a contractual entitlement to be considered for a payment of compensation in the event of dismissal for medical inefficiency and a contractual entitlement to receive a payment in accordance with a bona fide exercise of a discretion on the part of his line manager. The fact that the level of the payment was at the manager's discretion does not deprive the entitlement to a payment of its contractual force. Although the Respondent submitted that it could have decided not to have made a payment, Ms Canning's evidence was

that this would not in practice happen and the language of PI 37/2014 and of the ancillary documentation clearly envisaged that a payment would always be considered and made, with the discretion applying only to the amount.

28. There were then three separate documents that provided guidance to managers on how to implement the policy – the Civil Service Management Code, PIN40 and the "Guidance for Managers" document at page 94. In my judgment these documents primarily had the function that their titles described – they contained guidance for managers who were responsible for terminating the employment of those who were unable to work for medical reasons. The guidance was aimed in part at enabling managers to determine whether and to what the individual was culpable so that the overall award should be reduced. The parts of the documents concerned with that issue were not apt for incorporation into the Claimant's contract of employment.

29. PIN40 however was expressly referred to at paragraph 3.26 pf the Management of Attendance policy which states:

> "*3.26 The payment of compensation must be considered for all members of staff dismissed due to Unsatisfactory Attendance in accordance with Cabinet Office publication 'Personnel Information Notice 40' available on My Services.*

PIN40 then refers to certain provisions of the Civil Service Compensation Scheme and provides the link to the method of calculating the payment to be made. The CSCS sets out the actual formula for calculating maximum compensation. I find that the formula itself potentially had contractual force and would have formed the basis of a contractual entitlement had it not been for the fact that the formula borrowed a critical definition ("reckonable service") from the PCSPS, of which the Claimant was not a member. This problem is at the crux of the Claimant's claim, because he argues that the compensation payment was incorrectly calculated by limiting the payment by reference to this definition. He argues that the use of this definition makes the formula ambiguous and he asks me to resolve that ambiguity by construing what he regards as a contractual provision "contra proferentem" and removing the word "reckonable" so as to base the formula on all his years of service after the age of 40.

30. I have found this a difficult point to resolve. I have considerable sympathy for the Claimant's position and there is no doubt that the suite of documents governing the termination payment due to him are imperfectly co-ordinated and difficult to construe. It is far from clear on what basis the Respondent took the view that it was entitled to limit the payment to the Claimant to his years of service as a civil servant. That this was the Respondent's position as early as December 2015 is clear from the letter at page 51 but it is not clear to me how that position was justified by the documents.

31. The conclusion I have reached however is that the "borrowing" of the definition of "reckonable service" from the PCSPS - a document that has no application to the Claimant or probation officers in general - means that the there is too much uncertainty and imprecision about what is actually

intended for this part of the arrangement to stand up to scrutiny as a contractual term. The definition is this: "Reckonable service means service (in the Civil Service or elsewhere) which reckons towards a pension under this scheme". As applied to the Claimant that definition has no meaning, as he is not a member of the PCSPS and therefore has no service reckoning towards a pension under it. Taken literally this means that the Claimant had no years of service that could be taken into account in calculating the payment, but it is clear from the Respondent's actions that that was not what it intended. Nevertheless it is impossible to determine using the formula in the CSPS how many years of service ought to be taken into account when calculating the medical inefficiency payment due to a probation officer (including the Claimant). Therefore, in my judgment, the provisions relied upon are too uncertain to have contractual force.

32. Hence although I find that the Claimant was entitled as a matter of contract to be considered for a medical inefficiency payment, and to have his manager exercise her discretion in a rational and reasonable fashion when deciding upon the amount payable, the actual formula used is too imprecise to have contractual force because the term "reckonable service" has no meaning when applied to the Claimant or his colleagues. I do not think it was the intention of the Respondent to create this uncertain position, but that is the consequence of melding together several documents without seeming to be alive to the fact that a document a containing a definition critical to the calculation has no application to the Claimant.

33. I have considered the Claimant's contention that this uncertainty ought to be resolved by construing the contract contra proferentem and removing the word "reckonable" from paragraph (d) of the formula. I do not think that would be the correct approach. The problem does not seem to me to be one of ambiguity, which is a prerequisite for an application of the contra proferentem rule. It is not a case in which there is simply more than one way of interpreting the word "reckonable". It is a case in which the concept of "reckonable service" has no meaning at all when applied to the Claimant because it is derived from a scheme in which he was not a participant. The problem is therefore one of uncertainty, rather than ambiguity.

34. It follows from this that the Respondent was not under a contractual obligation to the Claimant when calculating the medical inefficiency payment because that part of the contract was too uncertain to be enforceable. The Respondent was therefore entitled to calculate the payment to the Claimant in the way that it did, which was to treat the Claimant and other probation officers as having service only from the date on which they became civil servants, on 1 June 2014. The payment became one that was in effect at the Respondent's discretion, rather than one fixed by a contractual formula. There was no breach of the Claimant's contract of employment in the Respondent having taken that approach. The Claimant's claim of breach of contract therefore fails and must be dismissed.

Employment Judge Morton
Date 4 July 2017