Appeal No: UKEATS/0012/17/JW

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 9 January & 18 May 2018
At 10:30am

Before

THE HONOURABLE LADY WISE

(SITTING ALONE)

STRATHCLYDE JOINT POLICE BOARD SUB NOM SCOTTISH POLICE AUTHORITY — APPELLANT

MS J JARVIE & 6 OTHERS — RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellant	Ms L Marsh Advocate DLA Piper Scotland LLP Collins House Rutland Square Edinburgh EH1 2AA
For the Respondent	Ms A Hardie in person

SUMMARY

CONTRACT OF EMPLOYMENT: Construction of Term

PERSONAL BAR: Mora taciturnity and acquiescence

The claimants were successful before the Tribunal in arguing that night allowances were properly payable to them in terms of their contracts of employment. The respondent appealed and contended that the Tribunal had erred in its approach to the construction of the contracts. It was not in dispute that clauses in a collective agreement had been incorporated therein, although the material provisions were not known to the claimants at the time of contracting. The respondent also appealed the Tribunal's decision that the doctrine of *mora taciturnity and acquiescence* did not apply to such claims.

Held:

Appeal allowed in relation to the ground relative to construction of contract. The Tribunal had erred in concluding that the reasonable person test applied in circumstances where the claimants were unaware of the term they subsequently claimed was incorporated. The relevant clause was clear and provided for two equally valid alternative approaches to payment of allowances. There was no default or implied provision. The question of which option applied to the claimant's' contract was a matter for evidence. There was material before the Tribunal on which it could make findings in relation to the issue of which option applied. The case would be remitted for the Tribunal to make those findings based on the evidence already available.

Appeal dismissed in relation to the ground relying on *mora taciturnity* and acquiescence. The plea is not apposite where statute imposes a limited period during which a remedy can be sought. The respondent had not sought to amend to introduce a plea of delay and affirmation. Further, as the claimants were party litigants it would be unfair and inappropriate simply now to treat the argument as one of delay and affirmation.

Introduction

1. The Claimants, seven in number, were (or are) all employed by the Respondent in an area control room based on a based on a call centre model, dealing with incoming calls to the Police. Each was employed as a Customer Support Representative, (CSR) with the first Claimant to be appointed commencing work on 14 January 2004. There were three possible shifts each Claimant could work, one of which was a night shift. The dispute arose when the Claimants became aware that, unlike office holders, they were not paid night allowances. They raised claims in respect of unauthorised deductions from wages contrary to section 13 of the Employment Rights Act 1996 (ERA 1996).

2. The central issue for the Tribunal was whether night allowances were properly payable to the Claimants in terms of the contracts of their employment. That issue was decided in favour of the Claimants and the Respondent has appealed the Tribunal's decision of 16 February 2017. The Tribunal confirmed its initial decision in a reconsideration judgement dated 4 May 2017. The appeal is also against the Tribunal's rejection of a plea of *mora, taciturnity and acquiescence.* Both before the Tribunal and on appeal the Claimants had no legal representation but one of their number, Ms Hardie, appeared on behalf of all. The Respondent was represented both before the Tribunal and on appeal by Ms Marsh Advocate. I will refer to the parties as Claimant and Respondent as they were in the Tribunal below.

Relevant Findings and Reasoning of The Employment Tribunal

3. The Tribunal made the following findings, in so far as relevant to this appeal, about the Claimant's contracts: -

"7(i) A best value review was commissioned by the respondent around 2003 which suggested a call centre model to deal with incoming calls. This would be a new way of delivering the service. An Area Control Room would be created which would handle the prioritization and dispatch of police officers. This was evaluated as higher skilled work and would be carried out by Police Officers and Communication Officers at Band AP1/2.

The less complicated calls would be dealt with by Customer Support Representatives (CSRs).

(ii) This proposal required the approval of the Strathclyde Joint Police Board. Having secured the consent for the appointment of some higher graded posts, in October 2003, the Chief Constable sought approval for 164 full time equivalent posts which included 140 CSR posts. This was included in a report presented to the Board meeting in October 2003. The report stated that '*Basic salaries will apply to such staff with no allowances being paid'.*

(iii) Of relevance to the present claims, the post of Duty Contact Centre manager was to be at Grade AP5, team leader roles were to be at AP3 and CSRs were at GS3/AP1 under the then applicable grading scheme used by the respondent.

(iv) The Board approved the proposal at its meeting on 9 October 2003.

(v) Following a recruitment and retention review in 2004, it was recommended that the starting salary for CSR roles be increased to AP1 but with no night shift allowances were to be paid.

(vi) When the claimants were recruited it was the intention of the respondent that allowances would not be paid for night working for the CSR role, the team leader role in the contact centre or the Duty Contact Centre Manager.

(vii) There were 3 possible shifts: early shift (0700/0715 – 15.00/15.15); late shift (15.00/15.15 – 2300/2315) and night shift (22.00/00.15 – 05.15/17.30) with an average of 35 hours per week.

(viii) The trade union was aware that the respondent did not intend to pay allowances to these posts for night working and were unhappy about it.

(ix) When successful, each of the claimants received a letter entitled 'Offer of appointment and written particulars of terms of employment'. This stated that '*your terms and conditions are enclosed'*. The letter set out the details of induction training that the claimant was required to attend. Further details included the shift that the claimant was to work, the salary and grade. There was no specific reference to allowances.

(x) The letter invited the claimant to advise '*whether or not you wish to accept this offer on the terms and conditions stated'.*

(xi) Enclosed with the offer letter was the document entitled 'Strathclyde Joint Police Board Schedule of Terms and Conditions of Employment APT&C Staff.' That document did not refer specifically to allowances. However, Paragraph 1 stated: -

i. "Your terms and conditions of employment are in accordance with: -

The existing collective agreements of the Police Support Staff Council (Scotland) – APT&C Services and the Scheme of Conditions of Service for APT&C Staff as applied by Strathclyde Joint Police Board.

Certain additional terms and conditions determined by Strathclyde Joint Police Board as contained in Circulars issued by Assistance Chief Constable (Personnel) and

Any special conditions referred to in the covering letter.

ii. Full details of the terms and conditions at (a) and (b) above are available for inspection either in the Administration Section at your Divisional headquarters or from your Head of Department and in the Force Support Section of the Personnel Department at Force Headquarters."

(xii) The documents referred to at (a) were contained in The Conditions of Service Manual for Force Support Officers employed by the Strathclyde Joint Police Board. The document included Clause 41.4 which stated: -

iii. **"***the normal hours of duty are 35 hours per week exclusive of meal breaks. The normal office hours are 0845 – 1645 Monday to Thursday 0845 – 1555 Friday with 50 minutes for lunch daily. (A scheme of Flexible Working Hours is currently in operation at Force headquarters). For certain types of post the normal office hours may be adjusted to suit the requirements of the service and when this is necessary details of the hours to be worked will be notified in the contract of employment."*

b. Following provision for overtime, the clause continued: -

i. **"***where such working arrangements are necessary employees in receipt of a basic salary not exceeding spinal column point 37 shall be entitled to the appropriate allowances detailed in the following paragraphs. The Force shall have discretion to apply the allowances to employees in receipt of a basic salary exceeding spinal column point 37.*

ii. Alternatively, the Force shall have the discretion to apply an inclusive salary to take all the features of the post into account."

(xiii) Clause 41.4 deals with "Night Working" and the relevant part provides as follows: -

iii. **"***An employee required to work at night as part of the normal working week shall be paid an allowance at the rate of time and a third for all hours worked between 2000 and 0800 hours".*

(xiv) All the claimants (apart from Ms Duggan who started much later) spent an initial period on induction training during normal office hours. The first of the claimants to be appointed was Ms Hardie who started on 14 January 2004.

(xv) Once they started carrying out the role of CSR, the claimants were not paid night allowances but only the basic salary. The claimants became aware of that office holders were paid allowances for night working. A complaint was submitted on behalf of the call centre employees and considered by the respondent from 2005 to 2006 approximately.

(xvi) The trade union was in discussions with the employer about a number of conditions, including the payment or non- payment of night allowances, throughout the period of the claimant's employment. This culminated in a collective grievance which some, but not all, of the claimants were named parties of the grievance. The grievance

included the non-payment of night allowances to employees in the call centre but also dealt with other matters.

(xvii) That grievance process took from July 2008 to November 2009. Some claims were presented to the employment tribunal towards the end of 2010 and the present claims were presented on 11 February 2011."

4. Having recorded that the central dispute related to the correct construction of clauses 41.1 and 41.4 reproduced above, the Tribunal decided (at paragraph 36) that the Claimants were entitled to allowances under paragraph 41.4. The reasons given for that conclusion and for the rejection of the Respondents' plea of *mora, taciturnity and acquiescence* are in the following terms: -

"**Considering liability, I have to decide whether the claimants' contracts of employment entitle them to be paid night allowances. This is a different question to what the collective agreement meant as between the respondent and the relevant trade union. The correct approach is set out in *Alexander v Standard Telephones* and *Investors Compensation Scheme Ltd.* I have to establish what the contractual intention of the parties was. Where this involves the construction of a written document, "*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to mean*". In this case the collective agreement provides for the payment of night allowances but it also provides that the respondent may exercise its discretion to pay an inclusive salary. It is clear that the respondent intended that no allowances for night work would be paid to the claimants. This is part of the background knowledge available to the respondent. However, that, of itself, is not enough. I also have to determine what a reasonable person having all the background knowledge of the claimants would have understood that clause to mean. Had the offer of employment stated that in this case the salary was inclusive and that no allowances would be paid for night work, then that would have been the end of the matter as far as the individual contracts of employment were concerned – however much this irritated the trade unions. However, the offer letter does not say this. It merely refers to the collective agreement which include the possibility of an inclusive salary. This is where the absence of evidence from the claimant is critical. Had there been evidence that the claimant had been told during the recruitment process that discretion had been exercised and no allowances would be payable, that would have been part of the background knowledge to be taken into account. However there was simply no evidence at all of what the claimants understood to the position to be with regard to allowances when they entered into the contracts of employment. I accept Ms Page's evidence that allowances were to be paid this would normally have been set out in the contract. That may have been relevant background knowledge if the claimants had been moving from one employment with the respondent to another. I do not understand that to be the case here. Therefore, the agreement has to be interpreted assuming that there is no discussion with the claimants about allowances at the time of appointment and that the claimants were unaware of the respondent's position on allowances. In these circumstances, in my judgment, a reasonable person would have understood from the written contractual documents that the allowances for night working under clause 41.4 would have been payable to the claimants. That being so, I find that the**

claimants are entitled to payment for night working under their contracts. Those sums are properly payable.

I now turn to Ms Marsh's various submissions as to why those allowances should not be paid to the claimants. I deal first with the issue of *mora, taciturnity and acquiescence.* I have some doubt that this principle applies to a claim under section 23 for the same reason as I refused Ms Marsh's earlier application to apply the law of prescription. There are very specific statutory restrictions on when a complaint can be made under section 23. Had there been only a one-off deduction, the claimants would be prevented from bringing the claim after the passing of 3 months. There is a separate and discrete breach on each occasion when the night allowances are not paid. However, the statute provides that where there is a series of deductions (as the case is here), a claim can be brought for the whole series within 3 months of the last deduction. I do not consider that *mora, taciturnity and acquiescence* applies because of the alternative statutory provisions prevailing. However, if I am wrong and there is a potential for such personal bar, I do not consider on the minimal evidence I heard that it could be could be said that it applies here. Although the claim to the employment tribunal was not brought for a significant period of time after the first deduction, action was being taken about the matter. There was a complaint to the respondent, union activity and ultimately a collective grievance, it is true that the claimants did not state they were working under protest and they did not immediately present legal proceedings but I do not consider they are personally barred from bringing the complaints, provided they can establish a series of deductions and the claims are in time."

5. The Tribunal clarified and elaborated its reasoning on these issues in the reconsideration judgment in the following way: -

"**In my judgment, if the respondent had wished to exercise the discretion to pay an inclusive salary (or perhaps more correctly not to pay allowances set out in clause 41.4) in respect of each of the claimants, then that required to be made clear at the time of contracting and then accepted. I was not intending to be prescriptive in paragraph 49 of the Judgement as to how the that could be done. I was providing an example of how that might have been done. Absent a clear written term to that effect in the appointment letter, it is possible that there might have been some evidence of that having been conveyed verbally. Clause 41 could then have been interpreted against that background, in accordance with Investors Compensation Scheme, to demonstrate agreement that Clause 41.4 would not apply to the claimants.**

Ms Marsh suggests that I should find as a matter of fact that this was communicated to the claimants during the interview process based on the Guidance provided to the interviewers (Para 15 of the respondent's Application) I do not consider that I can find, in the balance of probabilities that, based on this document that the interviewer would have said, in terms, no allowances will be paid and this salary is an inclusive salary. I do not consider that I can find that the interviewer would have said anything about the allowances at all.

Without that evidence, we were left simply with the words 41.1. As I have said I concluded that a reasonable person reading that clause would have understood that there was a

default position that allowances would be payable but that the collective agreement provided that the respondent could pay an inclusive salary. Ms Marsh suggests that the claimants did not want to put themselves in the position of giving evidence about this and perjuring themselves. I am not prepared to make assumptions about why the claimants did not give evidence. I agree that the burden of proof in this claim is clearly on the claimants to prove they were entitled to the allowances in 41.4. However, having established that Clause 41 was incorporated into their contracts, I consider that the evidential burden was on the respondent to show not just that they intended to exercise the discretion they had under the collective agreement but that they had exercised it and this was communicated to the claimants at the time of contracting so that that was part of the agreement. I consider that the respondent failed to do that in this case.

I stated in the Judgment that I do not consider that *mora, taciturnity and acquiescence* applies to a complaint under section 13 in the Employment Tribunal. Ms Marsh submits that the case of Henry and Others v London General Transport Services Ltd [2001] IRLR 132 shows that it does. I do not agree. Henry was a case where the claimant had been offered revised terms and although there had been an initial protest, this had not been continued and the court felt able to conclude that there had been an acceptance of the revised terms after a period of time when the claimant worked to the new terms. I do not consider that this is the same plea as *mora.* I quite accept that part in the Employment Tribunal may be deemed to have affirmed a breach of contract or to have impliedly agreed to a variation in contract. That could be a relevant consideration when considering sum is "properly payable".

However, I did not understand the respondent to be arguing in this case that the claimant had had a contractual right to be paid allowances under clause 41.4 but that that right had been impliedly varied by agreement, as was the case in Henry. My understanding is that the plea being relied on by Ms Marsh was that a party may lose the right to make a claim under section 13 of the Employment Rights Rule Act due to the passage of time and the failure to take any action. I do not consider that a plea is competent in this particular statutory regime where the claim is not one of breach of contract and where there are strict provisions in relation to time limits. My reasoning in this respect is similar to that in an earlier Preliminary Hearing in this case in respect of the application and the doctrine of frustration. I may be wrong in that, which is why I set out my conclusions in the event that the plea is competent."

Other references to the Tribunal's judgment were made in the course of the argument at the appeal.

The Respondent's Arguments on Appeal

6. For the Respondent Ms Marsh presented her arguments in two separate sections. First, she addressed the issue of the interpretation of the contract terms and secondly and separately the argument on *mora, taciturnity and acquiescence.* Turning to the first of these she explained

that the Respondent's position had always been that because they intended to pay an inclusive salary for the newly created fixed shift posts, as permitted under clause 41.1, there was no unlawful deduction from wages. On appointment, the Claimants, as new employees to a new form of post, had no expectation of receiving any such allowance and appear to have been unaware of the existence of such an allowance which was paid to some other civilian employees employed in a different type of job. Reference was made to the document "Consolidated Manual of Terms and Conditions for Civilian APT~C Staff" which was produced in a supplementary bundle for the appeal. The references in the Tribunal's judgment to clauses 41.1 and 41.4 are extracts from that document. Ms Marsh also noted that there is no cross appeal on behalf of the Claimants. A contentious issue before the Tribunal had been whether the Respondent was permitted to withdraw an earlier concession in relation to liability. The Tribunal found that the Respondent was so entitled so that matter is now final and cannot be revisited. The purpose of the appeal was to challenge the Tribunal's judgment and what was there characterised as "Issue 1" namely whether night allowances were "properly payable" in terms of section 13 (3) of the Employment Rights Act 1996.

7. Both sides now accepted that clause 41 of the Manual of Terms and Conditions was in fact incorporated into the Claimants' contracts. The question was whether the discretion set out in clause 41 could override the entitlement to allowances that would otherwise apply.

8. The Tribunal had made certain observations on the evidence (at paragraphs 8 & 9 of the judgment) that were of relevance to the appeal. First, because the claims concerned matters occurring between 2004 and 2010 when the first claims to the Tribunal were presented, the Respondent led evidence from one witness only, a Nicola Page who had been the head of corporate resources within Strathclyde Police from 2010 – 2013. Whilst her involvement with issues concerning CSRs occurred only laterally, she had been able to research all aspects of what had occurred in earlier years and had been able to refer to contemporaneous documentary material relied on by the Respondent. It was from that the Tribunal had been able to ascertain

the Respondent's intention at the time of entering into the contract, namely that the salary was to be inclusive and that no night allowances would be paid.

9. At paragraph 8 of the judgment, the Tribunal records that this evidence was available but that there was no evidence about the Claimants' intentions or understanding of what the position was about salary and night allowances from their perspective as they had been asked whether they wanted to give evidence and had declined to do so. It was understood, however, that the Claimants' position was that the wording of the clause in question conferred an automatic entitlement to night working allowances and that if the Respondent was not going to pay a night allowance that should have been stipulated in the offer of appointment letter and that accordingly there was no reason for the Claimants to give evidence. One consequence of that had been that the Tribunal had insufficient evidence to find on the balance of probabilities that the Claimants would have been told by the interviewer that they were not to receive allowances. The Tribunal had accepted that Respondent's evidence that if allowances were to be paid it would normally have been set out in the contract (paragraph 49).

10. It was not in dispute that the Claimant's Statement of Terms and Conditions did not include reference to the allowances. While such a statement is not a contract as such it is persuasive evidence of the agreed terms – **Alexander v Standard Telephone and Cables** [19991] IRLR 286 at paras 26 and 27. It could not be ignored that the Claimants had no documentation in relation to the night allowances when they signed their terms and conditions. In other words, all of the material available to them, including the advertisement, the offer of employment, the schedule of terms and conditions and the standard sample acceptance of the offer, all of which had been produced, made no reference to any allowances in addition to salary. There was an express provision for overtime in the contract but nothing in relation to night allowances.

11. Ms Marsh contended that the Tribunal's reasoning in relation to the intention of the Claimants at the time of contracting was flawed and that it reached an impermissible conclusion in two respects. First, the Respondent had provided unchallenged evidence in relation to three matters. In the guidance given to interview panels, the Respondent specifically states that candidates at interview had to be advised of the conditions of service for the particular post. The document provided to the Claimants' interviewing panels expressly stated "allowances: NA". There was also evidence that the Claimants' union official had been told in correspondence that the position of lack of allowances had been made clear in the advertisement for the posts. Also the Respondent's witness had given clear evidence that any allowances would be specifically referred to in the letter of appointment. The Claimants' entitlement to overtime payments under clause 42 had been expressly stated in accordance with the principle that if a condition in the collective or bargaining agreement was to apply it would be so referred to. From all of that it could be inferred that the Claimants had been told at interview that they would not receive night allowances and that their intention in relation to this could be inferred from their acceptance of the post offered on the terms specified in the letters. It was also contended that performance over many years demonstrated affirmation of the contracts on those terms.

12. Secondly, the tribunal had reached an illogical conclusion in relation to what a reasonable person would have understood from the written contractual documents. As the Tribunal had found that Claimants were unaware of the Respondent's position on allowances, a matter conceded by the Claimants, it was perverse to conclude that a reasonable person would have assumed allowances were payable if there was no access to the document referring to such allowances. The Tribunal had referred to the case of **Investors Compensation Scheme Limited v West Bromwich Building Society** [1998] 1WLR896 as authority for the proposition that the question was what a reasonable person having all the background knowledge which

would have been made available to the parties would have understood the contract terms to mean. It was a distortion of that principle to include knowledge or documents that were not in fact available to the Claimants at the time of contracting. The principles enunciated by Lord Hoffman in the **Investors Compensation Scheme** case (at page 912 – 913) illustrated that it was only documents reasonably available to a reasonable person that would be taken into account. This was reiterated in **Cabinet Office v Beavan** [2014] IRLR434 where the EAT, under reference to the **Investors Compensation Scheme** case and other relevant authorities, specifically emphasised that a collective agreement must be construed like any other contract, giving a fair meaning to the words used in the factual context known to the parties which gave rise to the agreement. In the recent UK Supreme Court of **Arnold v Britton** [2015] AC1619 Lord Neuberger reiterated (at paragraph 21) that when interpreting a contractual provision one can only take into account facts or circumstances which existed at the time the contract was made and which were known or reasonably available to both parties. Lord Neuberger went on to say that:-"*given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties"*

13. On the applicable law relating to the exercise of discretion which the Respondent in this case stated they had exercised, reference was made to the UK Supreme Court decision in **Braganza v BP Shipping Limited & Another** [2015] ICR449 where it was held that, where contractual terms gave one party to a contract the power to exercise a discretion or form an opinion as to relevant facts, it was not for the court to make that decision for them, but where the decision would affect the right and obligations of both parties the court would seek to ensure that the power was not abused by implying a term, in appropriate cases, that the power should be exercised not only in good faith but also without being arbitrary, capricious or irrational in the sense in which those terms are used when reviewing the decisions of public

authorities. Ms Marsh accepted that careful scrutiny had to be given as to whether the Respondent had been reasonable in a *Wednesbury* sense in the exercise of discretion. She relied on material that was produced before the Tribunal and on appeal confirming that the relevant union had been advised of the Respondent's decision to pay no allowances or enhancements for working on fixed shift basis. There was also material confirming that everything had been costed before the Respondent had exercised discretion. In particular there was a report by the chief constable on 22 September 2003 in relation to the plan to create the area control room posts. The salaries of the various proposed new staff are set out and the cost of creating them fully assessed. The reports states in terms that: "*basic salaries will apply to such staff with no allowances being paid"*

14. The Respondent's contention was that the reference to basic salaries being paid was indicative of the Respondent having exercised discretion to apply an inclusive salary to the new posts. The collective agreement had used a term of art but a basic salary was the same thing as an inclusive salary. It was a short hand way of infirming that the employees' salary would cover the whole of the employees' entitlement other than if something in addition was specified such as overtime.

15. Turning to the interpretation of the relevant part of clause 41.1 itself, the Respondent accepted the Tribunal's conclusion that there was no ambiguity in the wording. The Respondent agreed that the provision was capable of being construed by simple application of the "literal rule". The error on the part of the Tribunal was said to be that in treating the alternative options within 41.1 as hierarchical and so introducing a "default" position, the Tribunal had introduced an implied term where none was necessary in order to give the term efficacy. There was nothing in the language of clause 41.1 such as to lead to a conclusion that the default position was that the employees should be entitled to allowances. The clause provided two very clear

alternatives. First that the Respondent in the exercise of discretion could apply the allowances to employees in receipt of a basic salary. Alternatively, the Respondent had discretion to apply an inclusive salary to take all features of the post into account. It could not be taken from silence in relation to allowances in the Statement of Terms and Conditions of the Claimants' contracts that one of two alternative terms applied. For the reasons already given the Claimants could have had no belief of an entitlement to allowances at the time of contracting and so no expectation of or intention to contract on the basis that incorporated such allowances. The Tribunal had ignored that and instead created an implied default condition that could not be said on any view to be in the contemplation of any of the parties at the time of contracting.

16. The Tribunal had put beyond doubt in the Reconsideration judgment that this was the basis for the decision. At paragraph 15 of the reconsideration judgment the Tribunal records that its conclusion was that a reasonable person reading clause 41.1 would have understood there was a **default position** that allowances would be payable but that the collective agreement provided that the Respondent could pay an inclusive salary. It was for that reason that the Tribunal considered that the evidential burden was on the Respondent to show that the default position had been departed from and that they had exercised discretion to pay an inclusive salary. For these reasons, the Tribunal had aired the material points in issue in determining the matter not on the basis of the actings of the parties based on their knowledge or on the basis of an unambiguous contractual provision in the collective agreement but by implying a default position and so innovating upon the parties' contracts.

17. The second separate challenge related to the *mora, taciturnity and acquiescence* issue. Ms Marsh noted that it was with some hesitation that the Tribunal had concluded that the construct of *mora, taciturnity and acquiescence* did not apply in a claim under section 23 of the Employment Rights Act 1996. It was contended for the Respondent that the Tribunal's

conclusion in this respect was wrong and that claims presented in England under section 23 of the ERA 1996 where issues of *acquiescence* or *affirmation* of a contract of employment by delay had been raised had been determined on the basis that this was a relevant bar to a claim. Reference was made in particular to **Henry and Others v London General Transport Services Limited** [2001] IRLR132 (EAT) and the Court of Appeal decision, reported at [2002] ICR910. The Respondent had contended before the Tribunal not that the right to make the claim was lost, but that the Claimants were not entitled to proceed because of the combination of delay in making the claim and affirmation of the contract without payment of allowances. During the course of discussion, Ms Marsh accepted that the characterisation of this argument as one of *mora, taciturnity and acquiescence* might not be apt. In the **Henry** case, the Court of Appeal had confirmed that while the burden of proving that employees had accepted revised terms was on balance of probability upon the employer, there was force in the point that where revised terms had operated for two years before proceedings were commenced, an evidential burden is placed upon employees claiming not to have accepted the revised terms. The Tribunal had concluded that the case of **Henry** was irrelevant or at least distinguishable on the basis that it concerned a variation to a term in a collective bargaining agreement whereas the instant case referred to the term that had been present from the outset of the offer and acceptance. The Respondent contended that there was no basis for using that distinction to render the underlying principle inapplicable. Ms Marsh argued that the substance of the complaint was the same whether it involved a variation or terms and conditions applicable from the outset, namely that the employer failed to pay that which the Claimants maintained was contractually due against a background of Claimants working under the terms being challenged for a period of years. Accordingly **Henry** was in point. In addition the Tribunal had impermissibly conflated *mora* or *delay* with limitation and appeared to have proceeded on the basis that if a claim is presented in time in terms of section 23 ERA 1996 that would oust an argument based on *delay* and *affirmation.* While acknowledging that the Respondent had no plea of *delay* and *affirmation* Ms

Marsh contended that the plea could be characterised in that way. In any event all of the three elements *mora, taciturnity and acquiescence* were available which was sufficient in this jurisdiction to dismiss the claims. Reliance was placed on **Hendrick v Chief Constable Strathclyde Police** [2014] SC551, albeit under recognition that it involved judicial review proceedings.

18. In the absence of any evidence of why the Claimants in this case had not brought proceedings earlier, they may be taken to have affirmed the contract imposed upon them by the Respondent. It was accepted that *delay* on its own was not enough; it was a combination of *delay* and *affirmation* that led to the components of *mora, taciturnity and acquiescence* being established. The Tribunal had failed to address what was required to rebut a plea that the Claimants had affirmed their contracts as set out in **WE Cox Toner (International) Limited v Crook** [1981] ICR823 at 828E – 829H.

19. While Ms Marsh's motion was to allow the appeal and dismiss the claims, she accepted that there would be an option of remitting back to the Tribunal. She contended, however, that any remit back should be to a fresh Tribunal to decide the matter on the basis that the contract provides for two equally valid alternatives in relation to the payment of allowances rather than a default position. On the authority of **Stokes v Hampstead Wine Company Limited** [1979] IRLR298 at paragraphs 20 – 21 the declinature of the Claimants to give evidence remained binding on them and so the matter could not be opened up for further evidence.

The Claimants' Response

20. On behalf of all of the Claimants Ms Hardie sought to make a number of points. First, she addressed the question of the Claimants' refusal to give evidence before the Tribunal. She contended that the Claimants did not refuse to give evidence but decided not to after the

Tribunal had indicated that they would only be required to give evidence if there were disputes in relation to issues of fact. They had not understood what exactly was meant by evidence and so had not lodged witness statements but had made submissions. They had not understood why evidence might be required in relation to what had gone on at their interviews for the position in question and what exactly was available at the time of the offer to employ them. In any event, paragraph 19 of the reconsideration judgment confirmed that the Respondent had not indicated that it was contesting any issue of fact such as that a complaint had been submitted by the Claimants and considered from 2005 – 2006. Had they done so it had been agreed that one of the Claimants would be asked to give the relevant evidence under oath and be cross examined. It was accepted, however, that there was no cross appeal in relation to this or any other point.

21. In response to the issues raised by the Respondent on appeal the Claimants' main position was that if the Respondent had in fact exercised its discretion to pay the Claimants an inclusive salary that would have been stated in the offer. The Claimants did not accept initially at the appeal that there had been evidence before the Tribunal about the exercise of such discretion. However, once it was explained that the witness statement of Nicola Page who was called for the Respondent was evidence it was confirmed on behalf of the Claimants that Ms Page had been cross examined briefly on the issue of inclusive salary.

22. It was pointed out that the documents relied on by the Respondent, including the report of the Chief Constable, referred to "basic salary" with no allowances. The clause 41.4 itself made a reference to basic salary and the Respondent had used that expression in the ET3. The only evidence of inclusive salary had been in Ms Page's witness statement. Material on the job evaluation had looked at the role but not shift patterns and allowances. There was some discussion about a grade change in relation to CSRs. However, this was done to aid recruitment and retention and was not related to any decision to provide an inclusive salary. There was

some information about a "shift swap" introduced as a local procedure in terms of which employees would work shifts initially allocated to others. It was said that this took place both with employees who were paid allowances and those who were not. Ms Hardie explained that she and the other Claimants were not in fact the first staff to be employed by the Respondent on fixed shift working. There were typists who worked from Monday to Saturday day shift. Their hours were 7am to 3pm six days a week. She stated that those workers received at least one hour per day at the night working level and also the Saturday was paid as weekend working. It was noted also that the Respondent's witness Nicola Page had been employed only from 2010 and the Claimants contended that there were other witnesses available to the Respondent who could have spoken directly to the issue in dispute.

23. Ms Hardie contended that the Tribunal had not erred in law in the manner contended by the Respondent. It was agreed that the clause 41 and its sub clauses were part of the Claimants' contracts of employment. It was not uncommon for new employees at the time of contracting not to be aware of the full details of collective agreements and clauses but that made no difference because the clauses remained part of the contract. It would have been necessary for the Respondent to make clear to the Claimants that a discretion was being applied to their salary inclusive and not include allowances before they would be entitled not to pay those allowances. All of the material relied on by the Respondent such as the advertisement, the offer letter, the schedule of terms and conditions and the acceptance slips made no reference to a discretion having been exercised to pay an inclusive salary or to make clear that clause 41.4 would not apply. Accordingly the Respondent had failed to make clear at the time of contracting that they had exercised their discretion in this way. No acceptance or agreement was sought from the Claimants of that position. The letter sent to Unison in 2010 by the Director of Human Resources of the Respondent referred to it having been agreed that CSRs would be offered a basic salary with no allowances to be paid over and above that. That could not be taken to be an

exercise of discretion to pay an inclusive salary. There was no reference at all in the correspondence with the union to suggest the salary was to be inclusive of any right to allowances. The ET3 response to the Claimants' proceedings had also referred to staff receiving a basic salary and not an inclusive salary. The Tribunal had been correct in concluding that, in the absence of any statement by the Respondent at the time of contracting that they were exercising discretion to pay an inclusive salary, they had failed to pay the allowances required by the contract.

24. Further reference was made to the evidence of Nicola Page and the complaint was advanced that she had prepared her witness statement on the basis of paperwork and conversations with people previously involved. It was not accepted that her evidence was accurate in relation to payment of an inclusive salary. The record of a union liaison meeting referred only to a decision not to pay allowances for those working on fixed shift basis. There had been no intimation of an intention to pay an inclusive salary rather than allowances as contended by the Respondent. Nowhere in the documentation relied on by the Respondent was there any reference to inclusive salary.

25. On the issue of *mora, taciturnity and acquiescence* Ms Hardie addressed the factual basis for the submission made while acknowledging that she did not understand, as a lay person, the argument that had been put forward about the relationship between *mora, taciturnity and acquiescence* and *delay* and *affirmation.* She pointed to written evidence and submissions that were presented to the Tribunal that the Claimants had presented a formal grievance after three years of what she described as "failed promises by various managers and a review group". She referred to a document that had been lodged before the Tribunal headed "Contact Centre Grievance July 2008" in relation to the chronology of events. It records that the Claimants felt that they were being discriminated against in connection with other employees who they

discovered had attracted enhanced payments for working unsociable hours. There had been an ongoing review for three years such that there was no acceptance on the part of the Claimants in the way suggested by the Respondent. This material had been before the Tribunal and the Respondent had been given an opportunity to object to it being included in the submissions which it had not done.

26. The Respondent referred to the case of **Weatherilt v Cathay Pacific Airways Limited** [2017] ICR995 as authority for the proposition that the Tribunal had been entitled to construe the contract for the purposes of a section 13 ERA 1996 claim. In fact Ms Marsh had accepted that the position stated in **Agarwal v Cardiff University** [2017] ICR967 should not be followed and that **Weatherilt v Cathay Pacific Airways Limited** represented the correct approach. The Claimants contended that the decision for the Employment Tribunal should be confirmed and the appeal dismissed.

Procedure Following the Initial Appeal Hearing

27. It became apparent during the course of argument at the appeal that the parties were not at one on the issue of whether there had been relevant evidence before the Tribunal in relation to the question of whether the Respondent had exercised discretion to pay an inclusive salary rather than making separate payments of allowances. The Tribunal recorded the Claimants' submissions that no evidence had been produced that the alternative discretion referred to in clause in 41.1 was applied to the Claimants and that the "variation" would have had to be communicated to the employees for that to happen. As there had been considerable reference at the appeal hearing to the witness statement of Nicola Page and confirmation that the Claimants had cross examined her, at least to some extent on this point, I adjourned the appeal hearing so that Ms Page's witness statement and notes of the Claimants cross examination could be produced and allowed parties to make such further submissions as they wanted in relation to

those documents. I then relisted the appeal for consideration of that material before reaching my decision.

Discussion

28. This appeal has been restricted to two separate lines of argument, both properly identified as alleged errors of law on the part of the Tribunal. It is apparent that during the course of the Tribunal hearing there were other significant issues to be determined which are not now the subject of appeal. The Tribunal's judgment is comprehensive and determines each of the issues before it. It is noteworthy that a significant area of contention was whether the Respondent should be allowed to withdraw a concession made some years previously. It is understandable that there will have been considerable focus on that, and also on the issue of the Claimants' decision not to give evidence at the time the judgment was written. Nonetheless, this appeal, raises a sharp issue in relation to the construction of a contractual term, namely clause 41 of the collective bargaining agreement incorporated into the Claimants' contracts. There is no dispute that the terms in contention are clear enough to be interpreted as they stand. The facts and circumstances relating to the intention of the parties is relevant background and goes to the question of whether, if the Respondent exercised discretion in favour of paying an inclusive salary rather than separate allowances, there was sufficient evidence of that having been done. The first issue of interpretation relates to whether the Tribunal erred in failing to appreciate the significance of the Claimants' acceptance that they were unaware of the terms of clause 41 at the time they entered into the contract.

29. The most recently available authoritative statement in relation to the interpretation of contractual provisions is contained in the UK Supreme Court decision in **Arnold v Britton and Others** [2015] ACI619. In that judgment, Lord Neuberger refers to the recognised approach of the court which is to identify the intention of the parties by reference to what a reasonable

person having all the relevant background knowledge would have understood them to mean. In that context I consider the passage relied upon from that judgment by Ms Marsh to be of considerable relevance to this case. It appears in the context of Lord Neuberger setting out seven factors relevant to interpretation of contracts. It is perhaps only the fourth and fifth of those that are particularly apposite. These are in the following terms:-

"20. fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed even ignoring the benefit of the wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed……..
21. the fifth point concerns the facts known to parties. When interpreting a contractual provision one can only take into account facts or circumstances which existed at the time that the contract was made and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic arrangement involving both parties, it cannot be right when interpreting a contractual provision, to take into account a fact or circumstance known to only one of the parties."

30. It was clearly established before the Tribunal that the terms of clause 41.1 were not known to the Claimants when they entered into the contract. On that basis alone, it seems to me that the Tribunal erred in concluding, at paragraph 49, that the reasonable person test had to be applied to the written contractual documents, including clause 41, as that clause was not known to the Claimants at the time. Of course, it not being in dispute that clause 41.1 was in fact incorporated into the Claimants' contracts, if the words there used clearly and unambiguously entitled the Claimants to payment of allowances the Claimants would be so entitled. That is because, while reliance can be placed on surrounding circumstances of a contract being entered into, the practice of doing so should not, as Lord Neuberger also emphasised in **Arnold v Britton,** be invoked "… *to undervalue the importance of the language of the provision which is to be construed".* Accordingly, the Tribunal did require to consider the words of clause 41 and decide whether they provided for a default position with a possibility of variation from that or two alternative possibilities of equal validity.

31. I have concluded that the pertinent clause cannot properly be interpreted as one providing for a default position with the possibility of variation. In setting out my reasons for reaching this conclusion it may be useful first to reproduce the essential parts of the clause in question. In relation to arrangements that involve working outwith normal business hours it provides:-

"where such working arrangements are necessary employees in receipt of a basic salary not exceeding spinal column point 37 shall be entitled to the appropriate allowances detailed in the following paragraphs. The force shall have a discretion to apply the allowance to employees in receipt of a basic salary exceeding spinal column point 37.

Alternatively, the force shall have the discretion to apply an inclusive salary to take all features of the post into account."

32. It is clear from the wording of that clause that two alternative and equally valid possibilities are envisaged. The first is that employees on a certain salary level (including the Claimants) shall receive appropriate allowances. It is not in dispute that clause 41.4 includes night working allowances in that. As an alternative, the Respondent can, in the exercise of discretion, apply an inclusive salary to take all features of the post into account. Which of the two alternative positions was adopted in the Claimants case was a matter for evidence. At first glance, the words "shall be entitled" may suggest to the reader that this is a primary or default position from which the Respondent could only deviate with justification. However, the use of the word "alternatively" negates any such interpretation. An alternative does not denote an exception or fall back position. There is no reference to the allowances applying unless expressly excluded. To put it another way there is no entitlement as such on the part of the employee to be paid appropriate allowances in addition to basic salary. The entitlement is to have any element of working at unsociable hours such as night working reflected either as a separate allowance or included within the employees' overall salary as evidenced by the terms

and conditions of employment. There is no need, in my view, to go beyond the words of the clause. However, the uncontentious background is that the clause was the product of negotiation and discussion between the employer and the trade union, as with all collective agreements. It is not difficult to see that the first paragraph of clause 41.1 represents what an employee might be eager to ensure is included while the second paragraph allows the Respondent not to pay separate allowances but to include in the salary to be paid any features of the post which would include the hours at which the employee would be required to work. What the Tribunal has done is elevate the first paragraph of clause 41.1 into an express term that would require to be disapplied. Having done so, it is easy to see why the Tribunal concluded that it would be for the Respondent to show some deviation from that express term. In fact, the clause clearly provides two separate but equally applicable express terms. What the Tribunal required to do, on the evidence led, was to determine which of the two alternatives had been incorporated into the Claimants' contracts. If there was evidence of the contracts providing for a basic salary with appropriate allowances to be paid in addition that would militate in favour of the first possibility. On the other hand, if the relevant evidence supported the second possibility of inclusive salary having been adopted that would lead to the opposite conclusion. I have already indicated that there was evidence before the Tribunal in relation to this matter and I have now had sight of it. It is clear from the witness statement of Nicola Page and the brief notes of cross examination by the Claimants that the Respondent offered evidence that the posts for which the Claimants applied had been regraded to take account of the "fixed shift" issue over and above the job evaluation. It was for the Tribunal to assess that evidence and determine the issue of whether the Claimants' posts were to be paid on an inclusive salary against a backdrop of there being two equally available possibilities. However, because of the way the Tribunal approached the question of construction of the contract, this evidence is not addressed in the judgment at all. Accordingly, the Tribunal having fallen into material error in its approach to construction of the contract, the matter will now require to be remitted back to

the Tribunal for consideration of the evidence that I am satisfied was available for it to make decision on which of the alternatives in clause 41.1 was applicable to the Claimants' contracts.

33. Turning to the issue of *mora*, *taciturnity and acquiescence,* as properly understood in Scots law this is a plea to the merits of an action and operates as a bar to pursuing the claims in question. Generally, it applies to rights, remedies and obligations which are not limited by reference to a definite period. Where statute imposes a limited period during which a remedy can be sought in respect of a right, the plea is not apposite where a claim is made within that period. Where a time limited period is imposed, it has been interpreted authoritatively that where the claim in question has been brought timeously, no question of *mora* can arise. Of course, other forms of personal bar may still be in issue. In the employment context affirmation of a change to a contractual term would be one example where that is accompanied by a delay in raising proceedings. In this case, as Ms Marsh acknowledged, the Respondents sought to take a plea of *mora*, *taciturnity and acquiescence* but not one of delay and *affirmation.*

34. Whether or not changing a plea from one of *mora*, *taciturnity and acquiescence* to delay and *affirmation* in this context would amount to relabelling or more than that it does not matter for the purposes of this decision. At no point did the Respondent seek to amend its response to make clear that what was to be argued was delay and *affirmation* leading to rejection of the claim. Even during the appeal process no such application to amend was made. Against that background, and standing the Claimants understandable lack of knowledge of the law in this area, I do not consider that it would be fair or appropriate now to treat the Respondent's argument before the Tribunal as one of delay and *affirmation.* I consider that the Tribunal was correct to conclude that *mora*, *taciturnity and acquiescence* does not apply to a claim under section 13 of the Employment Rights Act 1996 in the Employment Tribunal. In the reconsideration judgment, at paragraph 17, the Tribunal concludes that the case of **Henry and**

Others v London General Transport Services Limited [2001] IRLR132 is distinguishable from the present case. It may be that the reliance on the facts of **Henry**, which related to a variation rather than contract terms being there from incipience was inapposite, but I agree entirely with the Tribunal that *delay* and *affirmation* is not the same plea as *mora.* In any event, the Tribunal had already made a finding that complaints were made by the employees as early as 2005 in relation to this contractual matter and, although the ultimate grievance was not dealt with until 2008, the reference in the document I was taken to by the Claimants referred to there being three years of "*failed promises by various managers and a review group"* supports a conclusion that there was material before the Tribunal on which it could find that these Claimants had not in fact affirmed the contract in the manner contended for by the Respondent. For these reasons, the second main ground of appeal fails.

Disposal

35. For the reasons given, I will allow the appeal in relation to the ground that relates to the Tribunal's error on the material decision it required to make on construction of the Claimants' contracts. Having considered the evidence available to the Tribunal, I am of the view that no further evidence is required in order for the Tribunal to assess, on that evidence, which of the two equally viable alternatives in clause 41.1 was incorporated into these Claimants' contracts. For the avoidance of doubt, I accept the submission on behalf of the Respondent that, the Claimants having declined to give evidence, they are not now in a position to insist on any change to that – **Stokes v Hampstead Wine Company Limited** [1979] IRLR298.

36. Accordingly, the appeal will be allowed in part and remitted back to the Tribunal for consideration. Although Ms Marsh suggested that it would be appropriate to remit to a fresh Tribunal, I do not consider that there is anything in the Tribunal's judgment to justify that. The appeal has been decided purely on the correct legal approach to construction of the relevant

contracts and I have every confidence that the same Tribunal will take care to consider all of the available material in light of the decision of this Tribunal on the correct interpretation of clause 41.1.