EMPLOYMENT TRIBUNALS

Claimant: **Mr R Shakeshaft**

Respondent: **Acas**

Heard at: **London Central** **On: 16 May 2018**

Before: **Employment Judge Wisby**

Representation
Claimant: In person
Respondent: Mr Midgley (Counsel)

JUDGMENT

The claimant's compliant of unlawful deduction of wages succeeds.

Reasons

1. Preliminary matters

2. The claimant now lives in Sweden and did not attend the Tribunal in person. The claimant stated in correspondence that he was aware this may mean his only representation on the day would be by written statement but he was happy to join the Hearing by phone, video call, Skype or any other service that could be suggested. For parties to use Skype they need to bring their own equipment to the Tribunal and videoconferencing needs facilities to have been pre-booked. The claimant was telephoned at the start of the Hearing and both parties stated that they would prefer not to postpone. The claimant explained he was happy to join the Hearing by telephone. Both parties agreed that since the case concerned contract construction they were happy to proceed with the witness statements being taken as read and that there was no need for cross-examination of

witnesses. The partied also agreed that they could advance their respective cases by submissions. The Tribunal therefore proceeded on that basis with the claimant being telephoned whenever the Respondent returned to the Tribunal room, adjustments were made to the room so that the claimant could fully hear both the Employment Judge and the respondent's representative.

3. The claimant clarified that he was not pursuing a complaint in relation to the calculation of overtime pay (the use of 'x' rather than '/' in the calculation being an obvious error that he had pointed out to the respondent). His complaint was limited to the calculation of travel time pay.

4. The two issues to be considered in this unlawful deduction of wages compliant therefore are:

   4.1. How the rate of pay for travel time should be calculated. The claimant's position being that the calculation of travel time should use net conditioned hours and the respondent's gross conditioned hours, and

   4.2. Whether the salary element for that calculation should use basic pay only or should include the additional pay elements of 'marked time' and the IT allowance.

5. The claimant calculated that between August 2011 and July 2017 he was underpaid by £1636.81 in respect of travel time payments. The claimant also seeks an apology however this is not within the jurisdiction of the Tribunal to award.

6. Evidence before the Tribunal

7. The Tribunal was presented with:

   7.1. An agreed bundle running to 510 pages.

   7.2. A witness statement by Danielle Smith (Head of Reward and Workforce Planning) for the respondent; and

   7.3. A witness statement by the claimant.

8. The Law

<u>Unlawful Deductions</u>

9. Section 13 Employment Rights Act 1996 ("ERA") sets out the right for a worker not 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.
(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

.....

10. To establish whether wages are properly payable in accordance with s13(3) ERA, the Tribunal needs to identify the legal basis for the entitlement to the payment (*New Century Cleaning Co Limited v Church* [2000] IRLR 27).

11. The Tribunal is required to consider all relevant circumstances when determining whether a sum is properly payable and this will inevitably involve assessment of the contractual position.

Contact construction/interpretation

12. Contract interpretation involves broad principles, rather than strict rules.

13. An objective test is used for ascertaining the intention of the parties to the contract. Their actual or subjective intentions are irrelevant. The standpoint of a reasonable businessperson is adopted. Where the contract is in writing, what the parties have written, rather than what they intended to write usually constitutes the agreement.

14. The main principles of contractual interpretation can be summarised as follows:

    14.1. Consider the actual text of the contractual provision and give it appropriate weight.

    14.2. Consider the remainder of the contract or instrument in which the provision appears.

    14.3. Consider the factual, legal and regulatory background to the contract.

    14.4. Give appropriate weight to business common sense, or the commercial purpose of the contract.

    14.5. Avoid literal interpretation if the result is manifestly unreasonable.

    14.6. Balance the potentially competing principles. "*This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.*" (see below - *Wood v Capita Insurance Services Ltd [2017] UKSC 24*; Lord Hodge, paragraph 12).

15. The contract should be interpreted not according to the subjective view of either party but rather what a reasonable person in the position of the parties would have understood the words to mean. In Investors Compensation Scheme Ltd v West Bromwich Building Society Lord Hoffmann said:

> "But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1384-1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] 2 WLR 945
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* 19851 A.C. 191, 201: ". . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.""

16. In Arnold v Britton & Ors [2015] UKSC 36 (10 June 2015) Lord Neuberger, in paragraph 15, summarised the position as:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101,

para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

17. Lord Neuberger then emphasised seven factors (one of which is only relevant to leases therefore not included):

"First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.

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 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. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

The fifth point concerns the facts known to the 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 only to one of the parties.

Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114, where the court concluded that

"any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22)."

18. In Wood v Capita Insurance Services Ltd [2017] UKSC 24, Lord Hodge said in paragraphs 10 -14:

"10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds [1971] 1 WLR 1381 , 1383H–1385D and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989 , 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 , 912–913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extrajudicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11 Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case [2011] 1 WLR 2900 , para 21f. In the Arnold case [2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury PSC, paras 13–14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 , paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571 , para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions

may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in Sigma Finance Corpn [2010] 1 All ER 571 , para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

14 On the approach to contractual interpretation, the Rainy Sky and Arnold cases were saying the same thing."

19. In Full Metal Jacket Ltd v Gowlain Building Group Ltd [2005] EWCA Civ 1809 Lady Justine Arden in paragraph 17 states:

"The judge in his judgment deals with the issue of the meaning of the contract and breach of the contract simultaneously. In doing so he takes into account evidence which ought not to have been taken into account on the interpretation of the parties' obligations. If the contract had been performed satisfactorily by the claimant but the defendant claimed that the performance did not meet the specification of the contract, evidence as to subsequent conduct would not have given the court any assistance in deciding the meaning of the contract. Indeed it would have distracted it from the task of interpretation. When it comes to legal policy it is important that the law should not undermine the certainty of the meaning of contracts or lead to a position where the meaning of a contractual provision fluctuates according to the conduct which in fact occurs under the contract when it is performed by the time the meaning has to be ascertained. It is therefore worth repeating and emphasising that the courts in general should not have regard to subsequent conduct when interpreting written contracts."

20. It is important when constructing the contract not to concentration too much upon individual words to the neglect of the contract as a whole. The meaning of the document or of a particular part of it is to be sought in the document itself. "*The deed must be read as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause should be interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible*." (N.E. Ry v Hastings). However, the courts will look at all the circumstances surrounding the making of the contract and available to the parties which would assist in determining how the language of the document would have been understood by a reasonable person in their position.

21. Business efficacy - the court may imply a term which is necessary if the contract is to work properly. The term must be 'founded on presumed intention and upon reason'. If the term really is necessary in order to make the contract work, then (since the contract is to be construed on the basis of what a reasonable man would take to be the consensus) the court can say that it must necessarily have been in the mind of both parties, so that it is possible to conclude that, if asked, the parties would have said: 'Of course! … we did not trouble to say that; it is too clear' (Reigate v Union Manufacturing Co, per Scrutton LJ).

22. Findings of Fact

23. Background

24. The claimant was employed by the respondent from 25 January 2010 to 31 July 2017. The claimant was initially based in Newcastle but worked for a period in London and then returned to Newcastle in September 2014. His last job title was

business analyst.

25. On 30 March 2017 the claimant raised irregularities with his pay. These irregularities led him to audit his payments and review the terms in relating to how travel pay is calculated. The claimant reached the conclusion that the travel time pay calculation was not being carried out correctly, in that he considered it should be carried out on the basis of net conditioned hours not gross conditioned hours (see below). In this context on 6 April 2017 the claimant highlighted to the Respondent the definitions of 'plain time hourly rate' and 'hourly rate' set out in the handbook (see below).

26. On 28 April 2017 the claimant was informed that there were two methods of calculating the 'plain time rate', that the position for overtime and travel time were different and the handbook would be updated.

27. On the basis that overtime and travel time have different payroll codes the respondent later rejected the argument that the overtime hourly rate calculation in the handbook should be applicable but it accepted that the travel time calculation needed to be made more specific.

28. On 18 July 2017 the claimant raised a formal grievance regarding the travel time pay calculation and other issues, relying on the hourly rate calculation. During a call regarding his grievance the claimant also raised the definition of annual salary used in the calculation. The claimant's belief was that his IT allowance and 'mark time' payments (see below) were part of his salary and the totality of that salary should be used for the calculation since the hourly rate formula did not simply refer to 'basic pay'.

29. The claimant was advised his grievance had not been upheld on 26 September 2017. The claimant appealed on 9 October 2017 and he was informed that his grievance appeal had not been upheld by letter dated 27 October 2017.

30. The respondent calculated the travel time hourly rate using the claimant's basic pay rate and gross conditioned hours.

31. **Contract construction**

32. The parties agree that the claimant's initial contract of employment does not assist with the calculation of travel time pay but that the respondent's contractual handbook is relevant.

33. The original version of the handbook was ratified by both the respondent's Management Board and the ACAS Trade Unions. It was unclear whether the subsequent amendments to the handbook had received the same level of consultation and ratification.

34. No minutes of meetings between the unions and management relating to how travel time or other payments should be calculated were available to be considered. The same applies to minutes regarding the drafting of the relevant forms and various handbook versions.

35. It was agreed that the version of chapter 16 of the handbook in the bundle sets out how hours of work are to be calculated. It was agreed that the wording of chapter 16 had not been revised since 2001. The relevant sections are set out below.

Chapter 16 – Hours of Work

36. Paragraph 2.1 states: "*Conditioned hours may be expressed as a gross figure including meal breaks, or net figure excluding meal breaks. Conditioned hours for staff working part-time are always expressed as a net figure*". The tribunal was informed this is because part-time members of staff are not paid for meal breaks.

37. Paragraph 2.3 states: "*Gross conditioned hours are 41 (36 net) for full-time staff in the London pay areas and 42 (37 net) for those working elsewhere.*"

38. Paragraph 3.23 sets out: "*Overtime is defined as time worked in excess of the full time conditioned hours...*"

39. Paragraph 3.34 sets out: "*The provisions which follow relate to time spent on official travel outside staff members' conditioned hours. Time spent on official travel within conditioned hours is counted as work and paid accordingly*".

40. Paragraph 3.38 sets out: "*Staff working flexible working hours are recompensed for travelling time on the same basis as those working chartered hours*".

41. Paragraph 3.40 explains that travelling time of less than half an hour on any day is not paid but (subject to certain conditions) can be added to other periods for a claim to be made. Total travel time is rounded down to the nearest quarter of an hour when a claim for payment is made.

42. Paragraph 3.43 sets out:

> "*If on any day a staff member works and also travels officially, and:*
>
> *a. the total of the hours spent working and the travelling time is less than that day's conditioned hours, the day is treated as if the conditioned hours were completed and no travelling time is payable*
> *b. the hours worked are less than the conditioned hours for the day, but the total of hours worked and travelling time amounts to more than the conditioned hours for the day, travelling time is calculated by deducting from the total time away from home (adjusted where appropriate to take account of the normal home/office journey) whichever is the greater of either the notional conditioned hours or the total of the time actually worked plus the time taken for lunch...*
> *c. the hours worked are more than conditioned hours for the day, and there is travelling time in addition, the extra working hours are added to the hours worked that week for overtime purposes and the travelling time qualifies for payment at plain time rate....No period of time qualifies for both over time and travelling time*"

43. Paragraph 3.41 sets out: "*Payment or time off in lieu for travel on weekdays (other than public holidays) is at plain time rate (see Chapter 14)*...". Paragraph 3.45 then

goes on to set out double time rate for Sunday or holiday travelling time and paragraph 3.46 sets out that travelling time on a Saturday attracts premium payment or time off at the rate of time and a half.

44. Paragraph 4.10 sets out in relation to part-time working: "*Premium rate payments for time worked over and above the staff members conditioned hours can be made only if more than the normal full-time hours for the grade are worked*."

45. Appendix 1, paragraph 44 sets out in relation to flexible working hours: "*When applying the travelling time rules the 'standard' FWH day is regarded as the equivalent of attendance within conditioned hours... travel on official duty outside the 'standard' day is treated as travelling time. All travelling time should be recorded separately from FWH and compensated for under the rules in paras 3.34 - 3.51. The following arrangements apply to staff working FWH:*
a. Notional conditioned hours - to calculate travelling time, the notional conditioned hours for one day needs to be defined. For staff who work a five-day week they are 1/5th of the weekly gross conditioned hours, either eight hours 12 minutes in London areas or eight hours 24 minutes elsewhere...." (i.e 41 hours in London areas or 42 hours elsewhere).

46. There is no dispute between the parties that in working out the amount of time that could be claimed for working time (as opposed to the pay rate) gross conditioned hours are used and that is also made clear in the form that is submitted to show the time for which the individual is claiming travel pay. It is also not disputed that the payroll system is programmed to calculate travel payments using gross hours.

Chapter 14 - Pay

Section 1 - ACAS payroll administration

47. Paragraph 1.5.1 sets out: "*monthly gross salary is based on 1/12 of the annual rate*" it then goes on to refer to: "*Pro rating of salary and other allowances*…"

48. Paragraph 1.6.1 states: "*The pay of part-time staff is automatically calculated by the payroll system based on the full-time equivalent salary and the proportion of hours worked to the net conditioned hours for the location.*"

49. Paragraph 1.7.1 sets out: "*Hourly rates are automatically calculated by the payroll system based on the full-time equivalent salary and the conditioned hours. The formula is: Full-time equivalent salary/52/ full-time conditioned hours*."

Section 2 - Pay

50. Mark-time pay arrangements are set out in paragraph 2.14.1: "*This normally occurs when someone transfers from London to a non-London pay location. The mark-time rate is held until such time that it is overtaken by the person's national rate of pay for the new location.*"

Section 3 - Allowances

51. Part 1 contains information regarding recruitment and retention allowances at paragraph 3.1.2 it states: "*These allowances are payable outside, and in addition to, the salary scale. They are reckonable for: PAYE and National Insurance purposes, for overtime, and also for calculating superannuation benefits*." Part 2 concerns Accountancy Allowances, Part 3 the IT Allowance; Part 4 the Researchers Allowance; Part 5 the First-aid Allowance and Part 6 the ACAS long service award. The rates of pay are set out in Appendix 2, which has the title 'Recruitment and Retention Allowance Rates'. Under the title the allowance rates for qualified and part qualified accountants, IT Specialists, Researchers and First Aiders are listed. Appendix 3 is titled Recruitment and Retention Allowances for IT staff and contains information on eligibility, designated posts and competency in essential skills.

Section 7 – Overtime Pay

52. In Section 7, Part 1 – Eligibility, paragraph 7.7.1 states: "O*ver time is only paid to staff in grades 8 to 12 once the conditioned full-time hours have been worked*". Paragraph 7.7.2 states: "*If a part-timer works extra hours but does not work more than the full time net conditioned hours in the location, plain time rate for the extra hours worked will be paid during the period. If their total weekly hours worked exceeds the net full-time conditioned hours for the location any excess will be paid at the overtime rate for the grade*".

53. This is the first time the "plain time rate" is mentioned in this chapter.

54. Section 7 Part 2 - Overtime Pay Rates and Claim Forms, at paragraph 7.2.1. states: " *Overtime is calculated using the plain time hourly rate as the basis of calculation. This is the annual rate of basic pay plus any reckonable recruitment and retention allowances converted to an hourly rate as follows:*

7.2.2 $\dfrac{\text{Basic Pay + Reckonable RRAs per annum}}{\text{52 weeks x full-time conditioned hours (41 or 42)}} = \text{plain time hourly rate}$"

55. It was accepted by the claimant that the fact the calculation states 'x' rather than '/' was an obvious mistake; one that he in fact pointed out to the respondent although initially they did not acknowledge it.

56. The section then goes on to set out occasions on which the respondent pays at 1 x plain time, 1.5 x plain time etc.

57. Section 7 Part 3 deals with time off in lieu.

58. Section 7 Part 4 is titled 'Travel Time' and states: "*Full details of the principles of travel time and when a claim can be made can be found in the Personnel Handbook chapter 16 Para 3.34 et seq*".

59. Paragraph 7.4.1 states: "*Travel time during Monday to Friday is paid at plain time*

rate. Travel Time earned on Saturday is paid at time and half; while any earned on a Sunday or on a Public holiday is paid at double time rate."

Chapter amendments

60. Chapter 14 was amended in April 2013 but no material changes were made to the sections relevant to this complaint.

61. Chapter 14 was amended again July 2014. No change was made to the hourly rate formula set out in section 1, mark-time pay arrangements or the allowances section. In the Overtime Pay section however the formula for calculating the plain time hourly rate changed so that it became Basic Pay + Reckonable RRAs per annum divided by "*52 weeks x full time conditioned hours (36 or 37)*". The formula had therefore changed from using gross hours to net hours. The Travel Time paragraphs were not amended. Danielle Smith stated in her witness statement at paragraph 18: "*From 2014 the calculation of the plain time rate for overtime was changed from using the gross to the net conditioned hours...This was not a change that applied to travel time payments as reflected by the relevant section (page 312) which remained in similar terms. The gross hours therefore continued to apply to the calculation of travel time payments.*" Danielle Smith explained orally to the Tribunal that the change to the formula had been introduced to remove a disadvantage to part-time staff that resulted from using gross rather than net conditioned hours in the calculation.

62. Chapter 14 was again amended in June 2015 and in this iteration the hourly rate formula in section 1 was amended to "*Full-time equivalent salary/52/36 (London) or 37 (elsewhere)*". The calculation therefore now specified net hours. Danielle Smith in her witness statement stated "*despite this change in 2015, the calculation for travel time payments remained based on the gross conditioned hours as the change to the net hours was not intended to affect travel time payments. The section dealing with ' Travel Time' still stated that the plain time rate applied and continued not to state a more precise calculation*". It was agreed no further material changes were made in 2015 relevant to this complaint.

63. In March 2016 Chapter 14 was amended further. Mark-time pay arrangements were changed such that staff transferring from London pay location to on the national scale did not retain their former London basic salary on a mark-time basis.

64. Finally for the purposes of this complaint, in October 2017 Chapter 14 was amended as a result of the issues raised internally about travel time by the claimant. The hourly rates section in section 1 was amended to state: "*The hourly rate for travel time is calculated on gross weekly hours and for overtime on net weekly hours*". The Travel Time section was also amended to read: "*Full details of the principles of travel time and when a claim can be made can be found in the Personnel Handbook chapter 16 Para 3.34 et seq. The hourly rate for travel time is calculated on gross weekly hours, see Appendix 5*". Appendix 5 then reads: "*The hourly rate for travel time is calculated on gross weekly conditioned hours. The hourly rate for overtime as calculated on net weekly conditioned hours*".

Submissions

65. In summary:

66. The respondent submitted that the Tribunal needs to imply a term in relation to how the travel time rate is to be calculated to give the contract business efficacy.

67. The claimant submitted that in calculating travel time payments two calculations must be carried out; one under Chapter 16 to calculate the amount of time for which a payment should be made and the second under Chapter 14 to obtain the rate of payment that should be applied.

68. The claimant considered the applicable definition for use in the pay calculation was the hourly rate definition, originally in paragraph 1.7.1 of Chapter 14, which until 2015 had stated a formula based on "full-time conditioned hours" but did not state expressly whether these were gross or net hours. The claimant stated that the fact that in 2015 the formula was amended to reflect net hours meant this was a mere clarification of the earlier position and that the formula was always intended to refer to net conditioned hours. The claimant in his statement stated that there is no other calculation marked as 'plain time rate' but at the Hearing accepted that 'plain time rate' was referred to in the overtime calculation.

69. The respondent submitted that the reference in paragraphs 3.44 to 3.46 of chapter 16 to 'plain time' was to distinguish the level of pay from double time or time and a half but that it was not intended to identify any basis for the calculation of pay for travel time more generally.

70. In relation to Appendix 1, paragraph 44 of chapter 16 the respondent pointed to the fact gross conditioned hours are used to calculate one aspect of travel time for FWH employees, namely the notional conditioned hours that must be first completed before any claim for travel time can be made by a FWH employee. The respondent then submitted it would be nonsensical and illogical for the gross conditioned hours to be used to calculate the notional conditioned hours to be worked but net conditioned hours to be used to calculate the pay for the travel time above that period. The claimant did not accept that submission pointing to overtime as an analogy, submitting for a full time employee gross hours must be reached first then additional hours are paid using the net hours calculation.

71. In relation to the hourly rate calculation the respondent submitted that although there is no express reference to gross conditioned hours by implication from paragraph 2.1 of chapter 16 the calculation of hourly rates for full-time staff required the use of the gross figure for the conditioned hours.

72. The respondent also submitted that from June 2015 the handbook refers to net conditioned hour figures for pay calculations for example in relation to overtime and substitution (acting up into a more senior role) but the same calculation is not expressly stated for travel time and that "One would expect it to be so stated if it were intended to apply. Rather, as before, the principles for payment of travel time stated to be set out in chapter 16 at paragraph 3.34". Effectively the same point is made in relation to the March 2016 version of chapter 14. The claimant stated that cross reading between the two chapters is misleading as chapter 14 is

concerned with pay and chapter 16 is concerned with the calculation of hours of work.

73. The respondent submitted that the form used for claiming travel time is not contractual but that it and its precursor are understood to have been drafted at the time the handbook was created and are therefore evidence of the parties intentions as to the payment of travel time. The respondent also points to the fact that the form has never been challenged by the Unions. The claimant once again highlighted the difference in his view between calculating the period of time for which a claim can be made in the method of calculating the pay for that period of time.

74. The respondent submitted that there is no express contractual term detailing whether travel time should be calculated using gross or net conditioned hours therefore the Tribunal will have to imply a term to give the contract business efficacy and it must have regard to the usual rules regarding construction and the interpretation of contracts. In summary the respondent pointed to the fact the court can consider extrinsic evidence to assist with the interpretation and construction of the contract referring to *Reardon Smith Line Ltd v Yngvar Hansen - Tangen* [1976] 1 W.L.R. and that as Lord Wilberforce said the intention of the parties is to be ascertained objectively ".. *when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties*." The respondent also referred to *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1986] 1 WLR where Lord Hoffmann, referring to the matrix of fact, said "*Subject to the requirement that it should have been reasonably available to the parties... it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man*". The respondent pointed out that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made but that terms may be implied in any given case from the circumstances of the parties having consistently on former and similar occasions adopted a particular course of dealing.

75. The respondent submitted that there are indicators within the handbook of the parties intentions in relation to the calculation of payments for travel time these being:

    75.1. Travel time is only paid after employees exceed their gross conditioned hours whether the employee is full-time or works flexible hours.

    75.2. The genesis of the distinction between gross and net conditioned hours indicates that gross conditioned hours is the appropriate measure for full-time workers.

    75.3. Whilst other elements of the handbook have been changed to expressly record calculations on a net conditioned hours basis travel time has not but refers back to Chapter 16.

    75.4. Travel time has always been paid on the basis of gross conditioned hours.

75.5. The form to claim travel time requires employees to calculate travel time using gross conditioned hours.

75.6. There has been no challenge to the form, calculations derived from it or the consequent payments of travel time from the Unions.

76. The claimant submitted that the post-2013 amendments had not benefited from the same involvement from the unions as the original Handbook had.

77. In relation to the definition of salary the respondent submitted that the section on recruitment and retention allowances specifically states these are payable outside and in addition to the salary scale, the section lists what they are reckonable for but does not list travel time payments. The claimant in response pointed out the mark time pay arrangements do not refer to them being payable outside and in addition to the salary scale.

78. The respondent also submitted that there was a fundamental difference between overtime and travel time and this is reflected in relation to the sum of money paid for overtime compared to travel time, pointing to the rounding down of travel time and the rules around the 30 minute travel time exception.

79. The Tribunal asked the parties to address it in relation to the potential crossover reading of the formula for plain time set out in the overtime section to the travel time section. The respondent highlighted again their submission that the reference to 'plain time' was merely to distinguish the payment level from say double time or time and a half and that there was always an intention for travel time to be compensated in a different way from overtime. It was submitted that the change in overtime rate was to remove a disadvantage to part-time employees that didn't exist for part-time employees' claims for travel time pay. The claimant did not accept the respondent's position.

80. Discussion and Conclusions

81. It is not disputed that the claimant has been paid a sum in respect of all the periods he claimed travel time, it is the calculation that is in dispute.

82. It is also not disputed that there are two parts to the calculation one in relation to the amount of time that payment is to be made for and the second in relation to how that pay should be calculated; although the respondent submits that the former calculation informs the latter calculation.

83. There is no dispute as to how the period of time for which a travel time claim can be made is calculated.

84. The claimant's gross and net conditional hours are not disputed, nor is the fact that gross hours were always used for the calculation of travel time pay, as well as for computing the period of travel time a claim could be made in respect of.

85. The claimant did not dispute that overtime and travel time are different and viewed differently by the respondent. This is supported by the fact a distinction between

travel time and overtime is made in chapter 16 with different rules and criteria applying to when a claim for each can be made. As a result of this distinction chapter 14 has separate paragraphs within the Overtime section dealing with overtime pay and travel time pay. Different claim forms are also utilised to reflect the different information that is required for the claims to be processed.

86. Turning therefore to the disputed areas, in constructing the contract the starting point is to consider the first version of the contractual handbook provided to the Tribunal – i.e. the pre 2013 version.

87. Lord Hoffmann, referring to the matrix of fact, in I*nvestors Compensation Scheme Ltd v West Bromwich Building* said:

> "*Subject to the requirement that it should have been reasonably available to the parties … it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man*".

88. As stated above there is no evidence before the Tribunal from minutes or other documents produced prior to the drafting of the handbook relating to the payment of travel time or overtime or the drafting of the relevant forms. There is also no witness evidence in relation to such matters.

89. The Tribunal does not find that the forms the claimant filled in to apply for payment of travel time assist in the consideration of what the applicable pay rate should be. The forms concern the calculation of the applicable time period for which a claim can be made in accordance with Chapter 16. There is no reference to pay rates. There is no evidence of any particular course of dealing before the handbook was drafted for the Tribunal to consider; only the way the respondent operated after the handbook was drafted. The respondent pointed out as a matter of law actions subsequent to the completion of the contract should not be used to construct the contract.

90. Considering the wording of the contractual handbook, in relation to travel time the Tribunal accepts that chapter 16 is purely concerned with the principles of how an employee should calculate the amount of time they can legitimately claim for. As is clear from paragraph 3.4.3 and Appendix 1 paragraph 44 no employee can make a travel-time claim until full-time equivalent gross conditioned hours have been exceeded.

91. The respondent submitted it would be nonsensical and illogical for gross conditioned hours to be used to calculation the amount of time that can be claimed for but net conditioned hours to then be used for the pay calculation. In the context of the handbook the Tribunal does not accept that that is the case as they relate to different things. In the pre-2013 version of chapter 14 part-time employees could not claim overtime until full-time net conditioned hours had been exceeded but the overtime rate was calculated on a gross hours basis. Additionally after the 2014 changes the overtime rate was calculated using net conditioned hours but full time employees could only make a claim for overtime after their gross conditioned hours had been exceeded.

92. Reading chapter 14 (Pay) through from the beginning in sequence, as the reasonable person would, one notes that travel time falls within section 7, the title for which is “Overtime Pay”. The first reference to ‘plain time rate’ is in Section 7, 1 – Eligibility, in paragraph 7.1.2, concerning the rate to be paid for extra hours worked by part-time employees up until the point of completing full-time net conditioned hours. There is then a two-line paragraph before the subtitle, 2 - Overtime Pay Rates and Claim Forms. The paragraph immediately under the subtitle sets out that overtime is calculated using the ‘plain time hourly rate’ and that this is the annual rate of basic pay plus any reckonable recruitment and retention allowances converted to an hourly rate, with the formula using gross conditioned hours being set out in paragraph 7.2.2. Part 3 of section 7 concerns TOIL and Part 4, Travel Time.

93. The Tribunal does not find the fact that travel time is only paid once gross conditioned hours have been exceeded nor the relevant form for claiming travel time (which refers to gross conditioned hours) helpful when interpreting the pay terms. Those points support the position that is not disputed regarding the period of time for which a claim can be made under Chapter 16. Nor does the Tribunal find the genesis between gross and net conditioned hours, i.e. whether the hours include the lunch break or not, which is relevant in particular to part-time staff, helpful in constructing the travel-time pay terms.

94. In relation to the respondent’s submission that travel time has always been paid on the basis of gross conditioned hours, the Tribunal finds that since both the original overtime calculation and hourly rate calculation used (or should be construed as using (see below)) gross conditioned hours, this was not surprising up until July 2014.

95. The respondent submitted that when the overtime rate changed to net conditioned hours this should not be viewed as creating a contractual change to the travel time payment because the travel time section in chapter 14 was never intended to cross reference the overtime section but instead the Tribunal should look to chapter 16 because the Travel Time section states: “full details of the principles of travel time and when a claim can be made can be found in the personal Handbook chapter 16 para 3.34 et seq”. The Tribunal is not persuaded by this. The Tribunal finds that the travel time paragraph in chapter 14 being cross referred to the principles in Chapter 16 relates to ascertaining how the period of time should be calculated for which a travel time payment claim can be made and not how the actual payment should be calculated. Chapter 16 specifically referring to the hours of work and chapter 14 to pay for that work.

96. The respondent explained that the intention behind the overtime formula change in 2014 was to remove a disadvantage faced by part time employees from the formula using gross rather than net hours. The issue of whether part time employees suffered a disadvantage is not an issue for the Tribunal to consider in this case, however at a surface level it is difficult to understand that if using gross hours in the calculation for overtime pay disadvantages part time employees why using gross hours in the travel time pay rate calculation (as opposed to the time period for which a claim can be made) does not have the same effect.

97. The Tribunal is not persuaded that the use of the phrase 'plain time rate' should be viewed as having different meanings within two different parts of the same section of chapter 14; that section (section 7 - Overtime Pay) is only four pages long out of the 47 page chapter. The handbook should be read as a whole. Bearing in mind the length of section 7 and the specific terminology of 'plain time rate', the Tribunal finds that the formula of the 'plain time hourly rate' should be interpreted as also being applicable to the travel time paragraph at 7.4.1.

98. The Tribunal was also not persuaded that the use of 'plain time rate' in paragraph 7.4.1 is, as per the respondent's submission, purely to distinguish between a basic/standard pay rate and time and a half or double time. The Tribunal considers that a reasonable person's interpretation is that the term should be read across, otherwise the reasonable person would expect more standard terminology such as 'the basic pay rate' or 'the hourly rate' (for which a specific formula is set out in 1.7.1) rather than a more unique term that appears in more than one paragraph of the same section of the chapter. The Tribunal in considering whether the definition should be read across also considered the fact that at that pre July 2014 there is no dispute that both the overtime rate and the travel time rate were calculated using gross conditioned hours and the calculations were therefore aligned.

99. The Tribunal does not find that wording needs to be inserted into the contract to give 'plain time' in relation to travel time a different meaning to that in the overtime paragraph. There is no evidence that it would be appropriate to do this either from the wider wording of the contract or the factual matrix at the time. It is not obvious that the parties meant for plain time in relation to travel time to have a different definition to that set out for overtime.

100. The Tribunal does not find that the position put forward by the respondent, that there has not been a specific complaint made by the unions in relation to the payment for travel time, counteracts the Tribunal's finding that the calculation for travel time payments should be construed as referring to the formula for plain time set out in the overtime part of section 7. It is unclear to what extent consultation with the unions took place regarding the 2014 changes.

101. Turning now to the alternative proposition made by the Claimant that the hourly rate formula should be applicable to the travel time pay calculation and that pre June 2015 the formula should be interpreted as referring to net hours. The Tribunal reflected on the difference in wording used between paragraph 7.1.1 and 7.1.2 where full-time hours are just referred to as 'conditioned full-time hours' and net full-time hours are specifically identified as 'net' conditioned hours. The Tribunal was not persuaded that the change in the hourly rate formula to state net hours in June 2015 was merely clarifying the original position as per the claimant's submission but considers pre the June 2015 change the clause should be construed to mean gross conditioned hours. The Tribunal concludes that pre July 2014 therefore in all cases the contract should be construed as referring to gross conditioned hours when calculating the rates for overtime pay and travel time pay. The Tribunal was also not persuaded that the hourly rate formula was the correct formula to apply to the calculation of the plain time rate for travel time as the reasonable person would have expected the travel time pay section to simply say

the ‘hourly rate’ rather than use the specific terminology of ‘plain time’.

102. Having removed the subjective view of both parties and having considering what a reasonable person in the position of the parties would have understood the words to mean at the time (bearing in mind Lord Hoffman’s view that “we do not easily accept that people have made linguistic mistakes, particularly in formal documents” and Lord Neuberger’s comments “The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision”) and in light of the fact that there is no background evidence suggesting that something has gone wrong with the language, the Tribunal has concluded that the reference to ‘plain time rate’ in paragraph 7.4.1 regarding the rate of pay for travel time should be construed as referencing the formula set out in paragraph 7.2.2. It follows therefore that the salary definition to be used in the calculation of travel time should also be that set out in the formula at paragraph 7.2.2 (being Basic Pay + Reckonable RRAs per annum). This means that the IT allowance (as a Reckonable Recruitment and Retention Allowance as set out in Chapter 14, Section 3 - Allowances and Appendix 2) should be included in the pay calculation but that mark-time pay should not, mark-time pay not being an element of basic pay but a specific supplement to it.

103. In relation to the change in the formula to calculate overtime pay in 2014 and the change to the formula for hourly rate pay in 2015, it may not have been the intention of the respondent for those changes to impact on the way they were paying Travel Time payments but that does not invalidate the construction of the contract as set out above. The respondent’s stated subjective intentions at those times were not translated into clear drafting, setting out the intended distinction in pay between Travel Time and other payments - that finally happened in October 2017, following the claimant’s grievance process. The Tribunal bears in mind Lord Neuberger’s third point:

> “…commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.”

And in his fourth point

> “…The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.”

104. In conclusion therefore the Tribunal finds in respect of the claimant’s complaint that in the period August 2011 to July 2017 that travel time payments between August 2011 and July 2014 should have been calculated on the basis of the following hourly formula:

Basic Pay+ Reckonable Recruitment and Retention allowances per annum

---------- = plain time hourly rate
52 weeks/ full-time/ gross conditioned hours

and that from July 2014 to July 2017 the contractual hourly formula was amended by replacing gross conditioned hours with net conditioned hours. This was not the formula applied to the claimant's travel time pay claims accordingly the claimant's complaint of unlawful deduction of wages in respect of that period is well founded and succeeds.

105. Had the Tribunal not found that the correct construction was that in paragraph 104 above, it would have found that the hourly rate formula was the applicable formula and that formula should be construed to refer to gross conditioned hours until June 2015 when it was amended to specifically refer to net hours. In the case of the hourly rate formula the Tribunal would have found that the definition of salary does not include IT Allowances or mark time payments. The Tribunal would have reached this conclusion on the basis that in the monthly pay explanation in paragraph 1.5.1 reference is made to the annual gross salary rate then reference is made to pro-rating of "salary and other allowances" indicating a difference between the annual rate of salary, which the Tribunal considered should be construed as basic salary and "other allowances". In the following paragraph (1.6.1) "full-time equivalent salary" is referred to for the first time in Section 1 when setting out how monthly pay for part time staff is calculated. The Tribunal considers this should be construed by referencing back to the previous paragraph relevant to the monthly calculation for full time staff. The next paragraph (1.7.1) then sets out the formula for the hourly rate being: full-time equivalent salary/52/full-time conditioned hours. One again the Tribunal considers this should be construed by referencing back to the paragraph relevant to the monthly calculation for full time staff, hence the Tribunal would have concluded the formula should be construed to read full time equivalent basic salary.

106. Remedy is to be considered separately if it cannot be agreed between the parties.

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Employment Judge Wisby on 7 June 2018