EMPLOYMENT TRIBUNALS

Claimant: Dr L Spurr

Respondent: Bradford Teaching Hospitals NHS Foundation Trust

HELD AT: Leeds **ON:** 26-27 February 2018
In chambers 20 April 2018

BEFORE: Employment Judge Wade

REPRESENTATION:

Claimant: Miss S Tharoo (counsel)
Respondent: Ms I Omambala

Note to the parties:

The written reasons below for the Tribunal's decision on a deductions from wages complaint were delivered orally in an extempore Judgment on 27 February 2018, the written record of which was sent to the parties on 5 March 2018. A written request for written reasons was received from the claimant on 1 March 2018.

On 29 March 2018 the solicitors for the claimant submitted a written application for costs, for which there had been no time at the conclusion of the hearing, and to which the respondent provided its submissions in opposition on 18 April 2018, shortly before these reasons were to be sent out.

Both parties were content that the costs application be addressed in chambers and without a hearing and it is therefore convenient to consolidate these reasons with that costs judgment.

The reasons for the principal decision are corrected for error and elegance of expression, and are provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the

Judgment given on 27 February 2018 and sent to the parties on 5 March is repeated below:

JUDGMENT

1 The claimant's complaint of an unlawful deduction from wages succeeds: the respondent made an unlawful deduction from her May 2017 wages in failing to pay to her back pay owing in respect of pay supplements at Band 3 in respect of her rotation as a junior doctor in the respondent's Accident and Emergency unit from 7 December 2016 to 4 April 2017.

2 The respondent shall pay to the claimant the sum of £4627.17 in back pay, a gross sum in respect of which the claimant may be required to account to the revenue for income tax.

JUDGMENT ON COSTS APPLICATION

The claimant's application for costs dated 29 March 2018 is dismissed.

REASONS

Introduction

1. The claimant in this case, a junior doctor, says in essence, that her contract entitled her to a "penal" pay band supplement, "Band 3", which meant a 100% supplement to her salary for the material period. The respondent trust says that she was correctly paid at "Band 1A", which involves a 50% supplement: that was the band provided for in her contract of employment. Further, in rejecting prescribed monitoring data which suggested otherwise, the respondent says that it acted in good faith and with reasonable and proper cause such that the sums claimed by the claimant were not "properly payable". The claimant presented her complaint relying on Part II of the Employments Rights Act 1996 - a deductions from wages complaint.
2. Yesterday I heard from Mr Wakeford of the British Medical Association, Dr Got, a former colleague of the claimant, and the claimant herself. I then heard oral evidence on behalf of the respondent from Ms Coatesworth, Medical HR Manager, and from Dr King, clinical lead for the Accident and Emergency Department at Bradford Royal Infirmary, where these events unfolded. I am very grateful for the helpful oral evidence I have heard.

Issues

3. As to the issues that I have had to decide, there was discussion of those by the parties' counsel, but not wholesale agreement: instead I identified them at the start of the case. The issues discussed distil to this: what sums by way of pay

supplements were properly payable to the claimant in respect of the period 7 December 2016 to 4 April 2017, when she was completing a four month training rotation as a junior doctor in the respondent's accident and emergency department at Bradford Royal Infirmary?

4. So far, so straightforward. There was a great deal in this case which was not in dispute. I include in that the voluminous contractual documentation before me. For the advocates' notes, if these reasons come to be typed then there will have to be copy typing of [the following relevant provisions of the claimant's contract of employment dated 29 July 2016 (expressed in letter form) and the Terms and Conditions of Service of Hospital, Medical and Dental Staff and Doctors in Public Health Medicine and the Community Health Service (England and Wales) ("the National Terms and Conditions") expressly incorporated into that contract. The underlined paragraphs 4(b) and 6 below of the contract of employment refer to the pay supplements and monitoring over which the parties are in dispute.]

5. There was no dispute before me that the claimant had accepted the relevant terms and conditions.

The contractual terms

"*Dear Dr Spurr*

Offer of appointment

1. (a) I am instructed by the Bradford Teaching Hospitals NHS Foundation Trust to confirm the offer of an appointment as Foundation Year 2 doctor at Bradford Teaching Hospitals NHS Foundation Trust commencing on

03.08.16 – 06.12.16 Dermatology

07.12.16 – 04.04.17 A&E

05.04.17 – 01.08.17 Haematology "

(b) For the purposes of calculating accrued service your continuous employment dates from 5 August 2015. For the purposes of the Employment Rights Act 1996 continuous employment dates from 3 August 2016.

The next provision was as follows:

*"**Applicable collective agreement**"*

2.

"Your appointment will be subject to the Terms and Conditions of Service of Hospital, Medical and Dental Staff and Doctors in Public Health Medicine and the Community Health Service (England and Wales) as amended from time to time and any reference in those Terms And Conditions to an employing authority shall be construed as if it were to include a reference to an employing Trust.

Duties

3. (a) Your hours and duties are as defined in your job description (For rotations, the job description may differ for each individual post/placement). You will be available for duty hours which in total will

not exceed the duty hours set out for your working pattern in paragraph 20 of the Terms and Conditions of Service.

(b) Your working pattern is described as Dermatology (Full Shift), A&E, (Full Shift), Haematology (Full Shift) with controls on hours as defined in the Terms and Conditions of Service paragraph 20.

Full Time [For staff contracted as full-time staff

(c) You will receive a base salary as detailed in Table 1, Appendix 1 of the Terms and Conditions of Service.]

(d) A non pensionable supplement at pay band 1A (Dermatology) 1A (A&E), 1A (Haematology) will be payable in accordance with paragraph 22 of the Terms and Conditions of Service (for rotations, banding supplements may differ for each individual post/placement.

(e) Banding supplements may be altered (in accordance with paragraphs 6(e) and 7(c) below) in the light of changes in working patterns in order to make posts compliant with the New Deal and the Working Time Regulations as amended. If the pay band changes, you will be issued with a letter of variation (in accordance with paragraph 7 below). Pay protection will apply in accordance with paragraph 21 of the Terms and Conditions of Service.

Pay

4. (a) Your base salary will be £28,357 per annum, paid monthly and will progress by annual increments to £32,066 per annum in accordance with the current national agreed salary scale for your grade. (These rates are subject to amendment from time to time by national agreement). See Note 1.

(b) Your incremental date will be 3 August.

(c) <u>You will receive, in addition to your base salary a supplement at the rate of 50% (Dermatology), 50% (A&E), 50% (Haematology). These rates may be amended from time to time by national agreement).</u>

Pension

5.

(c) Pay supplements over and above base salary are non-pensionable.

Monitoring of work patterns

6. (a) <u>The Trust is contractually obliged to monitor junior doctors' New Deal compliance and the application of the banding system, through robust local monitoring arrangements supported by national guidance. You are contractually obliged to co-operate with those monitoring arrangements.</u>

<u>(b) These arrangements will be subject to:</u>

- *<u>Review by the regional improving junior doctors working lives action team (or equivalent); and</u>*
- *<u>For the Trust, the performance management systems.</u>*

(c) The Trust must collect and analyse data sufficient to assess hours' compliance and/or to resolve pay or contractual disputes. Therefore, when the Trust reasonably requests you to do so, you must record data on hours worked and forward that data to the Trust.

(d) The Trust is required to ensure that staff in all training grades comply with the controls on hours of actual work and rest detailed in sub-paragraph 22.a of the Terms and Conditions of Service, and with the requirements of the Working Time Regulations as amended from time to time.

(e) You are required to work with your employer to identify appropriate working arrangements or other organisational changes in working practice which move non-compliant posts to compliant posts and to comply with reasonable changes following such discussion.

Revision to pay banding

7. *(a) The Trust will notify you in writing of its decision on pay banding.*

(b) Full details of the procedure for appealing against banding decisions are in the Terms and Conditions of Service sub paragraph 22l.

(c) Full details of the procedure for re-banding posts are in the Terms and Conditions of Service sub-paragraph 22m.

Additional work

11. You agree not to undertake locum medical or dental work for this or any other employer where such work would cause your contracted hours (or actual hours of work) to breach the controls set out in paragraph 20 of the Terms and Conditions of Service.

Deductions

15. I understand that I have a responsibility to check that payments made to me are accurate and report any errors promptly.

Working Time Regulations 1998

26. You are required to comply with the Working Time Regulations, including declaration of hours worked and breaks taken. You must complete written records if required and report any instances where your pattern of working hours may constitute a Health and Safety risk to yourself, patients, the public and other Trust employees.

Acceptance

34. If you agree to accept the appointment on the terms specified above, please sign the form of acceptance on the following page and return it to me. A second signed copy of this is attached, which you should also sign, and retain for your future reference.

NOTES

1. Your salary gives 0 years' incremental credit for previous service. If you have any enquiry about how this has been calculated, please contact the Human Resources Department at St Lukes' Hospital/Bradford Royal Infirmary.

2. (a) The Department and the profession have agreed that minimum periods of notice should be applied as follows, unless there is agreement by both parties to a contract that a different period should apply:

Foundation House Officer (FY1) 2 weeks

5. Copies of HSC2000/031 – Modernising Pay and Contracts for Hospital Doctors and Dentists in Training, may be obtained on request.

The National Terms and Conditions

INTRODUCTION

i. This handbook sets out the Terms and Conditions of Service of hospital and medical and dental Staff and doctors and dentists in public health and the community health service in England. It supersedes the handbook issued in 1994, and incorporates all amendments agreed between the Secretary of State and the medical and dental professions as at 31 March 2013.

ii. The remuneration and conditions of service set out in this handbook have been approved by the Secretary of State under Regulations 2 and 3 of the National Health Service (Remuneration and Conditions of Service) Regulations 1991 (SI 1991 No 481) and under paragraph 11 of Schedule 3 to the National Health Service Act 1977.

iii. The terms and Conditions of Service set out in this handbook shall incorporate, and be read subject to, any amendments which are from time to time the subject of negotiation by the appropriate negotiating bodies and are approved by the Secretary of State after considering the results of such negotiations. A record of amendments to these Terms and Conditions of Service is available in the relevant section of the NHS Employers website at http:/www.nhsemployers.org.

iv. The approved provisions of this handbook are the Terms and Conditions of Service determined from time to time for the purposes of the contracts of hospital medical and dental staff and doctors and dentists in public health and the community health service and have been so determined by the Secretary of State for the purpose of those contracts requiring the Secretary of State's determination. The fees and allowances set out in Appendix IV do not form part of these Terms and Conditions of Service, and are included solely for the convenience of users.

RATES OF PAY

1.a. Practitioners shall be paid at the rates set out in Appendix 1.

PRACTITIONERS IN THE TRAINING GRADES

18.a. Practitioners in the training grades contract for.

i. 40 hours per week (see paragraph 65 for part-time practitioners);

ii. such further contracted hours as are agreed with the employing authority subject to the controls set out in paragraph 20 below;

iii. exceptionally, duty in occasional emergencies or unforeseen circumstances (see paragraph 110).

b. Practitioners in these grades work on an on-call rota, partial shift, 24 hour partial shift, full shift or hybrid working arrangement. Controls on the contracted hours of duty for each of these working arrangements are set out in paragraph 20 below and employing authorities shall ensure that these controls are met. They shall keep the working and contractual arrangements under review to ensure that they remain in line with the demands of the post. Hours of duty include periods of formal and organised study (other than study leave), training, all rest while on duty, and prospective cover where applicable.

Definitions

19. For the purposes of paragraph 20 below the following definitions shall apply:

c. ***Full Shifts***

Practitioners can expect to be working for the whole duty period, except for natural breaks. Practitioners will be rostered for duty periods that do not exceed 14 hours. Practitioners working on full shifts shall have adequate rest during a period of duty.

Controls on Hours

20. The following controls on hours of duty shall apply to practitioners in the training grades working on-call rotas, partial shifts, 24 hour partial shifts, full shifts or hybrids (except in circumstances where they are acting up as a consultant).

c. ***Full Shifts***

Employing authorities shall ensure that:

i. The maximum average contracted hours of duty for practitioners working a full shift do not exceed 56 per week including handovers at the start and finish of shifts.

ii. No period of continuous duty for practitioners working full shifts is longer than 14 hours, including the time required for handovers.

iii. Practitioners working full shifts have a minimum period of 8 hours off duty between shifts; do not work more than 13 days without a minimum period of 48 hours of continuous off-duty time; and have one minimum continuous period off duty of 62 hours and one minimum continuous period off duty of 48 hours in every period of 28 days.

e. ***Hours protection***

Following the changes in contractual terms on 1 December 2000, any substantive change to the working arrangement of any existing post which might lead to an increase in the number of hours of work can only be introduced with the agreement of the practitioner in post and the approval of the regional improving junior doctors working lives action team (or equivalent). The nature of the approval system is described in guidance accompanying HSC 2000/031.

h. Employing authorities shall ensure that practitioners in the training grades comply with the relevant controls of duty. Practitioners and their employing authority shall agree to work together to identify appropriate working arrangements or other organisational changes in working practice to ensure the controls on hours of duty,

actual work and rest described in sub-paragraphs 18.b, 20.a to d above and 22.a below are met for practitioners in all training grades, and to comply with reasonable changes following these discussions; changes to working arrangements shall be monitored by regional improving junior doctors working lives action team's (or equivalents).

Payment

21a. …..An additional supplement will be paid according to one of the pay bands, in accordance with the assessment of their post as described in paragraph 22 below, at the rates set out in Appendix 1.

…….

Backdating of Pay on Re-Banding after Monitoring

o. When following a change of house a rota is properly monitored to be in a higher band than demonstrated by previous valid monitoring, backdating of pay will apply to those doctors currently in post and will not apply to former postholders regardless of when previous monitoring took place, unless former postholders have formally raised concerns and requested monitoring but where that has not taken place. In such cases where the later valid monitoring confirms the concerns of the former postholders, they should receive back pay at the higher rate from the date of the request for monitoring to the end of the placement.

p. In the event of a rota, without any change in working pattern, being shown to belong in a higher pay band as a result of a valid monitoring round, pay at the higher level shall be backdated to the point three calendar months after the first day of the previous successful monitoring round, i.e. that which most recently showed the lower pay band, except:

- *where there are postholders who have taken up their posts after the previous valid monitoring round, for whom the most recent round is also their first one in their current post, in which case their pay increase will be backdated to their first day in the post;*

or

- *when there have been intervening attempts by the Trust to monitor, which the Trust can demonstrate to have been done in accordance with good practice guidelines and which have not been successful despite the proven best efforts of the Trust, in which case pay shall be backdated to the first day of the valid monitoring exercise which led to the rota being shown for the first time to belong in a higher pay band.*

Assessment of Pay Supplements

22.

a. Band 3 shall apply to full-time and part-time practitioners in posts which do not comply with the controls on hours of duty described in paragraph 20 above or with the controls on hours of actual work or rest described below (refer HSC 1998/240 and HSC 2000/031 including agreement to modify weekend rest requirements for on-call rotas) applicable to their working pattern…….

> *vii.* ***That practitioners working full shifts shall have natural breaks as minimum rest during the whole of each duty period with at least 30 minutes continuous rest after approximately 4 hours continuous duty.***

The facts

6. The undisputed facts in this case are that the claimant had worked in Accident and Emergency at Bradford for three or so months between December 2016 and March 2017, when a monitoring exercise was undertaken. The results of that two week monitoring exercise, pursuant to the national terms and conditions above, was available to the respondent trust on 3 April.

7. The time card recording system, an electronic system, was undertaken for a cohort of 20 training grade doctors between 3 and 19 March; the system was open for a further 14 days after the end of that monitoring period. That allowed for late input of hours time cards, or for them to be amended or updated or completed as necessary to have an accurate picture.

8. The Trust had previously monitored the particular rota to which the claimant was allocated twice yearly, typically March and September, going back to 2011. The detail of those monitoring exercises is at page 154. Apart from the March 2017 exercise with which we are concerned, the response rate from doctors had been a maximum of 61% and a minimum of 12%. The national guidance (pages 240 to 247) requires a return rate of 75% for making a "valid and accurate assessment of hours worked and rest attained", to be regarded in context as "safe".

9. The respondent had not re-monitored on any of these previous occasions. The issue of whether the nationally agreed controls on hours (the taking of natural breaks) had been complicit with national standards had arisen twice in that period, but there had not been re-monitoring then either. The HR team which examined the results had a practice of noting in the "notes" section of the system, any anomalies they observed, where perhaps they considered a doctor had made an error as to breaks or other matters. Ms Coatesworth' evidence was that she accepted it would be wrong to change a doctor's entry without agreeing that with them first (when it was the doctor who had the professional and contractual duty to report). She also said that generally there were then conversations with doctors and that entries were changed by HR in those circumstances. And she said: "anything we do input or change, we put a note in the notes section".

10. In the March 2017 exercise in which the claimant took part, in contrast, the response rate from doctors was 89%. That is, to put it in context, only two doctors out of the cohort had not completed a return at all, and one doctor out of the twenty had partially completed a return.

11. Taking into account the national guidance on return rates, on the face of it there was no reason to consider that this monitoring exercise was not reliable data, or "valid", given the numbers of doctors who had completed full time cards.

12. When the system report was printed on 3 April 2017 the system itself designated the rota as requiring the penal "band 3" supplement. That is at page 131. That is because it analysed the doctors' returns to the effect that only 35% of rostered duties complied with the contractual natural breaks and hours limitations provisions, as opposed to the safely targeted 75%.

13. In contrast, page 127 of the bundle gives the result as requiring a "Band 1A" supplement, because there the system analyses the rota template in isolation (ie if the doctors all take natural breaks as required and work the rostered hours only). At page 141 the system then designated the rota as "Band 1A" taking

account **both** template and monitoring. That outcome appearing perplexing and unsustainable in these circumstances, I heard evidence from Ms Coatesworth. She told the Tribunal that the system reached this conclusion when the response rate of monitoring returns was not 100%. That is, the default option of the system was to prefer a rota (the template only information) of what was planned to happen, rather than take account of the doctors' returns of what **actually** happened on any given shift, **unless** there was a 100% response rate in the doctors' monitoring returns.

The taking of natural breaks

14. As far as ensuring doctors take sufficient breaks, the provision in the National Terms and Conditions was a very simple one to which I refer in bold above: *practitioners working full shifts shall have natural breaks as minimum rest during the whole of each duty period with at least 30 minutes continuous rest after approximately 4 hours continuous* duty. Nothing perplexing, concerning or difficult about that.

15. In practice, it was accepted by the respondent that shifts of 10 hours or more required two thirty minute breaks to comply with this control. Further it was the position of the parties that 100% compliance by the respondent (or other trusts) with the controls on hours provision was never going to be workable, because of the clinical environment and need. This was reflected in a practical threshold or model adopted nationally to the effect that if 75% of duties in a rota achieved compliance on monitoring, then the rota was compliant and no pay supplement was required. That was adopted by this respondent trust, the BMA and other Trusts.

Events after the March 2017 monitoring

16. After the results of this monitoring were in, there were various attempts by two of the junior doctors in the cohort to obtain the results from the respondent. There were various emails between Ms Coatesworth and others indicating the respondent considered the potential need for re-monitoring (indicating it had concerns over validity), the potential need to pay the Band 3 supplement to the relevant doctors, and a need to talk to the individual doctors who had inputted the relevant hours information which produced those results.

17. In fact there was no discussion between HR and individual doctors concerning the detail of their entries such that there was agreement to changed entries.

18. At some time in May 2017 Ms Coatesworth discussed the results with Dr King, as the relevant clinical lead, and Dr King then discussed them with other clinicians in the department (consultants and registrars). The results were also discussed in a junior doctors' forum. There appeared some misunderstanding as to the prospect for the rota being changed, such that the BMA representative considered that re-monitoring may not be worthwhile if the rota was to be changed. Nevertheless by June Dr King had clarified, and she was in charge of the rotas in this particular department, that a change to the rota would not happen.

19. Even once that was known and clarified, the respondent did not undertake re-monitoring, nor did it issue instructions on working practices to address the apparent breaks issue. The respondent was very much focused at that time on

the new junior doctors' contract and the implementation of that in the coming Autumn.

Further findings and matters in dispute between the parties

20. The claimant had taken part in induction training which did not, on the balance of probabilities, set out the practical threshold for breaks to be taken on A&E: for 10 hour or more shifts, take two half hour breaks; for nine hours or less, take one; breaks need to be evenly spaced so that a doctor is not practising or treating patients for more than approximately four hours (which in practice means anything up to five) without a break. These were said to be the safe standards but they were not set out clearly in induction training, nor in communications even after Dr King was aware that junior doctors were saying compliant breaks were not being taken in the monitoring exercise.

21. Further guidance was issued (see pages 205 and 206) after June, but those new rules did not give the clear practical advice or guidance. The new rules were issued at a time seeking to straddle the old junior doctors' contract and the new contract, but that was not a reason to be unclear because on the particular "breaks" issue, the standard was for all intents and purposes the safe standard, and considered to be the same under the old contracts and the new contracts.

22. Not only did the respondent fail to carry out re-monitoring, which was an option available to it under the various provisions and national guidance in the event of concerns about validity, Ms Coatesworth and Dr King appeared to form the settled view that the data was unreliable and the fault lay with the doctors. This included because doctors had recorded nine hour shifts with a half hour break as "fails". They did not consider that those might be recorded as fails because of the time at which the break was taken, for example seven hours into a nine hour shift, or indeed that the break might have been several short interrupted breaks, rather than one half hour release from treating patients, which was the safe standard.

23. This early view about the inaccuracy of the underlying data was also formed by Ms Coatesworth because of previous monitoring return rates (which had been typically low), and in Dr King's case, because her consultant colleagues, who had far more direct supervisory responsibility for this cohort of junior doctors, were not expressing the view that there were any concerns being expressed to them on shift about break taking.

24. The overall high return rate from junior doctors in the March exercise was in contrast to poor rates of return for registrars: rota 22 (medicine) had a 5% return; rota 19 in A&E had a 22% return.

25. Finally, in December 2018 in preparation for these proceedings, Ms Coatesworth undertook a re-analysis of the data from the junior doctors in the March Accident and Emergency cohort, in which she corrected the data to address her misconception that the only explanation for "fails" on nine hour shifts was error by those completing the returns, the junior doctors. Even on that re-analysis, which only adjusted matters in favour of the rota being compliant, as opposed to errors which indicated non-compliance with the working time controls, the rota did not achieve the applied good practice standard: only 67% of duties were compliant with the controls on hours provisions.

Evidence

26. It is helpful to record my assessment of the oral evidence I have heard, albeit it will be apparent from my findings of fact that I did not have to resolve any great conflict. Nevertheless there were submissions made to me about the quality and reliability of the evidence, and what I could properly draw from it.

27. I heard from two junior doctors in this case, the claimant and Dr Got, both of whom worked on the rota in question, both of whom completed the monitoring exercise, as they were contractually obliged to do. They were consistent, they were cogent and on my assessment they were honest and reliable about these events. The claimant was particularly honest about the reason that she marked fails for her nine hour shifts, in terms of rest breaks: she researched the BMA guidance and she accepted, very straightforwardly perhaps, that she had misunderstood that.

28. She did not assert that the reason she marked fails for those nine hour shifts was because of interrupted breaks or breaks taken very late in the shift. Nevertheless she and Dr Got are the only doctors from that cohort of twenty or so, from whom I heard. They do not speak for the others. As I have indicated already, Ms Coatesworth's December analysis, which made the assumption of error on the part of all doctors who completed nine hour shift breaks as fails, still did not produce a result that this rota had been compliant with controls on hours at the time.

29. As to the evidence from Dr King, that too was entirely straightforward and direct about her mindset at the material time. In clinical terms, her evidence was that no one appeared to be raising concerns about breaks. It is understandable why that would be entirely her focus, rather than the consequences contractually.

30. In Ms Coatesworth case, her evidence in my assessment, had something of an embarrassed quality about it. Having been taken to the relevant contractual terms she accepted that she had not considered that break taking could be inadequate if it comprised half an hour in total, however much the time was interrupted, and however far into a nine hour shift it occurred.

Law and submissions

31. As to the law, I am very grateful of course to the summaries that have been provided in the respondent's skeleton. I simply adopt into these reasons sections 13(3) and 23(2) of the Employment Rights Act 1996. I do not accept the respondent's analysis of limitation for reasons that I shall explain shortly. I do adopt into these reasons the principles of contractual interpretation found in **Investors Compensation Scheme Ltd v West Bromwich** [1998] 1WLR 896 paragraphs 912h and 913e.

32. I also adopt, if needs be, the principles set out in **Department for Transport v Sparks and Others** [2016] ICR 695 and the Court of Appeal, as to incorporation and construction of contracts.

33. I am also grateful for the parties oral submissions, which in Ms Omambala's case, developed her skeleton.

Discussion and further conclusions

34. Coming to my principal task in this complaint, which is applying the law to the facts, many of which were apparent and undisputed in the chain of events, the claimant has more than established on all the evidence before me, which has

been comprehensively tested in cross-examination by professional representatives on both sides, that when applying the national terms and conditions as to payment (21(o) of page 318): there has been a change of house (department), that a rota was properly monitored to be in a higher pay band than demonstrated by previous [valid] monitoring, and that backdating of pay ought to apply to those doctors currently in post.

35. That is a simple and straightforward application of the national terms and conditions which were incorporated, and to which her local contract was subject.

36. If I am wrong about the application of that provision, sub paragraph (o), then I have considered paragraph (p), which is the sub paragraph about which the parties were at odds, as to which should apply.

37. The first introductory paragraph…"in the event of a rota, without any change in working pattern, being shown to belong to a higher pay band as a result of a valid monitoring round, pay at the higher level shall be backdated…{ to a particular point} …".

38. Just pausing there, I consider that the claimant has again more than established on the balance of probabilities that the operative provisions of that term apply, and that there has been a valid monitoring round, and that pay at the higher level shall be backdated, again applying those national terms and conditions.

39. The respondent has not even come close to showing on the evidence before me that the monitoring round was not a valid monitoring round by reference to the contract, the guidance or otherwise. In those circumstances the provisions of (p) are made out. I say more about this below.

40. The issue between the parties is whether the first bullet point (claimant) or the second bullet point (respondent) is that which applies in these circumstances.

41. The second bullet point on which the respondent relies requires me to apply **West Bromwich** and interpret what is meant by, "when there have been intervening attempts by the Trust to monitor which the Trust can demonstrate to be done in accordance with good practice guidelines and which have not been successful despite the proven best efforts of the Trust, in which case pay shall be backdated to the first day of the valid monitoring exercise…….".

42. The contention on behalf of the respondent is that intervening, in these circumstances, refers back to all the previous monitoring that has taken place and indeed the respondent's proven best efforts in that respect.

43. I take the view that giving the entire clause (including commencing at paragraph (p) and reading on to the second bullet point) its natural interpretation as understood by the parties at the time concluding these arrangements, "intervening attempts" can only be taken to mean attempts engaged upon between the point at which the shift or rota is shown to be in a higher pay band, that is the first point referred to in paragraph (p), and a later point before the next natural monitoring.

44. That point is, by way of example in this case, and perhaps the paradigm, had the respondent done what it said it was considering, namely to re-monitor after the results were available in late April, or in May, when perhaps a cohort of GP trainees would have still been in pace (the six month trainees), and had it, in those circumstances, received no co-operation whatsoever from the trainee

doctors such that the returns were inadequate or otherwise unreliable, then those circumstances would, in my judgment, engage the provisions of the second bullet point.

45. However, the respondent has not complied with “proven best efforts”, even in relation to earlier years because it appears to have accepted inadequate numbers of returns (see paragraphs 8 and 9) and/or has changed entries where errors by doctors were perceived, without necessarily understanding the variety of reasons that breaks, in particular, could be marked as “fails”.

46. For these reasons the respondent cannot demonstrate that previous monitoring of this rota was in accordance with the contractual obligation and good practice such that it can rely on (p) (ii) to limit the amount of backdated pay to the first day of the March monitoring period.

47. For both reasons of the facts I have found and construction the respondent cannot rely on that provision.

48. It is evident in my decision that I do not consider the evidence from Dr King about the extent to which registrars would know what was transpiring on the ground on any shift, in relation to the taking of two breaks on shifts of 10 or more hours, or the taking of interrupted breaks and so on, such that the respondent has established that the monitoring round was invalid and unreliable. I note that the return rate from those registrars on the same department was extraordinarily low - there might be good reason for that. I have not heard from any such witnesses who say that the data entered by the junior doctors, was in some way not an accurate note of their experience on shift or containing error (other than the limited error honestly accepted by the claimant). Invalidity is also unsustainable when the December analysis simply confirmed that the rota was not compliant with controls on hours when worked by the relevant cohort of junior doctors. Previous years’ poor return rates and changes concerning break taking on this rota similarly do not suggest invalidity in the March result.

49. I also take into account those who completed this monitoring information did so dependent upon the support and guidance of their seniors, but in the context of being junior doctors who were only in the department for a four month or six month rotation. That was a very short time in which to raise concerns within the context of a busy A&E department. Those junior doctors were also, on my findings, not given clear guidance about the need for two breaks during shifts of 10 or more hours. In the round the respondent had simply no reasonable and proper cause in my judgment to treat this monitoring exercise as unsafe or invalid in the way that it clearly did and in effect, to ignore it.

50. I also raised with the parties an issue of supremacy, which seemed to me to be relevant and in the nature of the respondent’s submissions: the contract of employment between Dr Spurr and this respondent provides for a clear pay supplement, according to the different rotations to which she was allocated and contracted with the respondent. It also provides for pay band decisions at paragraph 7 to be notified to her by the Trust. The contract also contains an obligation for the claimant to provide data in relation to monitoring. There is no expression of whether the local contract or the National Terms have supremacy in the event of conflict.

51. In those circumstances the gist of Ms Omambala's submission is that if this Trust rejects monitoring results as invalid, acting in good faith and with reasonable and proper cause, because of its decision making powers inherent in the contractual terms agreed between the parties including clause 7, in effect it has contractual control over the issue of pay supplement and no such additional supplement is payable.

52. That submission gives rise to whether there is an inherent conflict between the element of control which might be said to be implicit in clause 7 and the National Terms, which are, in my judgment, a comprehensive framework which leave no room at all for confusion and which is apparent in my decision above.

53. Having reflected on the matter I do not consider there is any conflict to resolve: the provisions, in my judgment address different situations. One can envisage clearly that this respondent might well want to embark on a monitoring exercise for the purpose of sense checking or assessing appropriate pay supplements for appropriate activities, houses, rotas and so forth, or might introduce new working practices, which may result in discussions with local "junior doctors working lives teams" as prescribed in the National Terms "Assessment of Pay Supplements (section 22). That is a different regime entirely to the preceding controls on hours provisions, which concern safe working for junior doctors in accordance with those National Terms and Conditions and part of a "new deal" that was arranged at the time.

54. I also take into account that I have heard that doctors are told to complete their monitoring data as they would complete patient notes. That is with the accuracy that one could expect from a professional in these circumstances.

55. In this case there is no conflict between the national conditions and the local ones such that I have to resolve which should take precedence. The National Conditions provide a comprehensive code for backdating pay in particular circumstances, which can be penal where hours controls are not observed. They are clearly to be implemented by the respondent and other Trusts if applicable.

<u>Paragraphs 2 – 4 of the respondent's written skeleton</u>

56. I take into account that there is comprehensive guidance to assist the parties in the implementation of these provisions to which Ms Omambala's skeleton refers and that return rate is one element of "validity", objectively viewed. I also take into account monitoring reports would typically expect to be issued three weeks after they are completed, I take into account that the National Terms and Conditions refer to the "backdating" of pay or pay increase. Reasonably, backdated pay, if it was due, ought to have been paid in the end of May pay run (or conceivably later), but could not reasonably have been paid during the claimant's allocation to the A&E department.

57. We have not discussed the claimant's payslips during the course of the hearing, but limitation was in passing raised in the respondent's skeleton, but not before. The claim was presented on 29 August 2017, with early conciliation between 3 July and 16 August 2017. There is no limitation issue.

58. A sample of the claimant's pay slips are in my bundle and it is absolutely clear from those pay slips that the pay supplement is not pensionable, and that it is a supplement paid entirely separate to salary, perhaps for the particular reasons that have been the subject of this dispute.

Decision

59. The sums due in backdated pay in accordance with the decision that I have reached were not paid. They amounted to a deduction because they were properly payable and were not paid at the end of May or at any time thereafter.

60. I declare that to be the case and I also declare that the respondent shall pay to the claimant the sums owing, namely in this case £4,627.17. That is a gross sum for which the claimant may need to account for income tax.

61. She is no longer an employee at this respondent. That will be a matter for her therefore, rather than a matter for the respondent's payroll. I again note that the sums are not pensionable and so there is therefore no particular complexity about that.

62. For all these reasons this complaint is well founded and it succeeds.

Costs application

63. The claimant advanced an application on the basis of Rule 76 (1)(b) only: it was clearly apparent that the response had no reasonable prospect of success.

64. The relevant paragraphs of that response are 10 to 17. In essence it relied on the respondent proving that the junior doctors entered inaccurate breaks and hours data ("..the respondent does not accept that the monitoring exercise undertaken in March 2017 is an accurate representation of the hours worked, the breaks available and breaks taken..").

65. True it is that the availability of the breaks adds nothing to the point – a monitoring exercise records whether compliant breaks were taken and hours were controlled in the way envisaged by the National Terms and Conditions. Putting that to one side, it might seem a surprising defence to suggest that doctors did not accurately record their experience on shift, and it cannot be surprising that an A&E rotation could involve greater risk of hour controls being breached that other rotations, nevertheless the respondent was entitled to advance that case and have it tested on merit. Its case could only be assessed on the evidence, (the gist of its submission on this costs application) both in documentation and in oral evidence.

66. Certainly the limits in the evidence presented, and indeed the outcome of the December exercise, are perhaps an explanation for, as I assessed it, the embarrassed quality of the evidence I did hear. Nevertheless, it cannot be said, as it can in some instances, that the response had no reasonable prospect of success without testing that evidence base.

67. Furthermore, given its limits (for example, the Tribunal did not hear from any registrars or others present on the shifts concerned), had there been a costs warning after the exchange of evidence, pointing out weaknesses in the evidential base, perhaps an application could have been made on a different basis.

68. That was not done, and therefore for the reasons above and on the basis the application was put, the application fails.

_____

Employment Judge JM Wade

Date 23 April 2018