THE EMPLOYMENT TRIBUNALS

Claimants: **Mr M Devlin**
Mr T Richardson
Mr K Kirton
Mr C Stephen
Mr A Perkins
Mr C Scott

Respondent: **Tyne & Wear Passenger Transport Executive (T/A Nexus)**

Heard at: **North Shields Hearing Centre** **On:** **Monday 20 January 2020 & Tuesday 21 January 2020**

Before: **Employment Judge S A Shore**

Representation:

Claimants: **Mr J McHugh (Counsel)**
Respondent: **Mr S Goldberg (Counsel)**

JUDGMENT

The claimants' claims of unauthorised deduction from wages pursuant to Section 13 of the Employment Rights Act 1996 fail.

REASONS

Background

1. The claimants are all employed by the respondent as infrastructure workers in the respondent's Capital Delivery Section. The claims all relate to a period of time during which the claimants were rostered on permanent night shifts. The respondent operates the Metro rail system in Tyne and Wear. The claims relate to a dispute over the interpretation of the claimants and terms and conditions of employment. It is agreed that the claimants were all entitled to a shift supplement of 33⅓% for working permanent night shifts. The dispute is to whether the claimants were also entitled to an additional supplement of 10% because they worked at weekends.

2. There were not many disputes of evidence between the parties and the case largely turns on my interpretation of the contractual terms between them.

3. As all the claims were presented in May 2018, they are subject to the provisions of the Deduction from Wages (Limitation) Regulations 2014, which limits the period of claim in such matters to two years ending with the date that the claim is presented. The period in question for this case, therefore, is the period between May 2016 and May 2018.

4. All the claimants are believed to be members of the RMT union, which is one of a number of unions recognised by the respondent for the purposes of collective bargaining.

5. It was common ground between the parties that the recognised trade unions and the respondent created a collective agreement known as the "Red Book" in 2009, which set out the terms of employment of affected workers (including all the claimants). The last version of the Red Book was published on 1 September 2011. It was agreed between the parties that all versions of the Red Book included a section at paragraph 1.4 on shift allowances. Paragraph 1.4 was headed "Nightshift" and stated that permanent night work complete shifts beginning after 21:00 and finishing before 08:00 hours attracted basic pay plus 33⅓%.

6. Paragraph 1.5 of the agreement was headed "Weekend Working" and at paragraph 1.5.1 it stated that "employees who are regularly rostered as part of the normal working week to work on any four or five days out of the seven days of the week shall be paid an additional 10% of their basic wage. On the face of it, therefore, a worker who was rostered to work permanent nights and weekends was entitled to a shift supplement of 43⅓%.

7. None of the claimants, save for Mr Devlin, were ever paid a supplement of 43⅓%. All, save Mr Devlin, were paid 33⅓% at all material times. Mr Devlin was paid 43⅓% until 2016, when he changed jobs within the respondent and was thereafter paid a supplement of 33⅓% like every other claimant in this case.

8. In the 2009 pay negotiations, which were conducted between the recognised unions and the respondent, two central issues were agreed by the parties in March 2010. Firstly, a pay increase of 1.6% was agreed across the board and, secondly, it was agreed that no worker should be paid more than a 33⅓% supplement on their shift.

9. It was agreed between the parties that from the implementation of the agreement in March 2010, workers who had been receiving 43⅓% supplement were "red fenced" to protect that level of supplement whilst no new employees were given the supplement. Mr Devlin was originally red fenced until he moved jobs in 2016.

10. Messrs Devlin and Perkins signed contracts with the respondent on 17 April 2013. Messrs Scott, Richardson, Kirton and Stephen signed contracts with the respondent on 4 February 2016.

11. To all intents and purposes, the contents of all the contracts are identical and run to twelve pages. Two clauses in particular were brought to my attention:-

> "**Collective Agreements:** your Terms and Conditions of employment incorporate the Collective Agreement between Nexus and its recognised trade union for the negotiation of the Conditions of Service for Metro Staff – "Red Book" – (available from the Nexus Intranet, or on request from the Human Resources Department). In such places as there may be contradiction between the collective agreement and the details set out in this offer letter, then the details contained in this offer letter take precedence.
>
> **Entire Contract:** this contract contains the entire agreement and understanding of the Parties relating to your employment by Nexus and the parties expressly understand and acknowledge that this contract supersedes and rescinds all prior agreements, understandings, representations, assurances, warranties between the Parties concerning your employment by Nexus."

12. After the claims were presented, a preliminary hearing was held before Employment Judge Hargrove on 20 August 2018 that produced a case management order dated 24 August 2018. It was noted in the preliminary hearing that the ability of an employment tribunal to construe complex contractual provisions when hearing a claim for unauthorised deduction of wages was in dispute was currently the subject of a potential appeal in the unrelated case of Tyne and Wear Passenger Transport Executive (T/A Nexus) v Mr S Anderson and Others UKEAT 015116/BA, which had been heard on 9 May 2017. A judgment had been handed down on 15 January 2018 by His Honour Judge Hand QC. That decision was reported to be the subject of an appeal to the Court of Appeal and this case was stayed pending the outcome of that appeal.

13. Ultimately, leave to appeal was not granted, so the decision of HHJ Hand QC remains the guiding precedent on the tribunal's ability to interpret complex contractual provisions.

14. The case management order of Employment Judge Hargrove limited the scope of this trial to liability only and determined that the sole issue to be determined was whether the claimants are contractually entitled to be paid a weekend working uplift/allowance of 10% of their basic pay in addition to pay and allowances they already received and, as a result, whether a weekend working allowance was properly payable to the claimants under Section 13 (3) of the Employment Rights Act 1996 in addition to a nightshift allowance of 33⅓%.

<u>Housekeeping</u>

15. The parties produced an agreed bundle of two hundred and ninety pages. The claimants' evidence was given in chief by Mr Scott. All the other claimants produced very brief witness statements confirming that they had seen Mr Scott's statement and agreed with its contents. Mr Scott was the only one of the

claimants to attend the hearing. He had been the RMT representative who had first raised the non-payment of the additional 10% weekend working supplement with the respondent in 2016.

16. Witness evidence for the respondent was given by Gemma Hewitt, who was employed as HR Manager at the relevant time; David Bartlett, who was HR Director with the respondent from 2006 until 2015; Paul Stevens, who was Payroll Systems Administration Officer between 2009 and 2015, and; David Brown, who is currently Head of Capital Delivery for the respondent.

17. As I have already indicated, there was little dispute between the parties as to the actual evidence, so I read the file and heard the evidence on the first day of the hearing. The parties made closing submissions on the second morning of the hearing and I reserved this judgment.

Evidence

18. Clive Scott's evidence was that he wasn't employed at the time of the 2009 pay negotiation, details of which were contained in the bundle [86 – 98]. He noted that the pay offer for 2009 from the respondent included an agreement that the maximum shift allowance should be 33%, regardless of whether individuals worked at weekends [92]. He says that this provision, whilst agreed, was never incorporated into the Red Book, which sets out the terms and conditions applicable to his employment. The provision was never referenced in either the Red Book or in his contract.

19. Mr Scott had begun working for the respondent on 4 February 2013. A copy of his contract was produced in the bundle at pages 166 to 177. He referred to the Collective Agreement and entire contract clauses that I have referred to above.

20. Mr Scott says that at the time the events that gave rise to the claims in this matter, his terms and conditions were governed by the Red Book, a copy of which was produced at pages 99 to 134 of the bundle. The Red Book confirmed that it superseded all previous agreed versions of the Red Book [101] and set out allowances for particular working patterns that I have summarised above [105]. He says that the Red Book that was incorporated into his contract, therefore, provided for a percentage increase of pay of 33⅓% for nightshift employees and 10% for those employees who are regularly rostered as part of the normal working week to work on any four or five days out of the seven days of the week. The supplement relating to weekend working was also carried over into the pay rates and the Red Book.

21. He says that neither the Red Book incorporated into his contract or his terms and conditions themselves contained any clauses limiting his allowances to 33⅓%.

22. Although his role changed in 2016, the reference to the Red Book governing his entitlements did not.

23. In July 2016, Mr Scott was asked by a number of members to ensure that applicable allowances were paid in the event that a proposed change of shift took

place. In the same month, he raised the issue about the correct calculation of allowances [251 – 252] and referred to the terms and conditions of his contract which did not contain any restriction limiting the maximum payment of allowances to 33⅓%. Any failure to agree was registered and the matter was escalated to the disputes committee. No resolution in favour of the claimants was made. The issue was discussed at the JNC meetings without resolution, and the claims of the claimants that payments for their shift patterns should have been 33⅓% plus 10% was rejected on 22 February 2018 by the respondent [279 – 283]. It is the claimants' case that under the terms of their contracts and the Red Book, the correct calculation of their allowances was 33⅓% for the shift allowance and 10% for the weekend working payment, being a total shift allowance of 43⅓%.

24. In answer to cross examination questions, Mr Scott was referred to the amended final offer from the respondent to the union dated 11 March 2010 [91]. He confirmed that he understood 11 March to be the date that the final deal was agreed. Mr Scott confirmed that he was aware that the negotiations set pay rates, but also included other terms and conditions. As far as he knew, if the union and Nexus agreed an increase in pay, it was applied to all. He accepted that there was an agreement to apply a general increase of 1.6% across the board [91] and that it had been agreed to put a cap on shift supplements [92] where it stated that:-

> "Agree that the maximum shift allowance should be 33%, payable for staff working permanent nightshift (regardless of whether these include work at weekends).
>
> Staff in receipt of 33⅓% nightshift and 10% weekend allowance as at 10 January 2010 will continue to receive the weekend allowance on a permanent red-circle basis; i.e. they will continue to receive the weekend allowance for as long as they continue to work a seven-day permanent nightshift pattern. For these staff (only), the weekend allowance will not be subject to future annual increases".

25. Although he was not employed by the respondent at the time, Mr Scott did not take any issue with the documents at pages 91 to 93 at all. Neither did he take any issue with the results of the union ballot approving the agreement which were produced at pages 95, 90 and 98. Mr Scott also confirmed that, to the best of his knowledge, all staff received a 1.6% basic increase that had been agreed. He couldn't suggest that they hadn't received it.

26. Mr Goldberg then asked Mr Scott about paragraph 7 of his witness statement, in which he talked about his contract. Given the effect of the 2014 Regulations, we were talking about the period from May 2016 to the issue of proceedings in May 2018. Mr Scott was taken to his own contract of employment which was produced at pages 166 to 177 of the bundle and was dated 30th January 2013. Mr Scott agreed that this was his contract that was in place for the relevant period.

27. It was put to him that his case was that his terms and conditions incorporated the Red Book because of the "Collective Agreement" clause, which, in his contract,

was at page 178. He also agreed that the version of the Red Book that he was talking about was the one at pages 99 to 134 of the bundle (version 1.2, dated 1 September 2011). These were the terms and conditions he was employed under and to which he referred at paragraph 8 of his witness statement. He accepted, however, that as at today, there had been numerous negotiations to change his terms and conditions of employment that had not been put in to any document. He accepted that, where the respondent had agreed with the unions on a change in terms, those agreements had become part of his contract. He also accepted that if the union and the respondent had agreed certain matters after 2011, the fact that they were not in the Red Book doesn't mean that they don't form part of his employment terms and conditions.

28. Mr Goldberg asked Mr Scott why the position on shift allowances between May 2016 and May 2018 was different, to which he replied that the answer was in paragraph 9 of his witness statement, which referred to part of his contract that said that the Red Book superseded all previous agreed versions of the Red Book (and by extension, as the version of the Red Book that was incorporated into his contract had no cap on supplementary allowances, no cap should have been imposed). Mr Scott accepted that there was never any version that he was aware of that had imposed a 33⅓% cap on allowances. Mr Goldberg asked what it was about the 2009 pay deal that was special and not incorporated into the claimants' contract? For example, the 1.6% agreed in March 2010 had not made it into the Red Book, but had been paid. Mr Scott's response was that the Red Book had been updated on 1 September 2011 and validated and authorised on 5 September 2011. At page 101, the Red Book said that it superseded all previous versions of itself and it has not been updated since.

29. Mr Scott affirmed that if something is not in a Red Book, it doesn't bind him. He was asked if he was aware of any agreement since 2010 that says that the allowance cap no longer applies and answered that the only thing he accepted was that the latest version of the Red Book superseded all previous agreements. He repeated that if it isn't in the Red Book, it doesn't form part of his terms and conditions. He did not know whether, after the 2009 offer was accepted in March 2010, the red-circle agreement cap continued to apply to pay arrangements but confirmed that after September 2011, when he said the allowance cap ceased to apply, it continued to be applied as was red-circling. As at September 2011, the cap was effectively fixed to maximum of 33⅓%. Mr Scott also confirmed that those provisions continued until he raised the issue in 2016 at a section hearing. He could not explain why, if the cap was abolished in 2011, the unions allowed it to be enforced until he raised it in 2016, other than to say that individual sections had their own agreements. It became an issue for the people he represented because they were required to work permanent nights, so the cap applied. That is why he did not raise it until 2016.

30. Gemma Hewitt's evidence in chief was that for Messrs Perkins and Devlin, their contract comprised the letter of appointment in April 2013 together with a letter in February 2016 confirming their new role following a reorganisation with the Capital Delivery Department. Messrs Scott, Richardson, Kirton and Stephen were all issued with new contracts in 2016. The current version of the Red Book dated 1 September 2011 was included as part of all their contracts. The Red

Book set out the details of shift allowances that we had already gone through and Ms Hewitt's evidence went through the process of annual negotiation. She said that the Red Book was not generally updated after the annual pay review and had last been updated in 2011, largely to reflect a move away from weekly pay to monthly pay. The 2011 version that starts at page 99 is the current version and the version on the intranet for staff. The prior version was dated 1 March 2010 which had been updated to reflect changes in the requirements for sick notes/fit notes from a doctor.

31. Ms Hewitt said that agreements reached with the trade unions through the annual review process were made without amending the Red Book itself and gave examples of pay, the abolition of pay grades in 2013, a change in holiday entitlement in 2013, changes to the calculation of basic pay that was made in 2012 and changes to leave entitlement and family-friendly policies that were made in 2017.

32. She was on secondment from the Nexus HR team in 2009/2010 when the 2011 pay negotiations took place. She was, therefore, not involved in the annual review and returned to HR team at Nexus in 2010. By that time, the 2009 pay deal had been agreed and she was only recently made aware of the final of the document [86] and the amended final offer document [91 – 92]. Following the agreement, Paul Stephen, the payroll manager, produced a schedule of the red-circle staff [284].

33. Since the 2009 pay deal, new recruits and existing employees moving on to permanent nightshift had received the maximum of 33⅓% allowance and no-one other than the red-circle staff had been paid more than this. No new joiner had received more than a 33⅓% maximum allowance. Clive Scott had raised an issue as RMT representative in 2016 relating to the pay of a group of colleagues who were on permanent nightshift for a short time. He had said that they should be entitled to a weekend working allowance on top of their permanent nightshift allowance. This was considered but rejected as I have summarised in Mr Scott's evidence above.

34. When Ms Hewitt was cross examined briefly by Mr McHugh, she could not say why the cap had not made it into the Red Book because it was before her time. However, it had not been amended since because the company had signed agreements in black and white with the unions. She accepted that the allowance agreement itself was not signed off, as such.

35. She was taken to the offer letter of Mr Perkins [134] and the clause that I've set out above regarding "Collective Agreement". Ms Hewitt agreed that clause did not make any reference to any terms and conditions that were outside the Red Book that had been agreed. The Red Book is as it stands. To move away from it, the company has to be consistent across all documents. The agreement would still stand. It was put to her that if a reasonable bystander considered the contract that started at page 134, would they not think that the only applicable term in the contract was the contract itself and the Red Book? Ms Hewitt disagreed because the company would implement other things that would not be in the Red Book or the contract.

36. Ms Hewitt was then taken to the "Entire Contract" clause [136] and agreed that it stated that the contract and Red Book contained the entire agreement between the employee and the company. However, this was an individual contract that regulated the relationship between an individual employee and the company. She agreed that the contract made no reference to any other external documents that bound the employee, but an individual employee could be bound by something not in his individual contract because anything registered separately is in a separate agreement.

37. David Brown's evidence in chief was that all the claimants, apart from Mr Devlin, joined Nexus for the first time in 2013 as part of the Capital Delivery Department for which he, Mr Brown, was responsible. Mr Devlin was already a Nexus employee in the maintenance permanent nights team, but applied and was successful in securing a role within Mr Brown's team at Capital Delivery. All Capital Delivery Red Book staff, including the claimants, started in 2013 on rosters working a base roster of two weeks of days and two weeks of nights, rotating. That shift pattern was known as a rotating shift. The company decided to change the way it was organised and in 2016, the Capital Delivery Department went through an internal reorganisation to set up an overhead line team to renew the overhead wire system (OLE) that powers the rolling stock. The claimants are the six employees volunteered to work on the permanent nightshift for the OLE renewal project. Messrs Scott, Richardson, Kirton and Stephen were appointed as Metro Grade 3 installation team members for OLE and Messrs Perkins and Devlin were appointed as Metro Grade 3 B chargehands. The claimants started the permanent nightshift rosta in September 2017.

38. Mr Brown says that the claimants were entitled to and have been paid the permanent nightshift allowance of 33⅓% in addition to the basic pay set out at section 1.4.4 of the Red Book from September 2017. That allowance stopped for Mr Perkins on 8 May 2018, but the other claimants remain on the permanent nightshift as their base rosta and continue to receive the allowance. He did not agree that the claimants were entitled to any weekend working allowance on top of the permanent nightshift allowance as he had always understood that 33⅓% for permanent nightshift is the maximum allowance, inclusive of a weekend working allowance. During 2016, the company had another group of sixteen staff who were required to work a permanent nightshift from 10 July 2016 to 11 November 2016. Mr Scott, acting as RMT representative, raised the issue of their shift allowance at a sectional committee meeting ahead of the work commencing after Mr Brown had confirmed that a maximum shift allowance of 33⅓% (inclusive of a 10% weekend working allowance) would be paid. He then described the process that Mr Scott had described in his evidence in essentially the same terms.

39. In cross examination, Mr Brown was asked why the agreement relating to the capping of shift allowance had not been incorporated into the claimants' contracts. Mr Brown said he had no idea, as it was an HR matter. He was taken to the "Collective Agreement" clause in Mr Perkins contract [134], but could not comment as to why no other agreements had been incorporated into the

contract. He is interested in recruitment, but doesn't get involved in the contracts of employment. Terms and conditions are set by HR.

40. Mr Brown was then taken to the "Entire Contract" clause [136] and differentiated the term "Entire Agreement" on the basis of Ms Hewitt's evidence that a collective agreement is collective, not an individual contract.

41. Paul Stephens, in his evidence in chief, dealt with the administration of the shift payments and the implementation of the cap. He had recently checked the payroll system and there are now only three employees who remain red-circled and in receipt of the 43⅓% total shift allowances.

42. In answer to supplementary questions, Mr Stephens confirmed he had heard Mr Scott's evidence about the Red Book documents dated 1 September 2011 which starts at page 99 had drawn a line in the sand as at that date, so far as the allowance cap was concerned. Mr Stephens confirmed that no employees had been given 43⅓% allowance after 1 September 2011 and that he was not aware that any employee had complained about a failure to give them a 43⅓% allowance before Mr Scott had done in 2016.

43. In answer to cross examination questions, Mr Stephens confirmed his evidence in chief that he didn't believe that the payroll department had been advised when the 2009 pay agreement had been reached in March 2010. He was asked to refine his answer and said that payroll hadn't been told that the cap had been applied at 33⅓%, not that the red-circling agreement had been reached.

44. David Bartlett's evidence in chief was that he had been HR Director of the respondent from 2006 until 2015. He set out the collective bargaining arrangements between the respondent and the RMT, ASLEF, Unison and Unite. Collectively negotiated terms and conditions for blue collar staff such as the claimants were contained in the document known as the Red Book, the last version of which was included at page 99 of the bundle. He believed that the origin of the Red Book went back to the time when the business was part of British Rail and understands that the Red Book was meant to mirror British Rail terms and conditions. He described the shift allowances in the Red Book, which I believe I have already set out in sufficient detail. Mr Bartlett's evidence was consistent with the evidence of previous witnesses. His view was that the 10% weekend allowance was never payable in addition to the nightshift allowance of 33⅓%.

45. In 2008 or 2009, it had come to the company's attention that some staff were being paid the permanent nightshift allowance of 33⅓% and the weekend working allowance of 10%, being a total of 43⅓% allowance, whilst other staff who were also working permanent nightshift, including sometime at weekends, were just receiving the permanent nightshift allowance only. A spreadsheet had been produced [85b – g] for every Red Book employee at the time and included the allowances they received. There was an obvious anomaly between the shift allowances paid to different staff – some got 33⅓% and some got 43⅓%.

46. Consequent to the review, a group of staff who were not in receipt of both allowances raised a grievance. Mr Bartlett acknowledged the anomaly and hoped that it would be cleared up an engineering review that was ongoing. He set out his interpretation of the Red Book allowances in an e-mail to department heads on 20 May 2009 [85h] that included an allowance of 33.3% with no weekend working allowance.

47. In June 2009 Mr Bartlett had correspondence with Mr Brown [85j – 85k] and they came to an agreement that 33⅓% should be the maximum allowance payable, but that there were concerns about unilaterally withdrawing the additional 10% weekend allowance from some staff who were being paid it. They decided to address the issue in the forthcoming pay negotiations for 2009 as previous witnesses had evidenced.

48. He said that the anomaly had come about because the Red Book did not say anything expressly on the point and the Red Book had been historically interpreted at a local level. The sectional committees for the different departments of Nexus attended by management and trade union officials had been empowered to agree allowances to particular rosters and roles. If it could not be agreed at a sectional committee, then the decision would escalate to the dispute resolution committee of the joint negotiating committee ultimately to the JNC itself, but otherwise decisions were made at a local sectional committee and level.

49. The respondent carries out an annual pay review of terms and conditions of its staff and negotiation with the relevant trade union. The 2009 annual review is relevant for the purposes of this claim. At that time, Mr Bartlett was HR Director and the process proceeded until it concluded in March 2010 as matters became urgent due to Nexus outsourcing the operation of the Metro service to another company with effect from 1 April 2010. Accordingly, a final offer was put and agreed on 10 March 2010 which was set out at pages 91 to 92 of the bundle as previously referred to. The final offer included an overall 1.6% pay offer and a cap on shift allowances of 33⅓%. That offer was then put by the unions to their members, who agreed in ballots. The results of the ballots are produced at pages 95 to 98 of the bundle.

50. The terms of the amended final offer were then implemented. The staff received a pay award of 1.6% and back pay to the date of implementation. A maximum shift allowance of 33⅓% was implemented and those receiving 43⅓% were red-circled. His evidence was that it was not normal for Nexus to update the Red Book after an annual review. The Red Book had been amended in 2011 to incorporate changes resulting from the agreement to move to monthly pay. In all other years Nexus simply reached agreement with the trade unions on the offer, filed it away for reference and implemented the terms.

51. In answer to supplemental questions, Mr Bartlett said that implementation of the agreed final offer of 10 March 2010 would have taken place at the beginning of April 2010, but was backdated to 2 September 2009. The allowance was capped at 33⅓% at the same time. The cap on allowances continued after the Red Book was reviewed on 1 September 2011 and affected approximately twenty staff, but

that number diminished over time. Approximately twenty people were red-circled and a similar number were not red-circled. Of those who didn't get red-circled or a payment of 43⅓% none complained and no union representative complained until Mr Scott did so in 2016.

52. In answer to cross examination questions, Mr Bartlett acknowledged that the pay agreement for 2009 was never recorded in the Red Book to amend shift allowances, but hesitated when he did so. He explained that his hesitation was because they had two groups of staff on identical rotas paid in two different ways. What was agreed was a means of dealing with that. The document at page 91 and 92 agreed that there was a shift allowance of a maximum of 33⅓% for those on a permanent nightshift. That agreement had been made in March 2010 and implemented in April 2010. He was asked why the changes had not been mentioned in the 2011 version of the Red Book, and answered that the version 1.2 of the Red Book was produced on 1 September 2011. An earlier version of the Red Book, which predated March 2010, had an equivalent section to sections 1.4 to 1.5 of the 2011 Red Book which was identical. So, prior to and post the 2010 agreement, the Red Book hadn't changed. They were essentially clarifying an existing agreement. If they had changed it as suggested, those who were paid 33⅓% prior to the 2010 agreement would become eligible to make a claim. It had been agreed that what had happened in past would not happen in the future.

53. The issues of the Collective Agreement clause and the Entire Agreement clause in the contracts were put to Mr Bartlett, and he was asked to note that there was no reference to any separate agreements in either of the clauses. Mr Bartlett said that the paragraphs refer to a collective agreement, but the Red Book did not incorporate every collective agreement. He accepted that the Red Book was incorporated in the contract but that it is not the entirety of the collective agreements that are incorporated. It was put to Mr Bartlett that the Red Book was the only collective agreement referred to, but nuanced his response to say that it was the only one *directly* referred to. Mr Bartlett was asked if a member of staff who asked for the Red Book via the company's intranet or HR department would have been given the 2011 version of the Red Book, to which he replied that they would, but anyone asking for the Red Book from the HR office should have been asked why they wanted the document. In those circumstances, HR staff would have said that they were aware of additional agreements that affected it so they would have been aware of it.

54. Mr Bartlett didn't accept that the Entire Contract clause meant that the totality of the employee's agreement was the entire contract consisting of the twelve pages that we had seen, and within that, lie the collective agreements. The collective agreements included the Red Book, but that is not the exclusive nature of collective agreements. Mr McHugh put it to Mr Bartlett that only one collective agreement was mentioned; Mr Bartlett responded that the title of the clause was collective agreement**s** (my emphasis). He accepted only one was referred to, but that was not the extent of the agreement between the respondent and the trade unions.

55. Mr McHugh suggested that if he was a third party looking at it, he would think that the entire agreement was the twelve-page contract document and the Red

Book, but Mr Bartlett didn't accept that because "collective agreements" is more than what was written there. He justified this statement by reference to the collective agreement clause at page 134 and the fact that the Red Book itself does not describe itself as an agreement between the unions.

56. Mr McHugh asked if there was a term that binds the claimants, it would have to be in the Red Book. Mr Bartlett said that Mr McHugh was talking about the claimants, but had to consider the respondent. If this was an agreement to increase bereavement or paternity leave and it wasn't in the document, Nexus would still be bound by it. Nexus would pay the additional bereavement or paternity pay.

Closing submissions

57. Both Counsel had produced concise but clear closing submissions which were of great assistance in making my decision.

58. Mr Goldberg submitted that this case is an exercise in contractual interpretation and that it was important to identify the words that I was required to construe and the dates of construal. The contracts that have to be construed are the contracts of employment of each claimant each of whom terms of employment were exactly the same. In his submissions he would take me through the contract of Mr Scott which started at page 178 and the task of the tribunal was to determine the meaning of the phrase "Collective Agreements". There was no dispute that the effect of the clause is to incorporate a collective agreement into the contracts of employment. The issue is what the effects of the collective agreement was. The claimants say that the clause incorporated is only the Red Book from 2011 that starts at page 99 of the bundle. The respondent says that the phrase "Collective Agreements" is a collective agreement between Nexus and the trade unions generally and is not limited to the document that starts at page 99.

59. The date of construing the contracts is determined by the nature of the claims for unauthorised deduction of wages by the claimants.

60. Section 23(4)(a) of the Employment Rights Act 1996 means that the claimants' claims for unauthorised deductions are limited to two years' back pay prior to the presentation of the claims. All of the claims were presented in May 2018, so all claims cover the period May 2016 to May 2018. The contracts are the contracts effective at that time. Messrs Scott, Richardson, Kirton and Shepherd have contracts dated 4 February 2016 starting at pages 178, 195 212 and 227 respectively whilst Messrs Perkins and Devlin have contracts dated 17 April 2013 that start at pages 134 and 150 respectively.

61. Bringing the issues together, the question for each claim on the date of the contract was whether the reference in the definition "Collective Agreements" was to the 2011 document only, or to the wider collective agreement. The exercise of construing a contract is a search for the intention of the parties. It should be carried out objectively, looking at the language used and the circumstances surrounding them. Mr Goldberg's primary submission was that none of the

parties to this litigation had given evidence that the contracts of the claimants would incorporate the 2011 version of the Red Book and nothing else.

62. Mr Scott is an intelligent man and gave evidence honestly. He was the only witness called by the claimants and was at the forefront of the RMT's case throughout. I should be able to take it that he speaks for all the claimants. Mr Scott acknowledged that there were terms agreed in collective bargaining that don't appear in the 2011 document. That is an important concession, which is both inevitable and properly made. It is inevitable because it could not have been the intention of the employer, the employees or the trade unions in 2013 or 2016 that the content of the claimants' contracts could be fixed with a document last updated in 2011.

63. If that was the case, it would mean that all active bargaining after 2011 (upon which Gemma Hewitt had given evidence in paragraph 8 of her witness statement) would have been pointless. Once one accepts that the collective agreement in the contract is not limited to the 2011 Red Book at page 99, the claimant's case is holed below the waterline. The reason for that is because the claimants did not dispute that in 2010, the trade unions and the respondent had agreed a pay deal that capped allowances at 33⅓% [91 – 92] and that that agreement had been ratified by ballots of the trade union members affected [94 – 98].

64. The 2009 pay deal was clearly a collective agreement as defined in Section 178 of the 1992 Act and there was no dispute that the pay deal had been implemented. The 1.6% pay rise had been implemented and the supplement cap had been imposed with the result that approximately twenty people had stopped receiving the 43⅓% allowance and approximately twenty people had that allowance red-circled.

65. The position was then unchanged until 2016 when Mr Scott raised an issue. It was submitted that there was something unusual about the RMT response the actions by the claimants arguing that a supplement cap imposed in 2010 which they had stood by for six years was now something that the union was saying was unlawfully applied.

66. Turning his attention to the claimant's case, all that could be said about it was what Mr Scott had said in his evidence: because the supplement cap was not in the 2011 agreement, it hasn't been incorporated into his contract. However, his contract includes terms that were not in the 2011 document, so what the claimant is saying is that because the 2009 pay deal predated the 2011 Collective Agreement, absence of a supplement cap in the 2011 collective agreement means it must have been revoked. It was submitted that that argument doesn't fly for three reasons:-

    66.1 the collective bargaining process requires mutuality of agreement as to the imposition and revocation of terms. It can't be done unilaterally. Mechanisms exist for revocation, but there was no evidence of any discussion let alone agreement of the supplement cap;

66.2 it was submitted to be unlikely that Nexus would have given up a valuable concession it had obtained eighteen months earlier, and;

66.3 the supplement cap was applied without complaint by all the parties for five years after the 2011 version of the Red Book was created and circulated. I may have thought that one of the trade unions or some of the employees had complained about the supplement cap, but I would note that Mr Devlin moved within the respondent organisation from a red-circle position in 2013 to a position where the supplement cap applied and he made no complaint about it. That is submitted to be clearest indication that there was no revocation of the supplement cap.

67. The document at page 99 (Red Book) says at page 101 that the document supersedes all previous versions of the Red Book. It is submitted by the respondent that that is irrelevant to the issues that I have to determine. All that the clause means is that if there is a difference between version 1.1 and 1.2 of the Red Book, version 1.2 takes precedence. Version 1.2 did not contain the supplement cap so the clause can't inform my decision. It is submitted that the implied revocation is simply a non-starter as an argument.

68. This is a case where the legally correct answer is also the common-sense answer. A collective agreement in the contract of employment must be wider than the 2011 Red Book and must include the supplement cap. If the supplement cap is incorporated, then the claimants' claims must fail. I asked Mr Goldberg if I should consider any issues of consideration for the removal of the supplement cap and he submitted that the claimants' case was that the cap was removed by implication. If it was part of a collective agreement it could only be revoked jointly. Neither party acted as if it had been revoked.

69. In closing for the claimants, Mr McHugh thanked Mr Goldberg for setting out the legal framework for my decision and confirmed that he didn't disagree with anything that Mr Goldberg had said in that regard. The tribunal's task is to look at the intentions of the parties when the agreement was made. Mr McHugh proposed to address the thorniest issue first, which was the alleged concession by Mr Scott that other agreements were incorporated into his contract. The assertion made by Mr Goldberg was that if Mr Scott had conceded other agreements were incorporated into contract, then other agreements could apply even if they weren't in the Red Book. It was submitted that Mr Scott's view was subjective and has little effect on the tribunal's task to look at objectively at what the contract means.

70. Mr McHugh reviewed the document and started at page 134, which was Mr Perkins contract with the "Collective Agreements" clause. That clause defined the "collective agreement" in the claimant's contract and was drafted by the respondent before being put to the claimants. The reference in the clause itself was to a collective agreement (singular) and that agreement was named as the Red Book. The respondent had drafted the clause and had had time to consider it. The respondent used the definition for "collective agreements" as the terms set out in the Red Book. The respondent's clause then goes on to clarify that the Red Book is on the respondent's intranet or available from the respondent's HR

department. The clause also says that in the event of a conflict, the offer letter takes precedence.

71. If one had gone to the respondent's intranet or HR department, one would have found the Red Book that starts at page 99 of the bundle. We heard Mr Bartlett say that the phrase "Red Book" was a misnomer because there was no book as such, but page 99 identifies itself as "Red Book".

72. This is a document that we can see, at the bottom of page 99, lists a summary of document changes that include new consolidated rates of pay and annual salaries, a change to monthly rather than weekly payment and other matters. None of the respondent's witnesses said there was any reference to a cap of shift allowance change. So, when the tribunal goes back to page 134 and looks at the document objectively, what could the parties have intended when the respondent drafted it? It was submitted that the parties intended to incorporate the Red Book into the contract. If they intended to incorporate anything else, it would have been listed at page 134. It is not.

73. So, does the respondent have another opportunity to say that the supplement cap applies? It was submitted that it does in the second part of the collective agreements clause at page 134, which said that in such places as there may be a contradiction between the collective agreement and the detail set out in its offer letter, and the details contained in the offer letter take precedence. The offer letters all post-date the supplement cap and there is no reference to the supplement cap applying to all the claimants. It could have been made clear in each and every individual contract that the supplemental cap applies. The contract is the Red Book plus the twelve pages of contract documents that start at page 134 only. In that contract there is no reference anywhere to a shift allowance cap.

74. In respect of the "Entire Contract" clause at page 136, it was accepted that there may well have been an agreement in 2010 about shift allowances. That was not in dispute. The respondent's difficulty is that its own document says that it rescinds any previous agreement and is entirely silent on the issue of the shift allowance cap. It is submitted that it is significant because all the evidence in the world about the parties' subsequent intentions is irrelevant when you have a clear written agreement that the employment tribunal can interpret in an objective manner.

75. The simplest point is that if the respondent had intended the cap to apply, why did it not include it either in the Red Book or in each individual contract of the claimants? That would have removed all doubt and given the claimants an insurmountable case to meet. The absence of any such provision was submitted to be telling.

76. Mr McHugh submitted that if the respondent had intended the claimants to be bound, they would have indicated it in the contract. A reasonable bystander would not take the view that a supplement cap applied because none is there. Everything else beyond that is just distracting noise.

77. The written agreements are there. It is a straightforward finding to make that if the parties had intended it to be there, the clause would have been in the contract. It was therefore submitted that I should find in the claimants' favour.

Findings and decision

78. I indicated to the parties that I didn't think it was in furtherance of the overriding objective for them to all wait whilst I made my decision. In addition to Counsel, there were two sets of instructing solicitors and approximately eight other people in the room. I anticipated that it would take me some hours to formulate my judgment and reasons and I indicated that I would give a reserved decision.

79. I reminded Counsel that my decision was on liability only and it was suggested by Mr McHugh that if I found in favour of the claimants, remedy would be an arithmetical calculation and, therefore, would be unlikely to trouble the tribunal again. Notwithstanding this, I indicated if I found in favour of the claimants, I would list the matter for a remedy hearing.

80. In determining the issue in this case, I start with the decision of HHJ Hand QC in Tyne and Wear Passenger Transport Executive (T/A Nexus) v Mr S Anderson and Others that the employment tribunal has jurisdiction to interpret contracts in cases under Part 2 of the Employment Rights Act 1996, which includes this claim.

81. That decision also contains a useful set of the principles established by the authorities as to the approach to be taken in the construction of a contract. These are contained in paragraphs 85 to 95 of the judgment. At paragraph 93, HHJ Hand QC identified the correct test to be that set out by Lord Neuberger at paragraph 15 of his judgment in Arnold v Britton as "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?" The contracts that I have to assess in this case are similar to the contracts that HHJ Hands QC had to interpret in the EAT, being of partly oral and partly written contract arrived at by the process of negotiation known as collective bargaining and as a species (or perhaps sub-species) of commercial contract. The process of negotiation recurred at regular (annual) intervals and was concluded within well-established written framework.

82. I was not presented with much by way of evidence of the negotiating process with regard to the implementation of the supplement cap, but I did have the final offer dated 11 March 2010 [91 – 92] from which, the respondent set out the principle that the maximum shift allowance should be 33% (which it was agreed was a typing error and should have read 33⅓%) payable for staff working permanent nightshift (regardless of whether these include work at weekends). I had the results of the ballots from all three unions confirming this agreement.

83. None of this evidence was disputed by the claimants, so I find that there was a collective agreement between the unions recognised by the respondent, which includes the union (of which all six claimants were members at all material times)

that, unless a worker was red-fenced, the most that they could earn as a shift supplement would be 33⅓%.

84. When applying the test in Arnold v Britton I note that I have to look objectively at what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using language in the contract to mean. I find that an objective reasonable person looking at the 11 March 2010 document [91 – 92] could have come to no other conclusion that the unions and the respondent had agreed to impose a supplement cap on payments to workers who worked permanent nights and at weekends.

85. The next question, therefore, is whether the agreement to impose a supplement cap was incorporated into the contract of the claimants.

86. I empathise with the position of the claimants and understand the logic of their position that if their written contracts say that they incorporate "Collective Agreements" and that the only collective agreement that is mentioned is the Red Book, then it makes some sense that if the contract itself doesn't mention a supplement cap, and the Red Book not only fails to mention that there is a supplement cap, but actually sets out entitlement to both the 33⅓% permanent nights allowance and a 10% weekend working supplement, that it follows that they are entitled to a 43⅓% shift supplement because of their work patterns.

87. However, I was persuaded by the evidence of Ms Hewitt, in particular, and the evidence of all the other witnesses (including Mr Scott), generally, that the Red Book had only been amended a couple of times, the last of these being on 1 September 2011. The unchallenged evidence was that the amendments had been to record major procedural changes, such as changes to the reporting of ill-health and to move from weekly pay to monthly pay. Ms Hewitt's evidence was clear and unchallenged that other matters that constituted significant changes in the terms and conditions of employees and which were neither reflected in their contracts of employment nor in the Red Book were implemented and operated without challenge or controversy.

88. The details of those incidences were set out in paragraph 8 of Ms Hewitt's witness evidence. Mr Scott gave honest and frank evidence that he considered terms and conditions which were neither in his contract nor in the Red Book to apply and bind both him and the respondent.

89. I therefore find that the only interpretation that a reasonable person having all the background knowledge of the evidence that I heard and saw in this hearing would come to would be that whilst the claimants' contracts and the Red Book were silent as to the supplement cap, a supplement cap had been agreed in March 2010 and implemented in April 2010 and had then been operated without complaint until Mr Scott raised the issue in 2016.

90. I find it difficult to make a finding that a reasonable person could have come to the conclusion that no salary cap applied if the claimants themselves and their

trade union had failed to come to a similar conclusion for a period of approximately six years.

91. The "Collective Agreements" clause on the first page of the claimants' contracts is stated as being in the plural and, whilst narrative only refers to the Red Book, I find that is not a term of exclusivity and that a reasonable person looking at the clause in the light of how the contracts of employment were operated in the relevant period would come to conclusion that "Collective Agreements" included all collective agreements that affected the contractual relationship between the employees and the employer which, in reference to this case, include the agreed imposition of a supplement cap in April 2010. On that point, I prefer the submissions of Mr Goldberg to those of Mr McHugh.

92. On my interpretation, therefore, the "Entire Contract" clause is irrelevant to my consideration as I have found that the "collective agreements" clause includes all collective agreements. I therefore find that the claimants' claims of unauthorised deduction from wages fail.

EMPLOYMENT JUDGE SHORE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
3 February 2020