Case Number: 4113190/2018
4113199/2018
1303739/2018
1303741/2018

EMPLOYMENT TRIBUNALS

Claimants[1]: **Mr J Ballantine C1**
Mr P Gorman C2
Mr P Hannah C3
Mr L McDermott C4

Respondent: **S R Technics UK Ltd**

Heard at: **Croydon via CVP** **On: 9/11/2020, 11/11/2020 to 18/11/2020**

Before: **Employment Judge Wright**
Mr C Rogers
Mr R Shaw

Representation:
Claimant: **Mr M Potter - counsel**

Respondents: **Mr P Gott QC - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimants' claims fail and are dismissed.

[1] These are the lead claimants in this case. The claim was originally listed as that of Mr R Fox, claim number 2304116/2017.

REASONS

Introduction

1. This is a multi-claimant (37) action against one respondent. The original named lead claimant was Mr R Fox (2304116/2017). Following a preliminary hearing on 10/7/2019 the claimants were directed to select four lead claimants. It is the claims of those claimants which the Tribunal has determined.

2. No order has been made under Rule 36 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

3. Although the claims were listed to be heard over seven days, unfortunately due to other commitments, one member of the panel was not available on 10/11/2020 and the Tribunal did not sit on that day. The hearing was converted to a CVP hearing due to the different travel and lock down restrictions in various parts of the UK and due to the shielding/vulnerability of some participants.

4. The Tribunal had electronic and hard copy bundles. The hard copies ran to five lever arch files. The Tribunal heard evidence from all four lead claimants and from Ms Claire Simpson, Unite Regional Officer. For the respondent it heard from Karl Howard-Norris, the former UK General Manager.

5. The evidence concluded on day four and the Tribunal heard closing submissions on day five and then reserved judgment. The Tribunal then deliberated. The Tribunal is grateful to the representatives for ensuring the evidence and submissions were heard within the allotted time.

6. In short, the claimants claim the respondent made unlawful deductions from their wages in respect of overtime payments contrary to s. 13 Employment Rights Act 1996 (ERA). They also claim that as a result of that unlawful deduction, their holiday pay has been underpaid.

7. The Tribunal had an agreed draft list of issues and agreed facts and a neutral chronology.

8. Mr Ballantine started to work for the respondent on 3/11/2002 as a Line Maintenance Engineer otherwise known as a Licensed Aircraft Engineer, based at the Edinburgh Line Station. Mr Gorman started work on

10/7/2000 in the same role, although he was a shift leader in addition. He is based at the Belfast Line Station.

9. Mr Hannah was also a shift leader and Licensed Aircraft Engineer based at the Glasgow Line Station, his employment commenced on 22/1/2003. Mr McDermott is also based in Belfast as a Licensed Aircraft Engineer, his start date was the 29/3/2015.

10. The claimants' employment is subject to collective agreements, which are negotiated on their behalf by the Line Stations Negotiation Committee (LSNC) with the respondent. There are two Collective Bargaining Agreements that are relevant to the claims. The first was effective from 1/10/2003 and was called the 2003/2004 Collective Agreement (page 291) and the second was effective from 1/9/2008 and was called 2008/2009 Collective Agreement (page 305).

Findings of fact

11. The claimants, in general worked a shift pattern of 12-hour shifts, four days on and four days off. As Mr Ballantine explained it, in effect his working pattern meant that he worked half of a year; 365 days divided by 2 = 182.5 working days.

12. The respondent had a 'working week based on 37[2] hours'. None of the claimants ever worked 37 hours. The claimants all worked a shift pattern of four days on/ four days off. Their shift was 12 hours long, although there was some debate as to the working hours, rather than the attendance hours, due to paid and unpaid meal breaks and tea breaks.

13. The relevant claimants gave evidence about the respondent's method of compensating them for the fact they worked in excess of the 37-hour week prior to the 2003 agreement. There was a biannual payment referred to as 'Built in Overtime'[3]. The payment was paid to recognise that the shift workers, worked a longer working 'week' than the office based-37 hours per week staff. The claimants worked an eight-day shift pattern and as such, it was not comparable with the office-based staff.

14. The bi-annual payment was of two lots of 39 hours = 78 hour per annum. This was said to represent the working week of 37 hours giving an annual number of hours of 1929. For the claimants, they worked 11 hours per

[2] The normal working week had originally been longer, however in 2000 it was agreed the working week would be reduced to 37 hours, by 31/12/2001 (page 533).
[3] In view of the issues the Tribunal had to determine in these claims, the label 'overtime' was rather unfortunate and misleading. In reality this was a payment which compensated them for shift work.

day x 182.5 working days = 2007.5. 2007 – 1929 = 78 hours[4]. It is the 78 hours that the bi-annual payment related to.

15. Mr Ballantine said these payments were standard in the industry and that he had received the same sort of payment from previous employers.

16. Mr Ballantine's case on this payment is that although he joined the respondent on 3/11/2002, he never received the payment. At least, that appeared to be his primary case[5].

17. Mr Gorman and Mr Hannah say they did receive the payment, although Mr Hannah said he received it in a different format to Mr Gorman. Of the four claimants Mr Gorman was the only one to provide pay slips. His payslips are dated 31/7/2002, 31/1/2003, 29/7/2003, 31/1/2004 and 31/7/2004. Mr Gorman worked overtime of 93 hours in January 2003, 82 in July 2003 and 68 in January 2004 (pages 1421-1425).

18. The payment for the 39 hours is not clear on the payslips. In written evidence Mr Gorman said that he would work approximately 70+ hours above the contractual 37-hours per week in a six-month period in order to cover the shift roster. He also said he worked additional overtime above that. The payments therefore are higher on his payslips as they included additional overtime outside his normal shift pattern. It was suggested that 129 hours overtime in July 2002 by definition, must have included the 39 hours (the bi-annual payment), with the result that Mr Gorman worked 91 hours additional overtime that month.

19. What is clear is that no bi-annual payment was paid after July 2002.

20. Against this background, the respondent and the recognised Trade Unions were negotiating a new agreement, based on a similar agreement the Union had with MyTravel, a company which shared a hanger with the respondent. The chronology is that in 2003 a new collective agreement which applied to the Line Stations (which included the locations at which all four claimants worked – Belfast, Edinburgh and Glasgow) was being negotiated. There are minutes of the Line Stations' pay negotiations on 8/10/2003 when the Line Stations are represented by two shop stewards and an Amicus FTO[6].

21. The respondent's HR Manager circulated the offer to the Union representatives and the meeting was due to reconvene on 13/10/2003

[4] The Tribunal does not necessarily accept the calculation is correct, however, it seems to have been accepted by the parties at the time.
[5] As at one point he referred to receiving the payment.
[6] FTO – the Tribunal understands this to stand for Full Time Officer.

(page 607). It seems that due to the historic nature of the claims, minutes of other meetings were no longer available. There is however evidence of drafts of the 2003 Collective Agreement going back and forth between the Union and respondent and being amended in manuscript:

Version one October 2003 (page 605)

Version three 21/11/2003 (page 608)

Final version December 2003 (page 621)

22. The Tribunal could not locate a signed version of the 2003 agreement in the bundle[7]. A document entitled - 'Terms of Settlement as proposed on Monday 1 December 2003, at Gatwick with the FLS Line Station Bargaining Group, represented by the LSNC', with an implementation date of 1/10/2003 was signed on 1/12/2003 (page 636). This is not the signature page of the 2003 agreement (which would appear to be page 11 (page 301) of that document). The signatories however are the same, save that Mr O'Gallagher (Divisional Officer Amicus) has not signed the version on page 636. Mr Cook and Mr Kennard (for the Trade Unions (page 301) have signed as the Line Station Negotiation Committee on 1/12/2003.

23. On 11/12/2003 John Irvine of the Belfast Line Station emailed HR with a query on bank holidays in the agreement (the bank holidays being different in Northern Ireland and Scotland to England and Wales). Mr Irvine said: 'we have read a faxed copy of the new line agreement, which I assume has been agreed.' (page 644)

24. HR responded on 15/12/2003:

> 'Just to clarify the process, before I answer your questions. The document had not yet been agreed for implementation. You will recall that we were trying to get all station engineers to [Stansted] last Friday – this was for a briefing from the unions on the document. This will now take place in the new year, after which all union members in the line stations will be balloted. Upon the assumption that the ballot will be successful, it will then be implemented.
>
> …
>
> Shift pay: the £5100 has increased significantly, due to the following reasons. The shorter working week payments are now incorporated into here, aligning with the business, as we have done the same with the bank

[7] There is an unsigned version at page 631.

> holiday working [illegible] annual leave, i.e. aligning with the other business areas. This is also the same as [Stansted] line station.'

(page 644)

25. On 21/12/2003 the FLSA[8] Belfast Line Station sent a fax to Mr Kennard and reference a discussion with Mr Cook on the 18/12/2003. The Belfast Line Station referred to the extra 78 hours per annum which they said shift workers worked, over and above the 37-hour working week. They referred to the bi-annual payment of 39 hours x the overtime rate of 1.65 and said that the annual payment came to £1968.28. They went onto say they understood the proposal to be to remove the bi-annual payment and to incorporate that into the shift pay premium and that payment had increased from £5,100 to £7,128 or £7,335. The Belfast engineers went on to set out that they believed they would be working extra hours and which should be paid at the overtime rate (page 646).

26. Mr Hannah sent a fax (it is not clear to whom, although he clearly included the 'Edinburgh guys') on or about the 25/12/2003 regarding the collective agreement meeting at Stansted on 5/1/2004 (page 668). He said:

> 'Any thoughts, questions or concerns? Study the draft document, get them down on paper and I'll see if I can get a word in edgeways.'

27. The Tribunal finds that Mr Hannah was either a self-appointed spokesperson or had been asked by his colleagues (certainly in Glasgow) to raise their concerns on their behalf.

28. Mr Ballantine responded (it is not clear when) raising six issues. Under item 1 he referred to clause 8.0 and to page 13 of the proposed agreement. Under item 2 'working week' based upon his calculations, he said the changes would mean they engineers were working an additional 278 hours per annum. He questioned, if the £2,000 in additional shift pay was to compensate for the 78 hours (replacing the bi-annual payment):

> 'what about the other 200 hrs unpaid OT we will be doing with the agreement?'

29. There is then a handwritten minute of a meeting on 5/1/2004 (page 669). It has not been transcribed and is not entirely legible, however, it appears to be titled:

> 'Line Stations Union Pay Talks Mtg 5/1/04

[8] The respondent's predecessor was FLS Aerospace Limited.

Present RC/LK
DJ/SM/NM/RF/AM/XX
Absentees JI/TH/RMc
KO'G

Aim: Discuss and understand line station collective agreement

Shift working week EMA permanently
CWL extra holiday
LGW extra holiday 309-207[9]

How is offer circulated? XX XX hourly rate

Xmas/Boxing day XX/XX - need to designate that these are B/holidays

N/y eve want premium as night not NYD night'

30. Apart from this note, any other minutes of the meeting on 5/1/2004 are no longer available and the Tribunal accepts that due to the claims being presented in June and August 2018, that due to the lapse of time, not all documents will now be produced. That is a result of the passage of time and is one of the reasons for the short time limits in this jurisdiction.

31. The comments made clearly show the claimants and those involved in the Union Pay Talks Meeting were referring to the 2003 agreement.

32. Mr O'Gallagher[10] wrote to HR on 16/1/2004 (page 670). He said:

> 'We appear to be playing mobile ping pong at the moment, so, belated although it may be, please find detailed below, the Union's position with regard to the ongoing negotiations on pay, terms and conditions licences and approval payments.
>
> 1. A large number of members have raised concerns regarding the apparent offset of additional holiday pay (for shorter working week) by increases to shift pay. The general consensus being is that they will be financially worse off if this change is implemented.
>
> 2. It appears that a large proportion of your employees will be disadvantaged by having to book 11.5 hours for a days annual leave as their current agreements allow for them to book only 11 hours.

[9] 207 appears to be a reference to hours of holiday entitlement by reference to page 613.
[10] His email sign off describes him as Divisional Officer, Amicus AEEU, Crawley.

3. Concerns have been raised at Gatwick that the Company are treating technicians less favourably than licensed engineers with regard to payment for licensing.

Overall, it would seem that there is something for everybody to hate in the new proposals being put forward by the Company and I am therefore concerned that should we ballot at this time, we could easily find ourselves having to deal with the Company's offers being rejected by a massive majority thus making It far more difficult to achieve a settlement, as it will be necessary for either the Management or the workforce to be perceived as having climbed down.

If you lay the above alongside our well known and registered concerns ln relation to a nine month pay freeze, I would suggest that it would be prudent, if at all possible, to continue negotiations in the hope of finding a more palatable conclusion.'

33. HR responded on 22/1/2004 and in short, told Mr O'Gallagher the respondent was not going to re-open the negotiations and to put the agreement to a ballot:

'I have to say, I am rather disappointed at your request of re-opening the negotiations. At our last official meeting back on December 1 2003, the company and unions reached a conclusion in the negotiations, to a point that the unions could take the proposal and recommend to the workforce, with a view to balloting soon after. Then, after a meeting on 5 January 2004, between the unions, line stations (albeit some were unable to attend) and the company, the issues were discussed at length. The meeting concluded with all present saying that now they understood their concerns, they felt that the stations would be as comfortable as they could be with the situation. Given all that l was therefore surprised at your request, as well as the third point you make, as that was one that I had not been made aware of at all.

???nnot[11] accept your request to re-open negotiations, and therefore would ask that the ballot be organised to ??mmence[12] as soon as possible, However I would ask that before any ballot papers are sent to union members, that you let me know what the process and timescales will be.'

(page 670)

[11] I cannot?
[12] Commence?

34. On 24/2/2004 Mr O'Gallagher reported the ballot outcome to Mr Cook (page 672). The results were:

> '1 Pay & Terms and Conditions Package - 28 accept 14 reject
>
> 2 Pay 2003 – 28 accept 13 reject
>
> 3 Terms and Conditions Package 2003 onwards – 28 accept 13 reject
>
> 4 Buy out of Approvals/Licences – 29 accept 11 reject[13]'

35. Mr Gorman certainly said in evidence that he could not remember ever being balloted on the collectively agreed package or that he had the opportunity to vote, but could not remember if he did. He did however accept that the collective agreement had been put to a ballot and had been accepted. He maintained that the agreement did not explain why the bi-annual payment had been removed, said it was not clear and that it was not stipulated why the payment had been removed. Mr Ballantine said he had seen the result of the ballot in the bundle. Mr Hannah did not remember the ballot.

36. The Tribunal finds that the 2001/2002 agreement was re-negotiated in the latter part of 2003. It appears there were meetings in October 2003, however, for obvious reasons, the minutes are no longer available. Ms Simpson also said she was unable to provide any documents from the Union's archive.

37. The collective agreement went back and forth between the Union[14] and the respondent's representatives and resulted in an agreement which was signed off on 1/12/2003. The Union was then invited on 22/1/2003 to put the agreement to a ballot, which it did, with the results being reported on 24/2/2004.

38. The claimants were certainly concerned about the impact of the agreement on the remuneration and had indeed raised these concerns amongst themselves. There is however no record of them having raised it in any formal manner with the Union. It appears they believed that they would be financially worse off. Their understanding was that they would be expected to work overtime, for which they would not be paid.

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[13] The ballot does not appear to have been a full ballot (it appears there are a total of 42 members voting) in that fewer than 42 members voted on three out of four issues, however, that does not appear to have caused concern at the time and it may be explained by missing or spoilt votes.

[14] The term 'Union' is used collectively if there was more than one Union involved at the time.

39. Based upon Mr Ballantine's calculations[15], they were being expected to work an additional 200 hours per annum, using an estimated overtime rate given in evidence, that would equate to an annual sum[16] of £4,290. Mr Ballantine also suggested that based upon the pay slips provided for Mr Gorman, that his hourly overtime rate was £20 per hour and so using the same calculation, the figure would be £4,000 for Mr Gorman.

40. The Tribunal finds that is a significant sum of money and for Mr Ballantine, represents approximately 15+% of his basic pay. The Tribunal also finds that the claimants were aware of the removal of the bi-annual payment, the terms of the collective agreement and the fact that the ballot was successful. The claimants then did not take any steps to pursue the matter, either through the Union, or directly with HR.

41. HR had explained to Mr Irvine of the Belfast Line Station that the shift pay was increased to incorporate the 'shorter working week payments' (page 644). If Mr Irvine did not understand what HR was referring to, it was open to him to seek clarification.

42. The Collective Agreement itself provides that it may be varied at any time by written agreement between the parties and where a proposed change directly affects a particular group of employees, such change shall be agreed between the LSNC and the respondent (page 293)[17]. It was therefore open to the Union to revisit the agreement and it did not have to wait until the next round of collective agreement talks commenced to do so.

43. The shift premium increased from £5,100 to £7,335 per annum under the agreement. The claimant's accepted the pay increase and the increase in the shift premium. The Tribunal finds that despite the comments made prior to the meeting on 5/1/2004, that the ballot accepted the terms of the collective agreement and as such, the claimants' contractual terms were varied so as to remove the bi-annual payment and to replace it with an enhanced shift payment; and in addition, the claimants were aware of this.

44. Any claim of unlawful deduction from wages crystalised in January 2003 when the bi-annual payment was not paid by the respondent. That was the point when the claimant's should have realised that the last in the series of payments had been made in July 2002. Even if, on the

[15] Which the Tribunal does not accept.
[16] Mr Ballantine's salary was £26,252 on 15/10/2002, therefore his hourly rate of pay was approximately £13 x 1.65 x 200 = £4,290.
[17] The section that deal with variation to the agreement can also been seen at page 623.

claimant's case, they were entitled to that payment in January 2003, the payment was not made and any time limit under the ERA was then triggered.

45. The 2003 Collective Agreement applied from 1/10/2003 until 30/9/2005. The respondent subsequently proposed a draft collective agreement to the Union in August 2007 as part of the 2008 pay negotiations.

46. The final 2008[18] agreement was signed on 24/10/2010 (page 318). The agreement provides that the terms apply from 1/9/2008 for a minimum period of three years and there will be an annual salary review on 1st January (page 307). It has the similar variation clause as the 2003 agreement.

47. The hours of work (clause 7) is the same as the 2003 agreement, save that clause 7.1 'seasonal clock changes' has been added. Clause 9.0 Shift Working is in very similar terms to the corresponding clause in the 2003 agreement. Save that the agreement refers to Appendix 2 and there is no Appendix 2.

48. Clause 9.1 addresses shift pay. It states:

> 'Shift pay is paid in recognition of the unsociable hours employees work which has an impact on health and family life. Shift pay will only be paid to those employees who work designated shift patterns. As soon as an employee is no longer required to work a shift pattern shift payment will cease.
>
> Shift pay will be paid for attendance of training courses and periods of holiday no longer than 4 weeks in duration. For other absences, continued payment of the shift allowance will be reviewed by the UK Line Manager in consultation with an LSNC and HR representative after three weeks.
>
> The normal working week is defined as Monday to Thursday 08.00 to 16.00, Friday 08.00 to 15.30 (37-hour working week) which attracts no shift pay enhancement. Employees will be allocated to agreed shift patterns and paid shift premiums, as per Appendix 2, as operational needs demand.'

49. The minutes of the LSNC pay negotiation held on 24/10/2007 refer to a J Hayes saying (page 783):

[18] This was buttressed by the LSNC Recognition and Procedural Agreement effective October 2008-2009 signed on 24/6/2010 and which recognised Unite the Union as having sole recognition rights for all employees within the agreed bargaining group, in the form of the LSNC (page 865).

> 'Re: paragraph 9.1 payment of Shift pay – We have questions on how shift pay is calculated so we have amended this proposal to now give a factual record of what comprises shift pay including the fact that it compensates for the shorter working week as per the detail contained in this document *[JH shows LSNC a copy of the breakdowns]*.'

This meeting was attended by Mr Cook and Mr Kennard.

50. Much was made of the definition of unsocial hours. The claimants' case is that shift pay is purely to compensate them for the nature of unsocial hours and no more. The respondent's view is that it is not just the quality of the hours worked, but the quantity, by which it means the number of hours. The respondent referenced the fact that the claimants have never worked a 37-hour week and have always worked shifts and therefore, the shift pay includes any hours which the claimants work, in excess of the 37-hour week, as part of their normal shift pattern.

51. The Tribunal finds it can take judicial notice of both phrases 'shift pay' and 'unsocial hours'. Shift pay includes an element of pay to incentivise the employee to work shifts, which in this case, were long periods of work, outside of this respondent's normal working hours/office hours and including night/weekend working. Unsocial hours means working hours which would normally be available for traditional social events or domestic time, such as a family dinner in the evening or a meal out on the weekend. It is not possible to do these things if an employee is working long hours and at night/weekend. An employee is simply not going to work shifts if they could work the respondent's working week of 37 hours in the office and earn the same money. In order to attract staff to work shifts, the respondent has to offer remuneration to tempt them to work the shift-pattern the respondent has, in order to service the contracts it secures. In a 24 hour/7 day a week operation, the respondent has to recompense the staff for working long shifts, nights and weekends; all of which count as unsocial times of work.

52. The next relevant clause is 11 – Overtime. This provides:

> 'The Company's objective is to meet its customer and operational requirements within normal working hours. However, circumstances may prevent this from being achieved, and therefore employees are expected to be available to work a reasonable amount of overtime, subject to the limitations contained in the European Working Time Directive and the Company's Policies.

> Any time worked outside **the employee's normal hours of work**, with the prior agreement of the department manager attracts a premium rate of pay as follows:
>
> 1. Time and a half from end of normal working day to midnight; rest days and Saturdays (08:00 hrs to midnight)
>
> 2. Double time midnight to start of normal working day and all day Sunday'

[emphasis added]

The wording of this clause was the same in both agreements.

53. The claimants contend that the 'normal hours of work' cross-refers to the hours of work at clause 7.0, i.e. 37-hours per week. That however ignores the singular possessive the *employee's normal hours of work*, which contrasts with the 'normal working week' and also the definition of the premium rate of pay as being time and a half from the end of the 'normal working day' until midnight and double time from midnight to the start of the working day and all day Sunday. Previously there had been a single overtime rate. The claimants' case begs the question: are the alleged overtime hours within the night shift before midnight (time and a half) because they start early, or after midnight (double time) because they end late? The Tribunal did not consider the agreement would have been left in the air in this way if the claimants' interpretation of the agreement was correct or reasonable.

54. The claimants state that they were unable to complain about the change to their terms and conditions.

55. Mr Ballantine, who had started work in November 2002, said that he did not feel he could 'rock the boat'. There was nothing in writing from him until his solicitor's letter in 2017; there was however correspondence between him and HR (pages 455-466) demonstrating he engaged with HR. He said he raised matters five or six times, with HR or the Union, neither of which came back to him. He was told by the respondent a grievance would be an inappropriate use of the procedure and that he should go through the Union. There were no such things as emails and he had had telephone calls with the union, but did not get very far. Mr Cook from the Union told him on at least three occasions that the changes had been agreed.

56. It was put to Mr Ballantine that he was not so timid as to not to be able to say that there had been a mistake over pay. He replied that he was, and

that raising a grievance would be out of character for him. He said there was no support from the Union or that he left matters in the hands of the Union. The Tribunal does not accept Mr Ballantine was unable to raise a grievance about the issue of an underpayment.

57. Mr Hannah did not raise a formal grievance and said that, without the Union's backing or support he was unable to do so. He also said that it did not seem like an issue for the Union and he did not ask them to support a grievance.

58. On 20/2/2013 Mr Hannah had raised a grievance:

> 'I wish to address the issue of victimisation and threats I have been subject to at my place of work, for raising a complaint through legitimate channels. I would like to be accompanied at any subsequent hearing by my Unite Union representative.
>
> I would like to highlight the fact I have been singled out for unequal treatment by my manager, with my career progression effectively being blocked.
>
> After over 10 years service with the company, this has left me in the position of being (given the contract portfolio) the least qualified engineer on station, despite being the longest serving. Being treated differently has left me professionally vulnerable and my position tenuous compared to my colleagues.
>
> Needless to say, the stress of this uncertainty has impacted on my family and affected our quality of life massively.
>
> To this end I would like the discrimination and threats to my job security to cease and a personal file note raised, recording that no further detriment will occur.'

(page 418)

59. The Tribunal finds Mr Hannah at least has demonstrated that he was not unable or unwilling to raise a grievance, if he believed that it was justified. It is less controversial to raise a grievance which affects more than one person about an objective matter such as pay; than one where he is the only person affected, when the subjective subject matter is personal victimisation and threats. He was aware of the procedure and knew how to raise a grievance in writing.

60. Mr Gorman said he did not realise he could raise a grievance, but was constantly complaining to his manager - John Irvine and whenever there was a visit from a company representative or HR. He questioned the change informally at least every couple of years with HR but very rarely got a proper response or explanation. The Belfast Line Station was very remote and did not have any union representatives, and he did not have an email address for Les Kennard, the union representative. He did speak to union officials, but did not get a response and he felt there was no point in carrying on. It is not accepted Mr Gorman was unable to raise a grievance.

61. There is no record of the issue of overtime pay during shifts being raised by the claimants in 2007 when the Collective Agreement was revisited.

62. There was no documentary evidence that the claimants had ever raise this issue.

63. The Tribunal does not accept the claimants were unable to raise their complaints. All the claimants were professional, articulate and intelligent men. More than one of them believed they were underpaid and as such, it was not a case of one of them getting on the wrong side of the respondent (which is not accepted in any event). This was an objective complaint about pay. The respondent could either agree or disagree with them, but it was not a 'personal' complaint, such as an accusation of mismanagement or bullying, which clearly, whether right or wrong, would be upsetting for all involved. A dispute about pay is not something which engages emotions in the same manner.

64. The Tribunal finds this is not an employer who would not engage with its employees or would take exception if a member of staff raised a grievance in good faith. For example, on 23/8/2005 HR wrote to Mr Ballantine as it appeared a collective grievance had been raised by the Edinburgh Line Station, the letter said:

> 'I write because the Company has been led to believe that all the employees at Edinburgh wish to raise a collective Grievance[19] with regards to an unwelcome situation they find themselves in currently and I wish to offer my support if this is the case.
>
> As you may be aware, the Company has received a letter stating that it is a collective grievance from all Edinburgh employees, however as the letter is not from any employee based at Edinburgh I have taken the unprecedented step of writing to all Edinburgh employees directly to try

[19] The Tribunal is not aware of the subject matter of the grievance.

> and understand the situation and offer my help. As you will be aware from John Troman and Jim Kirby's recent visit to the line station, the Company has the best interests of its employees at the forefront of its activities and takes its duty of care as your employer extremely seriously. To this end rest assured that every endeavour is being made to effectively manage the issues at Edinburgh and reach the best possible solution for both yourselves as employees and SR Technics.
>
> Should however you feel that you wish to raise a formal grievance with the Company, I would invite you to please refer to the SR Technics UK Grievance Policy 10-06-02 (located on the Intranet). This procedure spells out the steps to enable you to raise formally any grievance you may have. The policy also provides for the representation of a collective grievance by way of election of a spokesman from within that employee pool representing the group.
>
> As the HR Officer for your division of the business, namely Aircraft Services, please let me know if I can be of any service to you in this instance either with the grievance itself, or informally regarding this particular issue or indeed with any other situation you may wish to discuss.
>
> Please feel free to contact me on 01279 825411 if I can be of assistance to you.'

(page 454)

65. This is clearly a supportive employer. In any event, as the subsequent 2017 Collective Grievance showed, it was correctly and properly investigated by the respondent, even if the outcome was not what the claimants were seeking.

66. Another point Mr Gott put to the claimants in cross-examination was that if they believed they were entitled to 5 hours overtime per week, they would have entered that onto their time sheet; which they did not do. None of the claimants' timesheets provided showed such claims, although Mr Hannah said he did claim via the timesheets for a number of years after his employment commenced in October 2002. The claimants said that would have meant their timesheets were returned as the department manager would not have agreed to the overtime. That is accepted and the result would have been a delay in processing the claimants' timesheets and their pay. The claimants however could have presented a separate timesheet in order to demonstrate their case, that they were entitled to additional overtime.

67. That aside, Mr Gott made another more crucial point about claiming overtime. He took Mr Gorman to his timesheet for July 2017 and a particular overtime claim of 0.25 (15 minutes) on 13/7/2017 (page 397). Mr Gott put it to Mr Gorman that it was extraordinary that someone who claimed overtime when his shift had overrun by 15 minutes, would not take action in respect of a sum he calculated to be in the region of £600/700 per month, which was (he said) underpaid.

68. The claimants said the issue of the underpayment was drawn to their attention when the respondent changed from paper time sheets, to an electronic version in 2017. Mr Gott again dealt with this by demonstrating that based upon the time sheets in the bundle, the claimants used paper time sheets until at least March 2018. That assertion therefore did not stand up to scrutiny.

69. As such, the Tribunal was not given any explanation as to why the claimants waited until April 2017 to raise a collective grievance.

70. Ms Simpson said that she took over at the Union representative for the claimants in August 2013. She attended the collective grievance and appeal meetings and she was responsible for all LSNC engineers. When asked why having begun her role in August 2013 the collective grievance was not lodged until 2017, she replied she accepted the explanation of the collective agreement given to her at the time. It was not until she was approached by the members that she started to question the explanation she had been given and sought guidance.

71. This does not address the fact that the claimants had been, on their case, dissatisfied since December 2003 with the removal of the overtime pay. It is also their case, that they would regularly raise the issue with the Union. If, using Mr Gorman as an example, he felt a sum in the region of £600/700 was being deducted every month, why would the issue not come to a head earlier? Particularly as Ms Simpson was a new representative and it appears that once she understood the claimants' complaint, that she agreed with them and their interpretation of the agreement. It is not clear however, why Ms Simpson did not take the matter up earlier having referred to negotiating a new pay deal in 2014.

72. Following on from that, the Tribunal is not clear why this issue was resurrected in 2017 by means of the collective grievance. It can speculate that it was as a result of the 2018 agreement talks commencing prior to that, or, as a result of the introduction of electronic time recording. What is clear is that 'something' prompted raising this historic matter.

73. A collective grievance was raised on 28/4/2017 (pages 1000-1000a). The grievance said that the claimants were working 266 additional hours, for which they were not paid.

74. On 21/6/2017 Mr Ballantine instructed solicitors to write to the respondent setting out his grievance that he had been underpaid on average 4.6 hours per week, in addition, to an underpayment of holiday pay. In that letter, Mr Ballantine's solicitor said:

> 'Mr Ballantine has already raised an informal grievance with your HR department. In response he was asked to contact Unite the Union and seek their clarification on the matter, which he did. He was advised as follows:
>
> 1. His salary is associated with the job role not the number of hours worked.
>
> 2. The actual hours worked were determined by shift pattern and could vary with the agreement; and
>
> 3. The additional hours worked by employees on a 12 hour, four on four off shift pattern, are compensated for in the shift pay.'

(page 1002)

75. Mr Ballantine referred to this letter in his witness statement. It was put to him in cross-examination that this was the Union's position, that it was correct and accorded with the respondent's understanding. Mr Ballantine said this was incorrect and his solicitor had misrepresented him. This was HR's position he said, not the Union's.

76. The same point was put to Ms Simpson. She said Mr Ballantine had shared the letter with her. She was asked if the summary reflected the advice of the Union and she agreed that it did. She said it was the opinion of one solicitor advising the Union.

77. The evidence on the summary in the solicitor's letter is contradictory. Mr Ballantine did not correct a very obvious error either in his witness statement or in supplementary questions. If his solicitor's letter was misleading, it would be expected that he would have made that clear from the outset. He was however contradicted by Ms Simpson who agreed the summary was the advice the Union had provided; although she disagreed with the interpretation.

78. The Tribunal finds that the solicitor's summary was the advice of the Union at the time. This also explains why, prior to Ms Simpson's involvement,

the issue was not taken up by the Union. The Union agreed with the respondent's interpretation that overtime was only paid for hours worked outside of the employee's own work pattern/job role. Such that, if the employee worked shifts, those were their normal hours or work and there was no entitlement to overtime. The individual's hours of work was their own shift pattern and if they worked 12-hour shifts, 4 on/4 off, they worked that shift pattern before they were entitled to overtime pay over and above their basic pay and shift allowance.

79. The (Acting) Station Manager LGW heard the grievance on 7/9/2017 and did not uphold it (pages 1020-1071). The outcome was confirmed on 26/10/2017. That finding was appealed on 19/11/2017 (page 1073). Mr Ballantine also appealed separately on 24/11/2017 (page 1075).

80. Mr Howard-Norris heard the appeal on 18/12/2017 and provided his outcome on 15/1/2018 (pages 1078-1084). Mr Howard-Norris interpreted the disagreement to have arisen as a result of the 2003 Collective Agreement, when the bi-annual payment was withdrawn and shift pay was enhanced. If that is correct, then as previously found, the last bi-annual payment was paid in July 2002 and there was no payment in January 2003.

81. Mr Howard-Norris noted that Ms Simpson acknowledged the two payments (the bi-annual payment) had 'gone into the shift pay' (page 1084). Ms Simpson however said the minute attributing this comment to her was incorrect. Although Mr Howard-Norris referred to this in his outcome letter and witness statement, Ms Simpson did not refute this in her witness statement.

82. Mr Howard-Norris did accept there was an inequality between the Stansted based engineers who worked a 10.25 shift pattern (he said this was not industry standard) and the claimants' longer shift pattern. That however had no bearing on the claimants' grievance that they were underpaid overtime pay.

83. Mr Howard-Norris also said that the claimants in his view, had been let down by their Union representative. He said that none of the Union representatives were subject to the same collective agreement; they were on the Hanger Agreement and were Gatwick-centric. He said the Union representatives were dismissive of the LSNC, did not themselves receive the bi-annual payment and did not truly represent the LSNC employees. He also said the difference in the respondent's shift pay and that of Thomas Cook and Virgin was 'huge'.

84. Mr Fox (the initial lead claimant in the claim) had presented his claim on 17/12/2017[20]. In these lead cases, the Belfast claims were presented on 25/6/2018 and the Scottish claims on 10/8/2018.

85. The respondent's primary position is that (under s.13 ERA), the claimants have not particularised the alleged deductions or quantified their claims. The contracts were varied by means of the collective agreement in 2003 and more recently, by the 2008 collective agreement. The respondent's case is simply that the bi-annual payment was replaced with an enhanced shift allowance (on the respondent's case, the shift allowance was increased by 44% to account for the removal of the bi-annual payment). The respondent's secondary position is that the claimants are estopped by convention from making this claim, or in the alternative they have acquiesced to the respondent's position or had waived their claims. The respondent relies upon Abrahall v Nottingham City Council [2018] IRLR 628 in this regard.

86. The sums claimed by these claimants are substantial[21] [22] [23] [24]. There are 33 other outstanding claims. In view of the current economic situation and in particular the position of the aviation industry, the claimants' motivation is not clear. Potentially, if the claims were successful, the sums claimed could put the respondent under severe financial strain if not render it insolvent, with resulting job losses.

The Law

87. The ERA at s. 13 provides:

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

[20] Claim number 2304116/2017.
[21] Mr Ballantine claims - overtime £15,816.73 holiday pay £1,697.81 Total £17,514.54
[22] Mr Gorman claims - overtime £45,392.69 holiday pay £4,877.71 Total £50,270.40
[23] Mr Hannah claims - overtime £47,485.04 holiday pay £5,102.16 Total £52,587.20
[24] Mr McDermott claims - overtime £22,327.66 holiday pay £2,387.98 Total £22,715.64

88. The ERA provides:

> **23 Complaints to employment tribunals**
>
> (1) A worker may present a complaint to an employment tribunal—
>
> (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
>
> …
>
> (2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
>
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
>
> (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
>
> (3) Where a complaint is brought under this section in respect of—
>
> (a) a series of deductions or payments, or
>
> (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
>
> the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

89. The Tribunal was referred to numerous authorities and extracts were quoted in the parties' skeleton arguments and closing submissions.

90. In Abrahall v Nottingham City Council [2018] IRLR 628, Underhill LJ said:

> 102. First, the proposed variation was wholly disadvantageous to the employees. Sometimes pay-cuts are proposed as part of a package of measures some of which are (at least arguably) to the employees' benefit. If the employees continue to work without protest following implementation, taking the good parts as well as the bad, it is usually easy to infer that they have accepted the package in its entirety. But

where that is not the case it is more difficult to say that they are not simply putting up with a breach of contract because they are not prepared to take positive steps to remedy it, whether by taking industrial action or by bringing proceedings. [Counsel for the Nottingham City Council] would say that this was, in substance, a package case because the employees were relieved of the risk of redundancy. But that is not the same: the Council was not asked to, and did not, make any contractual promise not to make redundancies.

103. Secondly, the matter was not, on the ET's findings, put to the employees as something on which their agreement was required. Indeed, given that pay was negotiated collectively, it was not something on which employees would normally be expected to take individual decisions: although that route had had to be resorted to for the introduction of single status it was wholly exceptional. No doubt when the freeze was first proposed the Council tried to get the unions' consent; but when that was not forthcoming it was imposed unilaterally, and the Council's position was that it was contractually entitled to take that course. That is in my view important: ... Although I have been critical of the unions for not stating their position explicitly, or encouraging their members to do so, the same criticism can be advanced of the Council. It would have been open to it to tell the employees in terms that if they continued to work after 1 April 2011 they would be taken to have agreed to the proposed freeze (without prejudice to whether their agreement was legally required): I do not say that continuing to work in the face of a unilateral ultimatum of that kind would automatically have constituted acceptance, but it would have made the Council's position clear and made the argument for an acceptance by conduct much stronger. There was equivocality on both sides.

104. Thirdly, there was strenuous protest on the part of the unions not only up to but beyond the date of the implementation of the freeze on 1 April 2011: ... At that date they were in the course, or on the cusp, of consulting their members about the possibility of industrial action, and the results of that consultation did not become known until about the middle of the month: ... [Counsel for Nottingham City Council] confirmed in his oral submissions that it was his case that the variation took effect from the first pay-day after 1 April 2011: I did not understand him to rule out the possibility that it took effect at some later date, but he did not propose any such alternative or advance any argument about how it might be identified. We do not know precisely when during the month the pay-day fell; but even assuming in the Council's favour that it was at the end of the month, after the results of the ballot were known, I find it hard to see how the Claimants' continuing to work as from that date could be taken as an unequivocal acceptance of a variation which might have

> been the subject of industrial action until days before. A decision not to take industrial action is not the same as a decision to accept a variation (as is illustrated by the facts of *Rigby v Ferodo*[25]), and there is no suggestion that the unions made it clear that they would take no further steps, still less that they would now reluctantly agree to the freeze – indeed the two statements recorded …, general though their terms may be, are inconsistent with any such volte-face. I do not believe that the failure of the unions to take further steps thereafter, or of the Claimants to voice any explicit protest, compel the conclusion that their position changed; and, as I have mentioned, [Counsel for Nottingham City Council] did not advance a positive case for a half-way house date.

91. Underhill LJ had also considered (at paragraph 80) when it can be inferred that a contractual pay cut had been accepted. Depending upon the circumstances of the case, it may not be on the date it is first implemented as the employee may be taking time to think. He also contrasted the situation where a contractual variation 'bites' or immediately takes effect, such as a pay cut, with a variation when may take effect at some point in the future, such as to a redundancy payment, which may never be relied upon.

Conclusions

92. Mr McDermott does not have a claim arising out of the removal of the bi-annual overtime payment as his employment post-dated the removal of it.

93. The claims have been presented out of time as per s. 23 (2) ERA. In accordance with s. 23 (3) ERA, the last of the series of payments was received in July 2002. Any deduction from pay therefore crystallised when the respondent did not make any payment in January 2003. According to Mr Gorman's payslip, the January 2003 payment was made on 31/1/2003 (page 1422). The primary time-limit for making a claim was therefore 30/4/2003[26]. The claimants have not sought to persuade the Tribunal to exercise its discretion under s. 23 (4) ERA, save for vague references to not being able to take the matter up with HR or the Union. In any event, the claimants' evidence was rejected on this matter.

94. In the alternative, the Tribunal finds that as a result of collective bargaining, the relevant provisions were incorporated into the claimants' contracts of employment. The result was that the 2003 agreement removed the bi-annual payment of built in overtime. It was replaced with a more favourable financial package as the bi-annual payment was

[25] [1987] IRLR 61
[26] The current regime of Acas early conciliation did not apply at the time and so there is no extension of time under that process.

incorporated into the shift premium and the shift premium was increased. The overall package was more favourable for the claimants, they accepted it in its entirety and they did not protest. It is understood[27] the respondent has since increased the rate of basic pay and reduced the shift premium, with the result that the contributions to the claimants' pensions are increased (reflected by the increase in basic pay).

95. As the respondent will accept, with hindsight, the variation could have been more clearly expressed. It is obvious from the findings, that there was disquiet prior to and at the time of the 2003 ballot. It may well be that the Union could have done more to address those concerns and to reassure the claimants of its position; that overall, the financial package was more favourable.

96. The union did not seek to vary the 2003 or 2008 agreement. The Union's view was as per that set out in Mr Ballentine's solicitor's letter (page 1002), albeit Ms Simpson subsequently did not agree with that view.

97. The claimants had never worked a 37-hour week (or any variation of that default working week). They all worked a longer shift pattern of around 12 hours attendance (with the actual working time reflected by the paid or unpaid breaks in force at that time) on a 4 on/4 off basis. That working pattern was their individual (the employee's) 'normal hours of work' for the purposes of the payment of overtime as per clause 11 of both the 2003 and 2008 collective agreements.

98. The Tribunal simply does not accept that *if* the claimants were owed hundreds if not thousands of pounds in overtime payments, that they would take no formal action until 2017. Irrespective of the Union's stance, the conclusion is that the claimants would have taken the issue up with the respondent. They could have individually or collectively: sent a fax, asked to meet HR, spoken to their Line Station managers, called HR, sent an email or followed any other reasonable course of action in order to bring their understanding of the underpayment to the respondent's attention.

99. In the further alternative, the Tribunal finds the claimants' position is the exact opposite of the claimant in the Nottingham City Council case. The alleged underpayment was immediately obvious to the claimants once the respondent removed the bi-annual payment and ceased to pay it from January 2003 onwards.

[27] Mr Hannah's evidence.

100. The Union was aware the bi-annual payment had been included in the increased shift premium and it took no action; it did not protest as in fact it agreed with the change.

101. The claimants did not formally protest, even though they were aware of the change and they were concerned about the impact on their remuneration. They believed they were being underpaid.

102. They did not need time to think in respect of their position and certainly did not need 14 years to reflect before taking action. The meetings in December 2003 and January 2004 indicate they believed there were over one-hundred and on some calculations over two-hundred hours of overtime which they believed was underpaid[28].

103. In any event, they took from January 2003 until the collective grievance was raised in April 2017; that is over 14-years to formally raise their dissatisfaction. Although Underhill LJ said in Nottingham City Council (paragraph 86) continuing to work following a contractual pay-cut may be treated as acceptance, does not mean that it will always do so. The Tribunal concludes that working for over 14-years, without formal protest or unequivocally stating the position, does result in acquiescence of the change, or waiver of their position. The variation has been accepted.

104. For those reasons, these claimants' claims are rejected and are dismissed.

20/11/2020

Employment Judge Wright

[28] The collective grievance states 266 hours (page 1000).