EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107709/2021

Hearing Held by Cloud Video Platform (CVP) on 29 and 30 September, 1 October 2021

Employment Judge B Campbell

Drs T and A Banerjee	**Claimants Represented by Mr K Gibson, Counsel**
Western Islands Health Board	**Respondent Represented by Mr A Hardman, Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. the claimants were contractually entitled to receive payment for out of hours work additional to their standard contractual hours when provision of that work was agreed;

2. the respondent was in breach of contract by not paying each claimant for such work they carried out between 1 March and 22 September 2020;

3. Separately the respondent made an unlawful deduction from the claimants' wages contrary to section 13 of the Employment Rights Act 1996 by not paying them for such work; and

4. the respondent is ordered to pay the first claimant, Dr Tushar Banerjee, the sum of **£7,538.92** and the second claimant, Dr Antima Banerjee, the sum of **£7,895.00** for such hours that each worked and for which no payment was made.

REASONS

General

1. These claims have been brought by two doctors, Tushar and Antima Banarjee, who are husband and wife. They have been combined under the same claim number. For the sake of convenience and clarity the claimants are referred to in this judgment by their first names.

2. The claims arise out of the claimants' employment by the respondent which began for both of them on 27 August 2018 and ended on 13 December 2020 by way of their resignation.

3. Evidence was given by each claimant, Dr Antima and then Dr Tushar. For the respondent evidence was heard from Dr Frances McAuley, Medical Director, Dr Jacek Rychter, former Clinical Lead and now retired and Ms Anne McHale, PA to Mr McAuley.

4. With the exception of Mrs McHale the evidence in chief was taken by way of written statements which had been prepared in advance. By agreement a small number of supplementary questions in chief were permitted. The decision to call Mrs McHale was taken by the respondent in the course of the hearing and without objection by the claimants. It dealt with the discrete matter which arose during the evidence of the claimants of a particular meeting and

the steps taken following it. Therefore her evidence in chief, which was brief, was given orally.

5. The parties had helpfully prepared an indexed and paginated joint bundle of documents. Numbers in square brackets below are references to the page numbers of the bundle. The claimants also provided an updated table of dates on which additional hours were said to have been worked, and corresponding sums claimed. This was added to the bundle and partially agreed by the parties as discussed in more detail below.

6. All of the witnesses were found generally to be credible and reliable. The parties were not in direct conflict over much of the evidence and the case turned more on matters such as what precisely a given person had said, or intended by what they said, in a given meeting and, principally, the application of the law to the largely agreed facts.

7. The parties' representatives provided written submissions at the close of the hearing which were considered and where appropriate they are referred to below.

8. The parties and their representatives are thanked in general for the helpful and constructive way in which their respective cases were pursued.

Legal issues

9. At a preliminary hearing for case management on 4 May 2021 a set of issues was noted. That has been slightly extended, principally to recognise that the claimants had raised both common law claims and complaints of unlawful deduction from wages contrary to section 13 of the Employment Rights Act 1996 (**'ERA'**)

10. The legal questions before the Tribunal were therefore as follows:

10.1. Was each claimant contractually entitled to receive payment in addition to their normal salary for hours worked outside of their standard hours when requested to do so?

10.2. If so, was each claimant so requested and did each claimant carry out any such work between the dates of 1 March and 22 September 2020?

10.3. If so, when did they carry out such work, for how long and at what rate of payment?;

10.4. Was the respondent in breach of contract by not paying each claimant for such work; and/or

10.5. Did the respondent make an unlawful deduction, or a series of unlawful deductions, from each claimant's wages contrary to section 13 ERA by not paying them for such work; and

10.6. In either case (or both) what therefore is the total amount of the payment each claimant is entitled to receive?

Applicable Law

11. A contract of employment is subject to the common law of contract, save where there is a specific statutory provision which takes precedence. Each contract of employment involves rights and obligations. Those are established in different ways. Most of them are agreed expressly in writing at the beginning of the relationship and subsequent changes will also be documented. Express terms can also be verbally agreed. Terms can be imported from elsewhere. They can also be implied from the way the parties act, even if never directly spoken about or written down.

12. The right to remuneration is a fundamental feature of any contract of employment. If an employee has agreed with their employer that they will be paid in a certain way for carrying out certain work, they are entitled to be paid

upon performing that work. The employer will be in breach of contract if they do not make payment.

13. By virtue of section 13 of ERA a worker is entitled not to have unauthorised deductions made from their wages. Therefore, subject to specific exceptions provided for in that part of the Act, there will have been an unauthorised deduction if the worker is paid less than they have earned, depending on how their earnings are calculated, or not paid at all for their work. The date of the deduction is deemed to be either the day when less is paid to them than they have earned, or when they would normally have been paid but were not.

14. Examples of lawful deductions would include PAYE income tax properly deducted or a sum which the worker had explicitly consented to having deducted in advance by writing. Section 14(1) of the Act expressly states that an employer may recover a previous overpayment from a worker's wages, and this will not be treated as an unlawful deduction.

15. A worker who has suffered one or more unlawful deductions from their wages may submit a claim to the employment tribunal under section 23 ERA. There are detailed requirements as to the timing of complaints to ensure that a tribunal can determine them. In short, if a claim is about a series of deductions, the claim process (initiated by way of commencement of Early Conciliation through ACAS) must begin within three months of the last alleged deduction.

Relevant Procedural History

Case management preliminary hearing

16. A preliminary hearing for case management was held on 4 May 2021. The judge ordered the claimants to provide further particulars of their claims. The respondent was then to reply so as to clarify its own position [57].

17. The claimants provided further and better particulars [60-66]. The respondent replied [67-68].

18. By way of the above procedure the parties' positions were further focussed. The claimants contended that there was either an implied or an express term incorporated by custom and practice (or both) in each of their contracts to the effect that the respondent would pay them for overtime worked due to service demand. They said that the payments with which their claims were concerned had initially been requested and authorised by Dr Rychter in his capacity as Clinical Lead of the claimants' department. That covered March 2020. From April 2020 onwards authorisation was said to have been given by way of an email from Dr McAuley dated 24 March 2020 requesting that all departments prepare a plan to provide 7-day cover.

19. The respondent accepted that the claimants had been paid for overtime provided due to service demand 'previously' – taken to mean before the period March to September 2020 claimed for in these claims. It emphasised that on those previous occasions there had been a specific need for cover, a specific request made to the claimants and that they had the right to say no to it. It did not accept that the claimants were entitled to any payment for additional hours worked between March and September 2020. They had not followed the process used previously in terms of the timing of submission of their claims, and there had been no authorisation in advance. Reference was made to a meeting on 5 June 2020 (discussed further in relation to the parties' evidence below) at which Dr Antima was understood to have said that she and her husband had been providing out of hours cover during the pandemic out of goodwill and for no payment.

Claimants' amendment application

20. During the course of the full hearing an unopposed application was made by the claimants to amend their particulars of claim. The application was granted. This was to correct their position on what were their contractual working hours. The effect was to delete the first sentence in paragraph 3 of each set of particulars of claim [32, 34], which had said that the claimants were

contracted to work between 8am and 6pm, Monday to Friday from the outset. The amendment added the following text to replace that wording:

> 'The claimant was contracted to work core hours of 9am to 5pm each weekday (Monday to Friday). That equated to 10 programmed activities ('PAs') of four hours' duration each per week. In addition, the claimant agreed with the respondent when recruited that the claimant and the claimant's spouse would between them provide cover for all acute emergency and on-call consultation work each weekday between 8am and 9am and between 5pm and 6pm. It was agreed that such cover would be provided on the basis that in one week the claimant would provide the extra two hours' cover on weekdays for three days and the claimant's spouse would provide the additional cover for two days. The next week the claimant's spouse would provide the extra two hours' cover on weekdays for three days and the claimant would provide the said cover for two days; and so on alternating in each week.'

Findings of Fact

21. The following findings of fact were made as they are relevant to the issues in the claim.

Background

22. The claimants are both qualified medical doctors at the level of Consultant and specialising in paediatric care. The respondent is a part of NHS Scotland responsible for delivering public sector health care in the Western Islands of Scotland.

23. The claimants were employees of the respondent from 27 August 2018 until 13 December 2020. Their employment ended by resignation. They provided and served notice.

24. The claimants were employed as Consultant Paediatricians at the Western Isles Hospital in Stornoway on the island of Lewis (the **'hospital'**). They were the only specialist paediatricians within the service and so shared responsibility for provision of paediatric care between them.

25. The claimants received an **offer letter** from the respondent dated 27 August 2018, summarising some of the terms of the role. It came from Dr Angus McKellar, the respondent's then Medical Director who they treated as their line manager. Each countersigned the letter they received [158-161, 163-166].

26. Each claimant was employed on the **terms and conditions of service** which the NHS issued to consultant grade doctors at the time [69-145]. In addition they were issued with a **job description** more specific to their roles with the respondent [146-155].

Working hours

27. Each claimant had core contractual hours of 9am to 5pm, Monday to Friday. Their job description required them to provide the equivalent of 11 **'programmed activities**' (**'PA'**) of four hours each per week. They therefore also agreed with the respondent that they would additionally cover all acute and on-call work between 8am and 9am, and between 5pm and 6pm each weekday. They would share this extra time between them on the basis that one would cover the extra hours for two days in a given week and the other for three days, and they would then switch the number of days covered each alternate week so as to even up the overall amount of extra hours worked between them. They accepted that this arrangement did not entitle them to any extra pay.

28. Consistent with the above, the job description for each claimant confirmed in relation to out-of-hours working that *'There is no on call commitment outwith Monday – Friday 0800 – 1800.'* [151].

29. Section 4.8 of the terms and conditions of service deals with **out-of-hours** (**'OOH'**) working. Section 4.8.2 states that for any extra hours worked outside

of 8am to 8pm Monday to Friday, three hours of such time would be treated as equivalent to one PA which could be applied to reduce the scheduled work of the Consultant in a given week. Therefore their normal workload for the week would be reduced by an hour for each PA accumulated by OOH working. As an alternative to that arrangement, the employer and the consultant could mutually agree that the latter would receive a payment. That would be at the 'plain-time' rate if worked between 8am and 8pm Monday to Friday and at a 'premium' rate at any other time.

30. The terms of section 4.8 are said to be subject to the contents of section 14, but no aspects of that later section are relevant to the current issues.

Provision of out-of-hours cover from 2018 to early 2020

31. It was agreed between the claimants and Dr McKellar at the outset that the claimants would not be needed to provide OOH cover and other arrangements would be in place for that. Those were to have been by way of cover by other 'speciality doctors' on the island but in practice the respondent found it difficult to agree arrangements with them and that option could not be implemented.

32. Instead, the respondent would seek locum cover from paediatric doctors who were based on the mainland. This usually met any requirement for OOH cover but occasionally there would be a reason why locum cover would not be possible. In those circumstances the claimants would be asked to provide OOH cover and either or both of them generally accepted so that the cover was provided. There was agreement between the claimants and Dr McKellar that they would be paid for that work.

33. The OOH work was at least partly on-call and so there would be a mixture of occasions when the claimants would be on call but not required, be required but able to provide the necessary assistance remotely from their home, or have to go into or remain in the hospital and provide care there.

34. The respondent prepared a rota for out of hours cover on a monthly basis. It tended to be finalised some time in the month before. The rota was prepared by a Ms Michelle Morrison, the Medical Rota Officer.

35. The claimants worked overtime on various dates in 2018 and 2019 as requested and received payment for those hours [60-62].

36. The claimants would not be scheduled to cover OOH work without it being agreed in advance. An example of the type of request for cover which might be made is on pages [179-181].

37. Usually Ms Morrison would identify any gaps in planned cover when preparing the rota for the following month and raise those with Dr McKellar, or later Dr Rychter. Either doctor would ask her to check with the claimants if they could cover the gap. If they could they were added to the rota.

38. On at least one occasion, on 6 August 2019, Dr Antima offered to provide overtime cover when she knew that it was required and could not be provided by someone else. Dr Rychter accepted the offer and Dr Antima provided the cover [184-185].

39. As discussed below, when they were added to the rota without it being agreed in advance they raised that as being a departure from the established process.

40. The claimants were paid for all OOH work they performed. The process was that they submitted expenses claims using a form prescribed by the respondent. They would complete and sign the form, submit it and a more senior employee with relevant authority such as Dr McKellar or Dr Rychter would countersign it.

41. There was not a rigid practice in relation to timing of the submission of claims or their being signed off. If a claim was for one, or a small group of dates the claimants would tend to submit it shortly after. If a period of cover was longer they would wait until it was finished and submit a claim for the whole 'block' as it was described. It could take longer for a claimant to submit a claim, or

for it to be authorised. So, for example, Dr Antima's claim for OOH work on 12 January 2019 was submitted on 26 April 2019 and authorised on 11 June 2019 [167]. The claim was paid.

42. Ms Morrison asked the claimants on 24 January 2020 by email if they would be able to provide OOH cover in February 2020 [215]. They agreed and provided the cover requested.

43. Ms Morrison sent Dr Antima a copy of the rota for March 2020 on 27 February 2020. It showed OOH cover being provided between the claimants for the whole month. There had been a misunderstanding between the claimants and Dr Rychter over whether the claimants had agreed to do that, but Dr Antima met with him the next day and as a result the claimants agreed to provide the required OOH cover throughout March 2020 and provided that cover [220-223].

Arrival of Dr McAuley as Medical Director in March 2020

44. Dr McKellar left the respondent in or around June 2019. For a time there was no Medical Director to replace him and Dr Rychter dealt with some of his responsibilities.

45. In March 2020 Dr Frances McAuley joined the respondent as a Medical Director. On joining, Dr McAuley did not know the details of the claimants' contracts in relation to work in excess of their contractual hours. He was unaware of the practice which had been followed in relation to the claimants performing OOH work, claiming for it and being paid.

46. He sent an email to a number of the people working at the hospital, including the claimants, on 14 March 2020 [224]. He acknowledged that he had not long started in his role and had not yet been able to meet all of the doctors within his responsibility in person.

47. The purpose of the email was to address certain hospital staff, including the doctors on how they may be required to respond to the Covid-19 pandemic and its potential effect on their work. It contained the following paragraphs:

'Currently with respect to contractual things (as of 13/3/20) we are reminded that we are all key workers; that currently T's & C's are unchanged (ish). Leave arrangements guidance is constantly being updated. As far as annual leave goes, there is currently NOT a moratorium on A/L. But the maximum 5 day carry over rule has been rescinded.

We will be exploring different roles and potentially locations for all staff including medical as the pandemic takes hold and as we reduce any elective workload. In our isolated community this will involve supporting our community colleagues as best we can (as that is where the majority of patients will/should be), and also the hospital teams. One example could be a consistent direct consultant review for decision to treat/admit in A&E. We will also need to be mindful for our own general wellbeing, the next weeks will be difficult rather than days. This includes not "going the extra mile" every day, and indeed this is where we need to support each other. Overtime (or however we want to call it) will obviously be available/needed.'

48. Dr McAuley sent a further email to hospital staff on 24 March 2020 [225-226]. By then a nationwide lockdown had been implemented. The email dealt with the implications of that on the provision of care at the hospital. He said:

'Dear Colleagues

It is clear we are in difficult times, and indeed potentially extreme circumstances.

A "lockdown" is now in place for the UK.

For us on the Western Isles, what does this mean?

1. *Support in the form of locums or indeed returning medically qualified individuals is highly unlikely as of now/the very near future.*

2. *We will need to strive to be self-sufficient and continue to deliver a safe and sustainable service to care for our population.*

3. *Work is at an advanced stage for primary care (GPs and related) and also community care. This has involved redeployment of staff (including into areas they are not so familiar with), complete rewrites of rotas to ensure 7 day cover and to support overnight working, IT work on infrastructure to support sharing of information and to further promote our telehealth services.*

4. *My ask of yourselves, the NHS Western Isles Hospital based medical staff, is to reflect on your service needs and how best you and your team can deliver them in the current situation. Virtually all elective work (eg outpatients or theatres) has been cancelled, freeing up your time to support what will need to be a 7 day acute service for all specialities. We must not forget "routine" emergency and urgent work, but anticipate large numbers of covid19 related referrals (current evidence suggests of those infected ~80% will have a mild/moderate episode of disease (hence the need to bolster Primary Care).*

5. *By the end of this week at the very latest I need to be assured that all the Hospital specialities have in place robust 7 day (define a day? The new Contract states 0800-2000 for weekdays, Weekends have a 3 hour pa so would equate to a 4pa 12 day rather than a 3 pa 12 hour working week day). This will be challenging to all the specialities as for many this will become a 1:1 or 1:2 days. This is why getting the support structure from or trainees (who are already working on rotas) and nursing & AHP staff will be essential in ensuring resilience and protecting staff well being. Specialities include General Medicine, General Surgery, T&O, Paediatrics, Obs&Gynae, A&E and Psychiatry.*

6. *I am happy to discuss with individuals or a collective what the changes required to support the NHS on the Western Isles means*

and the impact it will have on all our lives for the next weeks to months. I am confident that as dedicated professionals we, the medical staff, will rise to the challenge presented by the covid19 pandemic caring for the patients, staff, family and ourselves.

Thank you

F'

49. The claimants took from the email that locum cover for their specialism would no longer be available with immediate effect and for the foreseeable future, given the restriction on travel between Lewis and the mainland. Dr Rychter confirmed to Dr Antima shortly after that this would be the case. They understood that along with their fellow doctors they were to devise a plan to cover any need for care arising both during and outside of their normal working hours.

50. The Paediatric service was different from others within the hospital in that only the claimants as Consultants provided it. They did not have trainee doctors, other doctors or nurses within their department who shared the provision of care, as other departments did.

51. Dr Antima replied to Dr McAuley's email on the same day, asking to discuss their area. A meeting took place that afternoon between Dr McAuley and the claimants. It does not appear that anything firm was agreed in relation to pandemic cover at that time.

52. On 26 March 2020 Dr McAuley sent a further email to staff in which he said he was *'Chasing folks up re 7 day rotas going forward. How you's looking??'* [230]. Dr Tushar replied the same afternoon to state that in Paediatrics there would potentially be a need for the claimants to cover 12 hours (8am to 8pm), seven days a week between them. Dr McAuley emailed back to confirm that locum cover would not be available from April 2020 and that he would try to arrange for unnecessary demands on their time to be removed. Dr Tushar

responded to thank him for the offer of support and confirm that the claimants would cancel leave they had arranged for April [228-229].

53. At some point around this time, although the parties were unable to say precisely when, the claimants agreed with Dr McAuley that they would provide a 12 hour, 7-day Paediatric service whilst the restrictions triggered by the pandemic were in place. Any such discussion did not directly address the question of payment for additional work.

54. OOH rotas continued to be prepared in the usual way and for April to June 2020 the claimants were scheduled to cover the hours of 8am to 8pm, seven days a week as they had agreed with Dr McAuley. This therefore required one of them to cover two extra hours each weekday and then a 12-hour period on both Saturdays and Sundays. In practice they shared the extra hours between them by taking it in turns to be on call. Therefore for any period outside of their standard hours featured on the rota, only one of them was on call. The respondent was content with this arrangement and hence the rotas would state 'Dr Banerjee' next to each period of OOH work rather than specify which of them was scheduled to cover a particular day.

55. In July 2020 the respondent was again able to use locum cover from the mainland due to easing of travel restrictions. The claimants were scheduled to cover 8am to 8pm Monday to Friday each week between them in that month, but no weekends.

56. Copies of the rotas for provision of Paediatric OOH care in 2020 were produced as follows:

    56.1. February 2020 [216-217];

    56.2. March 2020 [222-223];

    56.3. April 2020 [238-239];

    56.4. May 2020 [240-241];

    56.5. June 2020 [243-244];

56.6. July 2020 [252-253];

56.7. August 2020 [274-275];

56.8. September 2020 [283-284].

57. Those were agreed by the parties to be accurate in that they correctly showed the amount of time on each date in each month which the respondent had required by way of OOH paediatric cover. From April onwards they are consistent with the requirement for 7-day cover between 8am and 8pm as Dr McAuley had stipulated.

Meeting on 5 June 2020 to discuss proposed changes to the Paediatric service

58. A meeting was held on 5 June 2020 to discuss changes to the Paediatric service focussing on dealing with unplanned care and its associated risk. Dr McAuley led the meeting which both claimants attended, along with their BMA representative Mr Calum Anderson, the respondent's Director of HR and Workforce Development and their PA.

59. The meeting was minuted and the written minutes [245-251] were circulated to the claimants and Mr Anderson by way of a letter to each individually dated 16 June 2020. Each letter was in identical terms. It offered the recipient the option to comment on the minutes by doing so on a separate sheet of paper rather than amending the minutes themselves. Any such sheets would be attached to the minutes. Comments had to be returned by 23 June 2020 and if they were not, the minutes would be treated as approved as they stood. Neither claimant, nor Mr Anderson, sent any such notes back.

60. The minutes are therefore taken to be an accurate summary of the discussion which took place.

61. The discussion was noted to have lasted for 90 minutes and covered a number of areas. It dealt with how the service had been structured in the past, how it was being provided currently and the possible options for the future. It

had been arranged by Dr McAuley as he considered the service as currently structured to be unsuitable to deal with all possible scenarios, creating risk. As he was ultimately accountable for that, he saw it as his responsibility to explore alternatives, particularly for OOH cover.

62. The discussion was not about the more temporary matter of service provision during the Covid-19 pandemic, albeit that that situation had highlighted for all some of the potential shortcomings in the way the service was set up. Those included, for example, that the claimants were a married couple which could create additional strain for them on a personal level when sharing additional hours and an additional challenge for the respondent if they wished to take leave together.

63. One passage in the minutes drew particular attention in the evidence. In the meeting the claimants were asked for their thoughts on how the service might be adapted for the future. In response Dr Antima referred back to a discussion the claimants had had with other people at the hospital including Dr McKellar upon joining the respondent. The view reached then was that the best option to support the claimants involved using island-based GPs with a degree of expertise in paediatrics who would be prepared to cover OOH requirements. She said that this was still the preferred approach and was aware of three such 'Rural Practitioners' who may be suitable. She was recorded as saying that:

'…out of goodwill, [the claimants] both volunteered to do out of hours for no monetary compensation, even though it's not in their job description. She stated that when the moved to the island, it was not their intention that they would be providing the paediatric service 24/7 365 days.' [247].

64. Dr McAuley understood the quoted comments to indicate that the claimants were providing OOH cover during the 24-7 pandemic arrangement he had agreed with them for no additional remuneration, and knew that. The claimants did not take that meaning from Dr Antima's comments. Dr Antima said that the words had been used in the different and narrower context of what the claimants had done at the beginning of their period of service rather

than in 2020. She was saying that in those early days the claimants had agreed they would step in on occasion to cover paediatric care needs outside their normal working hours, for example when planned locum cover suddenly became unavailable. They had agreed with Dr McKellar that they would be available to do so as effectively a last resort. Those words did not extend, she said, to later events such as the pandemic contingency plan when they were scheduled to work regular OOH hours in advance.

65. In the event, neither claimant was required to respond in the way they had offered to Dr McKellar. The only OOH hours they worked had been identified and agreed in advance, and paid for.

66. Later on in the meeting the minute recorded Mr Anderson raising that the claimants were:
'now working 8am to 8pm singlehandedly, and they are undertaking some duties which aren't usually carried out by Consultant Paediatricians, for example discharge letters etc. He asked if this is something that could to (sic) be explored to ease the burden on Dr's Banerjee. He noted the importance of them being remunerated for any extra they have worked. He added that the matter will need to be resolved before any new arrangements are put in place. Mrs Keen agreed.'

End of provision of OOH cover, resignation and submission of expenses claims

67. On 24 July Dr McAuley emailed the claimants to say that he had asked Dr Rychter to bring in OOH Paediatric cover, to include nights, weekends and bank holidays. He therefore no longer required the claimants to provide OOH cover and thanked them for their help and support over the previous months [273].

68. The claimants' provision of OOH cover reduced through August and early September 2020. The last dates on which the claimants provided OOH cover were 11 and 14 September 2020 for Dr Tushar and Dr Antima respectively.

69. The claimants kept notes of the OOH work they performed from 1 April 2020 onwards. As a secondary record, the monthly rotas set out the additional cover provided, albeit that it did not differentiate between the claimants for each given day.

70. On 14 September 2020 the claimants resigned, each sending an email to the respondent and copying in Mr McAuley [287, 290]. Three months' notice was given which was the contractual requirement. The emails were acknowledged by Dr McAuley who thanked each for their service.

71. On 22 September 2020 both claimants submitted claims for overtime payments related to the OOH cover they had provided since the beginning of March 2020. Each did so separately.

72. Dr Antima submitted claim forms covering 9 March to 14 September 2020 [291, 293, 294, 297, 299, 301, 303, 304] along with a covering letter addressed to Dr McAuley [306]. Dr Tushar sent his forms covering dates between 2 March to 11 September 2020 [292, 295, 296, 298, 300, 302, 305] with a covering letter also [307].

73. The claimants notified Drs Rychter and McAuley that they had submitted their claims, by way of an email from Dr Tushar also dated 22 September 2020 [311]. Dr McAuley replied shortly after to say that he was slightly confused, as he had not considered the claimants' offer to provide OOH on-call work to be in return for additional remuneration, and nor had remuneration been mentioned. He said that with reduced inpatient and outpatient work, that appeared to be inappropriate. He ended by stating that no agreement had been entered into involving extra payments being made for the work and that no form of vouching by way of timesheets or diaries had been requested. He was '*disappointed*' and would seek formal advice [311].

74. Dr Tushar replied to D McAuley that same afternoon [309-310]. He wished to clarify the claimants' position. He said that they had agreed to working extra hours after being asked by way of Dr McAuley's email of 24 March 2020. They did so on the understanding that they would be remunerated for the extra

work. He said Dr McAuley was not correct to refer to a lack of outpatient clinics as those had been maintained throughout the whole pandemic period. He stated that additionally ongoing care had been provided for complex cases which would otherwise have been transferred to Inverness or Glasgow. He therefore disputed that the claimants had any less work from the beginning of April as compared to before.

75. Dr McAuley emailed back two days later to accept that his perception of the claimants' workload over the last six months or so was inaccurate, and he apologised for any upset caused [309].

76. On 25 September 2020, a day later, Dr McAuley emailed Dr Tushar at greater length [313]. He stated that his email of 24 March 2020 had been a general request to all of the doctors to find a way of providing cover between 8am and 8pm seven days a week. He stressed that this did not mean that both of the claimants had to be working and in the hospital at all of these times, and that early mornings, late evenings and weekends could have been covered by on-call working which the claimants had been willing to do before. It is noted at this point that the claimants did share the early morning, late evening and weekend additional hours between themselves and at least partly did so by remaining on-call at home rather than attending the hospital. They did both attend the hospital during their normal working hours as they had done before April 2020. It is not clear whether Dr McAuley's expectation in relation to those hours was that they would each only be at work part of the time. In any event, based on the claimants' evidence which Dr McAuley ultimately accepted that would not have been feasible as their workload did not decrease.

77. Dr McAuley also referred to the fact that the claimants did not yet have a Job Plan in place, which was unfortunate as it contributed to the lack of clarity over what the respondent could ask the claimants to do within the scope of their contract.

78. He accepted that the claimants' normal work had continued and thanked them for providing it throughout the pandemic. He pointed out that this was different from the majority of other departments who had been able to postpone

elective procedures and reduce levels of their clinics. He ended the email by repeating that he did not see that at any time the respondent had entered into any agreement with the claimants under which they would receive pay for any additional hours they took on. That would have required a formal agreement involving timesheets being signed off. He repeated that he would have expected the additional hours to have been covered by splitting them between the claimants and the use of on-call status. He said that the claimants should not essentially exploit the delay in agreeing a Job Plan to secure extra remuneration. He signed off by emphasising that the respondent was not going to pay the claims.

79. The claimants' resignations took effect on 13 December 2020. They served their notice periods through a combination of working as normal and utilising accrued holidays.

80. The respondent did not pay all or any of each claimant's expenses claim submitted on 22 September 2020.

Amounts claimed by the claimants

81. The claimants prepared a table showing, for each of them, the dates and times on which they had worked OOH from March to September 2020 onwards, the hourly overtime rate said to apply to that time and the overall gross amount claimed for each occasion [344-350]. Dr McAuley when asked said that the hours had been worked, to the best of his knowledge.

82. The hourly rate specified for Dr Tushar was £44.21 up until 26 August 2020 when it increased to £45.44. For Dr Antima it was £43 rising to £44.21 on the same date. Those figures were agreed.

83. For Dr Tushar, the table contained claims for hours beginning on 2 March and ending on 11 September 2020. There is a combination of claims for the hours 6pm to 8pm on weekdays and 8am to 8pm on weekends. For Dr Antima the

table showed claims for hours between 9 March and 14 September 2020 inclusive.

84. The respondent agreed with the numerical calculations. It did not however concede that the claimants had worked all of the time claimed for.

85. In the course of the evidence it emerged that the claimants had sought payment for OOH work on days when they had been on annual leave. They were on leave together between 24 August and 4 September 2020 with the consequence that any claims falling within that period were not justified. It was submitted that the claimants had simply made an error and that was not disputed by the respondent, and accepted to be the case. The effect is to remove five entries from the table for Dr Tushar (24 to 28 August 2020 inclusive) and also five entries for Dr Antima (31 August to 4 September 2020).

86. Following the hearing, on 20 October 2021 the claimant's solicitors emailed the tribunal to indicate that the claimants were no longer seeking payments in respect of 9 and 10 September 2021 because they were undertaking study leave. This information, they said, had only come to light after the hearing had concluded. The respondent's solicitors did not oppose that request. Dr Tushar claimed for both of those days and those entries should be discounted. Dr Antima did not claim for either day.

87. The precise sums therefore claimed and their treatment is dealt with below as part of the conclusions reached.

The parties' submissions

88. The parties helpfully provided written notes of submissions which were considered as part of their respective cases. In particular, the authorities referred to in the submissions were considered, although not recorded in this judgment.

Discussion and Conclusions

The initial contractual position

89. The starting point for the claims is the terms of the claimants' contracts with the respondent. As far as written documents are concerned, the terms were originally contained in the offer letter, the job description and the terms and conditions of service.

90. Considering those documents, it is found that each claimant worked, or could be asked to work, between 8am and 6pm on each weekday and any such work would be covered by their normal salary.

91. There was no contractual commitment on the part of the claimants to work at times outside of those hours, i.e. OOH work. Nor, for completeness, was there an entitlement on their part to work such additional hours. If they were to do so, both parties had to agree to it.

92. The question of pay for OOH work is related but separate. The offer letter and job description for each claimant do not refer to the question of whether any OOH work would be remunerated. The terms and conditions of service do deal with the matter, in section 4.8. In summary, either the Consultant will be given credit for OOH work performed which can be set off against other scheduled work for the week, or by agreement with their employer they can receive a payment instead.

The parties' actings up to February/March 2020

93. There was no evidence of either claimant or the respondent directly raising the question of payment for OOH work on any of the occasions when it was performed between October 2018 and March 2020 – i.e. the pre-pandemic period.

94. On each occasion the claimants would agree to provide the work in advance, usually having been asked to do so. This is consistent with the written contractual terms.

95. What then happened is that the claimants submitted claims for pay, typically within around a month after the period of OOH work ended, and that the pay claimed was authorised and paid to them.

96. There is no evidence of the claimants and the respondent referring to section 4.8 of the terms and conditions of service, or indeed any existing written terms, during the period when OOH work was performed and paid for. That said, what the parties did was not inconsistent with the written terms. It appears that by agreement they defaulted to the alternative way of crediting OOH work, namely payment rather than offsetting it against planned weekly workload. That was the arrangement consistently followed throughout this period.

Position upon Dr McAuley taking over as Medical Director – March 2020

97. It is next necessary to look at events from the point of Dr McAuley's arrival as Medical Director on 3 March 2020. By then the claimants had already agreed to provide OOH cover for the whole of that month as recorded in the rota Ms Morrison prepared. As such the cover was to be provided, and was provided, under the same arrangement that had existed from 2018 onwards.

98. Any arrangements and terms for OOH working from April 2020 onwards would have been subject to anything the parties said or did to change what had gone before. The Covid-19 pandemic prompted changes both generally across the country and specifically for the parties and operations at the hospital. That did not in itself change the claimants' contractual terms or any agreed practice between the parties for provision of OOH work. However, the communications issued by Dr McAuley in relation to adaptation of service cover were relevant. Those came in the form of his emails of 14 and 24 March 2020.

99. The key passages of Dr McAuley's emails are reproduced above in the findings of fact. The overall message was that each department or service would need to find a way to provide cover from 8am to 8pm seven days a week. There would be no external help from locums or similar. The situation was expected to last for weeks rather than days.

100. Dr McAuley's statement, that *'Overtime (or however we want to call it) will be available/needed.',* was the subject of discussion in the evidence and in submissions. He indicated that those words simply meant to him that people would have to work extra hours. The claimants took it to be confirmation that working hours outside of their contractual agreements would be paid for. As such, for them this would be a continuation of the arrangement they had already worked under for most of their period of service.

101. It is found that Dr McAuley's statement about overtime had the effect of giving any required authorisation for payment in respect of OOH work carried out in order to provide the extended-hours service he had stipulated. It therefore applied to the OOH element of the 24-7 cover plan the claimants agreed with him in late March 2020. As such it served to continue the arrangement which had been in place from October 2018 up until late February 2020 when the claimants agreed to Dr Rychter's request to provide OOH cover for the month of March and were added to the rota to that effect.

102. This finding is made firstly because that is what an **officious bystander** would expect of the parties in that situation. It was already well established by March 2020 that the claimants were the only consultants within the hospital who could provide a paediatric service, such that any OOH cover under normal circumstances would have to be provided by a locum travelling from the mainland at some expense to the respondent. Once the locum option was cut off, it became inevitable that only the claimants alone could cover the extended service from 1 April 2020 onwards. Their contracts clearly stated that they had no commitment to OOH working, and so they would have to agree to it. On every occasion they had done so in the past, they had been paid in the same manner for their work. Their normal daily workload did not

decrease and so there was not the option for them to stagger their core hours in order to extend the service that way, or to gain time back during their normal working hours to compensate for OOH work as provided for in section 4.8 of the terms and conditions of service. That left the alternative of payment.

103. For each department of the hospital the steps and changes required to provide a 24-7 plan as Dr McAuley had requested were different. Each had a different make-up of consultants, trainee doctors, junior doctors and nurses. Other departments were able to share the workload across a larger number of people.

104. Also, scope to reduce or cancel certain types of work such as elective procedures varied depending on the nature of the service. There was no such reduction within the claimants' service.

105. Therefore it was not determinative of the claimants' circumstances that other departments found different solutions to provide an extended service, and that staff within them did not claim for overtime payments.

106. Although the period of claim in dispute turned out to be for longer than any previous period, that was not foreseeable at the time when Dr McAuley issued his emails in March 2020. The claimants agreed to work the extra hours *'till we are out of the contingency plan'*. The period was not indefinite or open-ended in the sense that Dr McAuley would decide when that plan would come to an end. At that time Dr Tushar had provided OOH cover for a significant proportion of February 2020 and both claimants between them had agreed to cover the whole of March. Any perceived difference between the two periods – before and after 1 April 2020 - could not be significant at the time the plan was agreed.

107. Secondly, for the reasons submitted on behalf of the claimants, that is the interpretation most aligned with the **business efficacy rule**. The claimants had never provided additional work without pay before. It would seem anomalous that they would be asked to provide further, and more, work, that they would agree and then depart from the expectation of payment. On the

respondent's side, although the claimants would have to be paid in addition to their salaries, that was the only feasible option because of the structure of their service and it was still less expensive by some way than engaging a locum, had one been available.

108. Thirdly, it is consistent with a plain reading of the words themselves. Dr McAuley said that overtime would be both available and needed. He agreed in evidence that the reference to overtime could embrace pay as well as the work itself, but equally recognised that those performing the work might prefer to gain some time back.

109. The use of the word 'available' in particular naturally conveyed that payment would possible for extra hours worked. One does not say something is 'available' to a person when merely a demand is being made of them – it conveys that they will receive something, whether outright or in return for something else. It follows that the word 'overtime' in this context connoted both the extra work and payment for that work. Dr McAuley agreed that as a general principle, had the claimants been asked to perform work outside of their contractual hours they would have been entitled to remuneration at the applicable rate.

The meeting on 5 July 2020

110. Some time was spent in evidence considering statements made by Dr Antima during the meeting on 5 June 2020. The respondent submitted that she had made an admission that the claimants' understanding at that time was that they were providing the extended pandemic service 'out of goodwill' and 'for no monetary compensation'. Dr Antima disputed this is what she said or what she meant.

111. It is found that the statement she made was, as she conveyed in evidence, a reference to what the claimants had said at the beginning of their service to Dr McKellar about what they would be prepared to do in an emergency. This would be where, for example, a locum was requested to cover a given day

but could not travel due to bad weather or some other form of unforeseen disruption. They were never called upon to step in on such occasion, and any later situations when they worked extra hours had involved sufficient time for that to be agreed in advance, and the respondent paid them. This is the clearest and most likely interpretation of what she said in the immediate context of those words and in the context of the meeting as a whole, which was to discuss the longer term plan for the structure of the service and not the contingency arrangements to deal with the pandemic which by then were already in place.

112. Therefore Dr Antima did not say anything which either conveyed an understanding on her part that the pandemic service was being provided for no additional pay, or could reasonably be interpreted as such.

Performance of the work claimed for

113. The respondent did not accept that the claimants had worked as they said on each occasion claimed for. It was for the claimants to prove that they had.

114. There was consideration in evidence of when and how the claimants were recorded as entering and leaving the hospital on dates when OOH hours were claimed for. The respondent had consulted 'Paxton' records – electronic logs of entry and leaving times recorded by way of the swiping of an ID card at the entrance to the hospital.

115. Neither claimant disputed the accuracy of the Paxton records as far as they went. However, they said, it was possible to enter and leave the hospital without triggering an electronic record of doing so. This could be done either at the main entrance, if someone held the door open or by entering or leaving via a different door which did not require an ID card to be swiped in order to pass through. The claimants maintained that these occasions were frequent. They also argued that since the nature of the OOH work was essentially on-call in nature, they would not need to be present in the hospital for all of that time if scheduled to provide cover.

116. Considering all of the evidence it is found that on balance of probability the claimants were working as they required to be – whether at home on-call, at home but working, or physically in the hospital – on the occasions they agreed with Dr McAuley to be available and therefore as now claimed for. Their own evidence together with the copies of the rotas produced makes this the most likely outcome.

Timing of the final claims for payment

117. In relation to the OOH work now claimed for, a longer than normal period of time had passed between the beginning of the claim period and the date the overtime was claimed.

118. The respondent submitted that this pointed to the fact that the claimants had not initially intended to claim for it, and had not agreed with the respondent that they could. Had they genuinely believed that payment was due they would not have left it so late to submit a claim. They would have made monthly claims or something similar. The claimants' position was that they normally waited until the end of a block of OOH working before making a claim for it, and this is all they did in September 2020. It just so happened, they said, that the block of time was for longer and ran up until the time they submitted their resignation.

119. It is found that the fact that the claimants only submitted their claims on 22 September 2020 in one block, rather than monthly as they might have done, was not sufficient to undermine the other evidence supporting a finding that the contractual entitlement to payment was in place. It undoubtedly would have been of assistance to the respondent to have received monthly claims, if only to allow the matter to have been resolved at an earlier stage, but there were no rules in place regarding timing of claims in order for them to remain eligible for payment.

Legal issues

The nature of any term and whether express or implied

120. The first issue to be decided was whether the claimants were entitled to a finding that each had a contractual term, and corresponding contractual right, entitling them to be paid wages in return for overtime worked. Overtime in that sense was OOH work.

121. It is found that such a term was present in each of their contracts. This was largely established by the express written terms in the offer letter, the job description and terms and conditions of service. The effect of those documents was that:

121.1. The claimants' standard working hours were between 8am and 6pm, Monday to Friday;

121.2. They had no commitment to work outside of those hours (i.e. OOH work);

121.3. They could agree with the respondent that they would carry out OOH work;

121.4. If they did so the time would be credited against their normal weekly workload, or they would receive a payment.

121.5. Over time the default method of compensating the claimants was established as being by way of payment rather than providing a time-based credit.

121.6. Dr McAuley's communications in March 2020 in the context of the pandemic service he was requesting did not change, and only served to reinforce, the existing arrangement.

Subsequent issues - quantification

122. It is found that the claimants performed work of a type falling within the scope of the above contractual term on the dates and at the times they claimed by

way of their updated table of OOH working at pages [344-350] of the joint bundle but amended as follows:

122.1. Removal of five entries for each claimant between 24 August and 4 September 2020 inclusive as the claimants were on holiday; and

122.2. Removal of two entries for Dr Tushar on 9 and 10 September 2020 when he was on study leave.

123. The parties had agreed that the rates claimed for each occasion of OOH work was correct.

124. As a result Dr Tushar's claim is for £13,226.17 and Dr Antima's claim is for £13,850.88 in gross terms.

125. Had the claimants been paid those amounts they would have received **£7,538.92** and **£7,895.00** respectively in net terms – i.e. after deduction of income tax at 41% and employee National Insurance contributions of a further 2%.

Was there a breach of contract or unlawful deduction(s) from wages?

126. It is found that the respondent breached the claimants' respective contracts of employment by not paying them for OOH work as calculated above. There was a term entitling them to payment for OOH work. They performed that work. The respondent made it clear it would not pay them for it.

127. The respondent also made an unlawful deduction from the claimants' pay by not paying them for the OOH work as calculated above. It is found that the date of the deduction was 31 October 2020 as the respondent should have paid the sums by the end of the month following the month in which they were submitted. It is recognised that historically there was never a fixed date on which expenses would be paid, but it would not have been any earlier and may indeed have been later, such as around the date their service ended in December 2020. This is relevant to the question of whether such claims were presented within the statutory time period allowed.

128. The claimants notified ACAS of their claims on 11 December 2020 according to their Early Conciliation certificate which was dated 22 January 2021. The claims were presented on 19 February 2021 and therefore the complaints are within time.

Conclusions

129. This was a finely balanced case in some respects. It is also a case which turned on its own very specific facts. Both the claimants and the respondents presented credible and persuasive arguments from their particular viewpoints.

130. Clearly the central issues arose out of a combination of circumstances involving the arrival of Dr McAuley in post just as the Covid-19 pandemic was taking hold. He had a great deal of responsibility to manage from the outset and was not afforded any bedding in period as might have normally been the case. Understandably he had not been able to meet all of the medical staff at the hospital or fully acquaint himself with all of the terms and practices which had applied before his arrival, as he would have liked to do. He drew on his experience elsewhere in the NHS in England which was no doubt of benefit in many situations, but did not allow him to appreciate some of the particular arrangements which applied to the claimants at an individual contractual level. The lack of detailed job plans for the claimants did not help. All parties should however be recognised for the work they carried out under demanding and uncertain circumstances. There is no question of fault or blame in relation to the issues decided in these claims.

131. As a consequence of the above findings the respondent is liable to pay the claimants the revised net amounts sought, which can be categorised both as damages for breach of contract and as compensation for an unlawful deduction from wages.

Employment Judge: Brian Campbell
Date of Judgment: 12 November 2021
Entered in register: 19 November 2021
and copied to parties