EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4101544/2017

Held in Glasgow on 21 and 22 November 2017

Employment Judge: Ms L Doherty

Mr J O' Donovan — **Claimant**
Represented by:
Ms L O'Neill - Solicitor

City of Glasgow College — **Respondents**
Represented by:
Ms M Sangster - Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the respondents made unlawful deductions from the claimant's wages contrary to section 13 of the Employment Rights Act 1916 (the ERA) and the respondents are ordered to pay the claimant £100 (one hundred pounds)

REASONS

1. The claimant presented a complaint under Section 23 of the Employment Rights Act 1996 (ERA) on 12 June 2007. The claim was presented as one of a multiple; however the claims were not conjoined. It was agreed that the claims would proceed by way of a test case; the claimant, Mr Donovan was selected as the agreed test case.

2. The issue for the Tribunal is to consider whether there was an unlawful deduction from the claimant's wages in terms of Section 13 of ERA. This involves determination of whether the claimant has a contractual basis upon which to receive the payments which he alleges were deducted from his wages. This in turn requires the Tribunal to consider the terms of a Collective Agreement (page 65 of the bundle - the Agreement) and to determine whether in terms of that Agreement the claimant was contractually entitled to receive payment of £100 identified at clause 3 of the Agreement in the pay year 2015/16.

3. Quantum is agreed at £100.

4. Evidence in chief was taken by way of witness statements, which were taken as read. The parties produced a joint bundle of documents.

5. For the claimant evidence was given by:-

(a) The claimant, who was a Senior College Lecturer at the City of Glasgow College and has been a member of the Educational Institute of Scotland (EIS) Further Education Lecturer Association (FELA) national executive for around 25 years;

(b) David Belsey, Assistant Secretary of the EIS (and former Joint Secretary of the NJNC);

(c) John Kelly, FELA Branch Secretary at West College and National President of FELA;

(d) Charlie Montgomery, Convener of the Salaries and Terms and Conditions Committee of the NJNC;

(e) Pam Currie, FELA Vice President.

6. For the respondents evidence was given by:-

(a) John Gribbon, Director for Employment Services, Colleges of Scotland

(b) Stewart Thomson, Vice President for Finance & Human Resources at Glasgow College.

Findings in Fact

7. From the evidence and information before it the Tribunal made the following findings in fact.

8. The respondents are one of Scotland's 26 Further Education Colleges and currently employ around 790 Lecturers and approximately 671 support staff. The claimant is employed by the respondents as a Senior Lecturer.

9. Lecturer's national terms and conditions of employment are negotiated and agreed by the National Joint Negotiating Committee (NJNC). The National Recognition & Procedure Agreement (NRPA) sets out the structure of the NJNC, how it should operate and the remit of national bargaining (page 40/49 of the bundle). The respondents have been a signatory of the NRPA since March 2016.

10. The structure of the NJNC includes a Central Committee in which the management and staff side appointed a Chair and a Secretary. Mr Gribbon was the management side Secretary until October 2017; the staff side Secretary was Mr Belsey. The Secretaries are known as the Joint Secretaries and are responsible for administration and organisational arrangements to support the work of NJNC.

11. The NJNC is made up of the Central Committee and two Side Tables, representing College's management side (Management side) and staff side (Lecturing staff side and Support staff side). An agreement reached by the

Central Committee or Side Table is a Collective Agreement forming part of the employee's terms and conditions of employment (pages 46/47 of the bundle).

12. NJNC circulars and Collective Agreements should be set out in writing by the Joint Secretaries. Circular 1/015 was issued in November 2015 (pages 50 to 51 of the bundle). It states that:-

> *"All collective agreements reached, through the NJNC will automatically be incorporated into the contracts of employment between the college and its staff. All contracts of employment will be varied to reflect that position"* (page 50).

13. NCNJ Colleges Members operate a pay year from 1 April to 31 March.

14. In or around October 2014 an EIS Lecturer's pay claim was submitted to the NJNC.

15. In or around November 2015, during the ongoing pay dispute, some NJNC College Members unilaterally imposed a 1% or £300 (whichever was greater) pay increase on lecturers.

16. The respondents did not pay lecturers 1% of £300 in November 2015 (the respondents were not a signatory to the NRPA at that time) and instead it was paid in March 2016 (page 117 of the bundle) after the respondents signed the NRPA.

17. The imposed pay increase of 1%/£300 did not resolve the pay claim and the EIS moved to industrial action. There was well supported strike action on 17th March 2016 over pay and terms and conditions on the part of the EIS membership.

18. On 18 March 2016 the NJNC met to try to resolve the pay claim and to try to avoid any further strike action.

19. At the March meeting there were attendees for the lecturing staff side (including the witnesses for the claimant in this case) and attendees on the management side, including Mr Gribbon.

20. On going into the meeting on 18 March 2016 both sides were aware that the EIS membership were unhappy about the imposition of the 1%/£300 pay deal for 201 5/1 6, and that there had been strike action on 17 March 2016 over pay and terms and conditions on the part of the EIS member.

21. Both sides were also aware that the management side did not have unlimited access to funding, and were subject to some financial constraints in terms of the funds available to pay lecturers salaries.

22. Both sides at the March meeting were aware that any pay award made to lecturers retrospectively for the 2015/16 pay period would, under the terms of a settlement reached with support staff, also automatically be awarded to support staff.

23. For the purposes of Collective Agreements reached between the parties, including the Agreement any pay award is deemed to be *consolidated* unless stated otherwise. *"Consolidated'* in the context of pay means the payment is paid every year.

24. A flat-rated pay increase means an award of a defined payment, as opposed to a percentage increase which is a percentage of employee's salary. The EIS preference was to negotiate flat-rated pay increases for their membership, with a view to achieving a harmonisation of terms and conditions of employment across lecturing staff in Scotland.

25. As the parties had been unable to reach agreement prior to that point, the meeting was in March 201 6 at the end of the 201 5/16 pay year. It was agreed at the meeting that the Agreement would cover two separate pay years: 1 April 2015 to 31 March 2016; and 1 April 2016 to 31 March 2017.

26. As the meeting took place in March, the next staff payroll was April 201 6.

27. The meeting on 18 April 2016 commenced at around 2pm, and lasted until around 3am on 19 April 2016. The meeting comprised of a mixture of face to face discussions, and an exchange of documents, the majority of the negotiations being conducted by the exchange of documents.

28. The outcome of the meeting was a *"Terms of Agreement"* document which was a Collective Agreement ("the *Agreement)* produced at page 65 of the bundle. The Agreement was *inter alia* in the following terms:-

> *"Terms of Agreement*
>
> *The offer is with effect from April 2015.*
>
> 1. *To extend this settlement period to cover 2 years inclusive of 2015/16.*
> 2. *To recognise that 1%/£300 whichever is the greater is an interim payment.*
> 3. *That in addition to the above, there will be a further flabrated element of £100 paid in April 2016.*
> 4. *That this offer provides for a flat-rated pay uplift for 201 6/2017 of £450.*
> 5. *To jointly develop a roadmap towards a harmonized workforce for the future, to exclude the following elements:*
>
> .....

29. On 19 March a press statement went out from the EIS confirming that a draft pay agreement *"would be sent out to the EIS FELA Executive for consideration with the negotiators recommendation to accept'.* The pay

Agreement only becomes binding on employees once it is agreed by EIS at ballot. The ballot closed on the 29 April and the pay Agreement was ratified by the EIS FELA executive on 20 April.

30. The Agreement was thereafter automatically incorporated into the claimant's contract of employment.

31. After the Agreement had been reached, Mr Gribbon drafted two Technical Implementation Notes (the Notes) for circulation among colleges in relation to how the pay elements of the Agreement should be implemented. He did not consult with the staff side Secretary David Belsey before doing so.

32. The first Note which Mr Gribbon drafted and circulated is produced at pages 76. He drafted a second Note (page 70 of the bundle). The effect of the Notes was to advise colleges that payment of £100 referred at clause 3 of the Agreement, for payment and Consolidation purposes was to be paid in the year 2016/17.

33. Part of the first Note issued by Mr Gribbon contained the following at paragraph 5:-

> *"The £100 is a consolidated one off payment directly attributed to the 2015/16 offer. The purpose of the £100 is to bridge the pay periods following the recommendation to implement the 1% or £300 without a formal settlement agreement. However for payment and consolidation purposes the £100 it is to be paid in the 2016/17 settlement period."*

34. It also states at paragraph 6:-

> *"For pay consolidation purposes, the £100 should be added to every point in the Lecturer pay scale from April 2016, then the £450 applied."*

35. The second Note stated: *"The total pay award for 2016/17 should be no greater than £550 consolidated by 31st March 2017"*

36. The Notes contained worked examples.

37. Colleges throughout Scotland have paid the £100 referred to in clause 3 of the agreement in the pay year 2016/17, but not in the pay year 2015/16.

38. The respondents paid the Claimant the1%/£300, referred to as an interim payment in clause 2 of the Agreement, in March 2016 (pay year 2015/16).

39. The *"flat-rated element of £100'* referred to at clause 3 if the Agreement was paid to the claimant in the respondent's May 2016 payroll (pay year 201 6/1 7). The reason it was not paid April, was because by the time the Agreement was confirmed and agreed by EIS members it was too late to process the payment in April.

40. Clause 4 of the agreement (flat-rated pay uplift for 2016/17 of £450) was implemented by the respondent from April 2016. Spread across 12 months, £450 equates to £37.50 per month, and the claimant was paid this from May 2016 onwards.

41 . In addition to receiving the payment of £100 in May 201 6, the claimant's basic monthly salary was increased in May 2016 by the £37.50 uplift, and by 12th of the £100 (£8.33). His basic pay in May was increased to £3, 473 per month.

42. In making these payments, the respondents did not follow the terms of the guidance by Colleges Scotland. The respondents processed payments in this way was to avoid having to pay two different pay structures for staff. New starts in the pay year 2016/17 were entitled to £550 uplift in their salary scale, but not £100 paid as a lump sum. Existing staff who had already received payment of £100 were entitled to a salary uplift of £450.
After May 2016 the claimant was paid at the rate of £3,463 for the remaining 10 months of the financial year.

43. The claimant did not accept that he was paid at the correct rate, and wrote to Mr Thomson complaining about this on 29 June 2016. As the issue related to a national Collective Agreement, the claimant brought the issue to the attention of Mr Belsey, the Joint Secretary of NJNC. Mr Belsey wrote to the respondents on 8 July to alert them to the fact that EIS considered the guidance provided by Colleges Scotland to be contrary and incorrect in places (pages 82/85) but did not receive a response.

44. The respondents have consolidated the £100 referred to in point 3 of the Agreement into the claimant's salary for the pay year 2017/18.

Note on Evidence

45. The Tribunal did not form the impression that any witnesses set out to mislead the Tribunal, but the claimant's and respondent's witnesses clearly had different perceptions of what the Agreement said.

46. There was not a great deal of factual dispute in this case, and the principal issue for the Tribunal is how the Agreement is to be interpreted. The construction of the written document is a question of law, which is dealt with below. On any view however, the Tribunal is not entitled to have regard to the pre-contractual negotiations in determining the proper meaning of words in a contract, and therefore albeit the Tribunal heard some evidence as to the conduct of negotiations, and the content of exchanged drafts in the course of those negotiations at the meeting of 18 March, it was not relevant to make findings in fact in relation to these, as they could not be taken into account.

47. It was potentially relevant, however, for the Tribunal to take into account the context and background of the agreement, and its purpose, and therefore it made findings in fact relative to those points.

48. In the end, there was not much in issue between the parties on these matters. The Tribunal was satisfied that there was awareness on the management side about the unhappiness of the EIS membership at the imposition of the

1%/£300 pay award for the year 2015/16; indeed there could be no dispute on this; was accepted that there had been strike action over pay and terms and conditions in March 2016.

49. The Tribunal was also satisfied that the lecturing staff side was aware that management was negotiating under some financial constraint. Without going into the detail of the position which the respondents set out as part of their negotiation, the EIS witnesses accepted in general terms that they were aware that the respondents were subject to financial constraints in terms of their ability to make pay awards. This was inherently part of the negotiation. It was put to Mr Besley in cross-examination, that he would have been aware the respondents did not have unlimited funds, and although he sought to answer that question by saying he was unaware of the respondents total pay bill, the flavour of his evidence, and indeed that of other witnesses who attended the meeting of 18 March was that they were aware the respondents were subject to some sort of financial constraint, but they had no knowledge of the exact extent of this, and had been given no information to allow them to quantify it.

50. While the Tribunal heard a considerable amount of evidence about the terms of the Notes issued by Mr Gribbon it was common ground between the parties that the Note was not binding, and at the point when the Notes were issued, there was clearly a divergence of view between the employers side and the lecturing staff side, as to what the Agreement meant.

Submissions

Claimant's Submissions

51. Both parties very helpfully submitted written submissions which were supplemented with oral submissions. There was common ground relating to many facts, and these were dealt with at the outset of Ms O'Neill's submission.

52. Miss O'Neill made submissions in relation to the relevant legal provisions, and thereafter the interpretation of the contract. She submitted the Tribunal should approach the construction of a contract of employment containing terms incorporated from a Collective Agreement like any other contract, giving a fair meaning to the words used in the factual context known to the parties which give rise to the agreement (Sir Thomas Bingham MR in ***Adams & others -v- British Airways Pic [1996] IRLR 22).***

53. She submitted this approach was followed by the EAT in ***Cabinet Office -v Beavan & Others [2014] IRLR 434.*** She refers to the judgment of Mr Justice Singh at paragraph 17 to the effect:-

> *". . . just as in the commercial context regard must be had to business common sense, so in the context of employment relations regard must to be had to what has been described as industrial common sense."*

54. Ms O'Neill submitted that therefore in considering the construction of the agreement the Tribunal should follow the approach summarised by Lord Neuberger in the Supreme Court of ***Arnold -v- Britton & Others [2015] AC 1619*** which has been followed by the Scottish Bench.

55. Ms O'Neill also wished the Tribunal to take into account the Supreme Court decision of ***Wood -v- Capita Insurance Services Ltd [2017] UKSC 24.*** She submitted following this case the correct interpretation of the Agreement will be achieved by considering the wider factual matrix as well as the ordinary and natural meaning of the words chosen by the parties. The claimant's witnesses had stressed the importance of context of each pay increase agreed under the Agreement as relevant to the interpretation of its terms.

56. Ms O'Neill submitted the Tribunal should not take into account the Notes produced by Mr Gribbon as they were not binding on the respondents and was issued without any input from the Staff Side of the NJNC.

57. Miss O'Neill dealt with the natural and ordinary meaning of the words of the Agreement, and her submissions on this are dealt with below in more detail.

58. Ms O'Neill also dealt with commercial common sense, and submitted that the effect on lecturers of the £100 being paid upfront in 2016/17 in April 2016 and then not being consolidated for another year was absurd. Further the practical approach of having a 2 tier approach for pay of those already employed pre 2016/17 and those subsequently joined was absurd. She referred in this connection to the judgment of Mr Justice Singh in ***Cabinet Office*** -v- ***Beavan supra,*** which stated **:-**

> *"if a practical construction would lead to an absurd results which could not properly be contributed to a rational party to the agreement, that would be a powerful reason not to adopt that construction"*

59. Ms O'Neil referred to the overall purpose of the Agreement, which was to resolve a pay dispute, and resolve strike action.

60. Lastly, she referred to the facts and circumstances known to the parties, and submitted that these incorporated that both sides knew support staff would automatically be entitled to an award given to lecturers in respect of 201 5/16. She submitted that the confirmation given by the management side in the course of the meeting that the £100 was referable to the pay year 2015/16, albeit not drafted into the Agreement should be taken into account in considering the facts known to the parties at the time.

Respondents Submissions

61. Ms Sangster submitted there were three elements to the 2 year pay deal. Those were (i) 1%/£300 uplift which had already been paid, (ii) £100 lump sum paid in April 2016, and (iii) a £450 uplift for the year 2016/17.

62. Ms Sangster submitted clause 3 the Agreement did not say that £100 should be backdated to be consolidated in for 2015/16. It simply stated that it was a flat-rated element of £100 would be paid in April 2016 which falls within year 2016/17.

63. Ms Sangster submitted the Agreement was ratified by the EIS on behalf of the claimants on 20 April, and thereafter each element of the Agreement was complied with by the respondents. The Agreement did not state at clause 3 that £100 was payable in respect of the previous year, 2015/16. It did not state that it should be paid as a lump sum, and also paid in installments throughout the year 2016/17 as salary uplift. It merely stated it should be paid in April 2016.

64. Ms Sangster submitted that all the colleges in Scotland have implemented the Agreement in a way which has the same effect.

65. Ms Sangster took the Tribunal also to the relevant law. She referred to the law on interpretation of contracts, submitting that the primary source of understanding what the parties meant is their language interpreted in accordance with conventional usage ***(Bank of Credit & Commerce International SA (In compulsory liquidation) -v- AH [2001] UKHL 8,*** Lord Hoffman at paragraph 39.

66. She submitted that accordingly it is what the parties have written, rather than what they intended to write, which constitutes the agreement. This was confirmed in ***Rainy Sky SA -v- Kookmin Bank [2011] I WLR 2900*** where Lord Clark confirmed-

> *"where the parties has used unambiguous language, the court must apply it. This can be seen from the decision of the Court of Appeal in* ***Co-operative Wholesale Society Ltd -v- National Westminster Bank [1995] 1 EJLR*** *97. The court was considering the true construction of a rent review clause in a number of different cases. The*

underlying result which landlords sought in each case was the same. The court regarded it as a most improbable commercial result. Were the result, although improbable, flowed from the unambiguous language of the clause, the landlord succeeded, whereas where it did not, they failed (paragraph 23)".

67. Ms Sangster submitted that the ordinary rules of construction apply when interpreting the terms of a written employment contract; she agreed with Miss O'Neill that leading case on the correct approach was the Supreme Court case of ***Arnold -v- Britton,*** which she quoted from at length.

68. Ms Sangster submitted that the Inner House of Court of Session has confirmed on many occasions that this is the correct approach to be followed in Scotland.

69. Ms Sangster's primary position was that the terms of the Agreement were clear and ambiguous and had been complied with. She submitted that the point made by Lord Neuberger in ***Arnold*** was that one has to start with the language of the contract. If it is clear and unambiguous then the parties are taken to have agreed the bargain which they have made. Lord Neuberger stated that *"it is a sensible proposition that the clearer the natural meaning, the more difficult it is to justify departing from it"* He warned the court should not embark *"on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning"*

70. Ms Sangster took the Tribunal into the terms of the Agreement. She submitted the only point in dispute was clause 3. This part, however, was clear and unambiguous. It provides for a payment of £100 to be paid in April 2016. Nothing further is stated. April 2016 falls in the second year of the pay period for the year 2016/17. There is no reference of the £100 being paid in relation to the previous year or of being consolidated into pay for 2016/17. The terms are clear and there is no justification to depart from the natural and ordinary meaning of the words.

71. The claimant's evidence as to the intention of the staff side in terms of conducting pay negotiations was entirely irrelevant. The objective evidence of the parties' intentions should be disregarded when interpreting a contract.

72. The fact that, if interpreted according to its natural language, the Agreement has resulted in a bargain the claimant is unhappy with is not a reason to depart from the ordinary language of the clause.

73. Ms Sangster then deal with her ***esto*** argument. She submitted that if the Tribunal was not with her in her primary position and felt that the language of the agreement was ambiguous, then it would have to look at the other factors identified by Lord Neuberger including the facts and circumstances known to the parties in commercial common sense. In that connection Ms Sangster referred again to ***Rainy Sky -v- Kookmin Bank SA*** and Lord Clarke's judgment at paragraph 21.

74. She went on to make submissions as to the facts and circumstances known to the parties at the time, and commercial common sense. She submitted that both parties had known the parameters in which Colleges Scotland were negotiating which was a maximum budget of 2.5% over 2 years. She submitted that in relation to commercial common sense it would not have made commercial sense for the agreement to be backdated to 2015/16 and then also consolidated into salaries for the year 2016/17 which would result in the lecturers being paid twice.

75. Ms Sangster then dealt with a further ***esto*** position, and submitted the Tribunal would require to imply additional words into the Agreement in order to achieve the claimant's interpretation. She submitted, however, this was not an exceptional case where the implication of additional wording was essential to make the contract work and she referred to the test in ***Marks & Spencer Pic*** -v- ***BMP Parabas Security Services Trust Co (Jersey) Ltd & Another [2015] UKSC 72.***

76. Ms Sangster submitted the Tribunal should look at the actual wording of the clause to determine what the parties agreed and having done so, the claim should be dismissed.

77. Lastly, Ms Sangster submitted it was open to the Tribunal to conclude that there was no *consensus in ildem* in this case, if on a proper and objective analysis the parties never reached agreement on the essential terms of the contract ***(Matheson McGhee (Ayrshire) Ltd -v- Quigley [1952] SC HL 38.*** If that is the case, there is no contract, and therefore no legal rights to payment.

Consideration

78. Section 13 of the ERA provides the right not to suffer unauthorised deductions from wages, and provides as follows:-

> *"(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".*

79. Section 13(3) provides:-

> *"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion".*

80. Section 27 defines wages, and states:-

> *"(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including -*
>
> *(a) any fee, bonus, commission, holiday pay or other emoluments referable to his employment, whether payable under his contract or otherwise"*

81. There was no issue that the claimants' gross monthly salary and pay increases to those salaries, fall within the definition of wages in Section **27** of the ERA. The issue for the Tribunal is whether the sums which the claimant says were deducted from his pay were *"properly payable",* in terms of Section **13(3).**

82. There was no issue that *properly payable* means that a legal or contractual right required to be demonstrated.

83. Whether such a right had been demonstrated required the Tribunal to consider the terms of the Agreement which, it was not in dispute, formed part of the claimants' contract of employment.

84. It was the claimants' submission that in terms of that Agreement he was contractually entitled to a £100 pay increase in respect of pay year 201 5/16, and for this to be consolidated and paid in monthly installments across the 2016/17 pay period and beyond.

85. The respondents contend that there is no such contractual entitlement in terms of the Agreement, and that the respondents have complied with the terms of the Agreement. The claimant received £100 lump sum payment in

May 2016 in respect of clause 3 of the Agreement, and is not entitled to a further payment of £100 in the year 2016/17.

86. The Tribunal began by considering the relevant law on the interpretation of contracts.

87. The parties' submissions on this point are set out above, and as is apparent, there was much in common between them in relation to the approach which had to be taken.

88. The construction of a written document is a question of law, and it is not to be interpreted according to the subjective view of either party. If express terms are wholly in writing, then deciding them is a matter of interpreting the document containing them.

89. Both parties referred to the case of ***Arnold*** -v- ***Britain [2015] AC 1619,*** and the judgment of Lord Neuberger:-

> *"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v* ***Persimmon Homes Ltd [2009] AC 1101,*** *para 14. And it does so by focusing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (Hi)the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common*

sense, but (vi) disregarding subjective evidence of any party's intentions"

90. Lord Neuberger goes on to state:-

"17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. ***Chartbrook (2009)*** *AC 1101 paras 16-20) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision"*

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

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

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. *The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to taken into account a fact or circumstance known only to one of the parties. "*

91. *The Tribunal also had regard to the case of Wood* -v- *Capital Insurance Services Ltd [2017] UKSC24,* and the judgment of Lord Hodge, which Ms O'Neil place particular reliance upon. At paragraph 10 of his judgment Lord Hodges states:-

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

11. Lord Clark of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case [2011] 1 WLR 2900, para 21f. In the Arnold case [2015] AC1619 all of the Judgments confirmed the approach in the Rainy Sky case: Lord Neuberger ofAbbotsbury PSC, paras 13-14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

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

in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the Judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mane JSC spoke in Sigma Finance Corpn [2010] 1 AII ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

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

92. It was Ms Sangster's position that the terms of the Agreement were clear and unambiguous. She submitted that only if the Tribunal considered the language was ambiguous did it require to consider the other factors identified by the Lord Neuberger in ***Arnold.***

93. Ms O'Neill also submitted that the language in the Agreement was unambiguous. However relying on paragraph 10 of Lord Hodge's speech Ms O'Neill however suggested that Wood is authority for the proposition that that in interpreting a contract, textual ism and contextualism can be used as tools to ascertain the objective meaning of the language, and that the correct interpretation of the Agreement will be achieved by considering the wider factual matrix as well as the natural and ordinary meaning of the words chosen by the agreement.

94. The Tribunal did not regard what was said in ***Wood*** to be inconsistent with what is said in ***Arnold.*** It appeared to the Tribunal that the approach outlined in ***Arnold,*** and in ***Wood,*** are in fact at one in that they both confirm that the court or Tribunal's task is to ascertain the objective meaning of the language which the parties have used in their agreement, and depending on all elements, including the quality of the drafting, give or more or less weight to the wider context (paragraph 10 **-Wood)** That, it appeared to the Tribunal, did not differ from the judgment in ***Arnold*** at paragraph 15 to 21, set out above.

95. When interpreting the Agreement the Tribunal has to identify the intention of the parties by reference to what a reasonable person having all the background knowledge available to the parties would have understood them to be using the language of the contract to mean, and it appeared to the Tribunal, that both ***Arnold*** and **Wood** identify that the starting point in that exercise is the consideration of the language of the contract itself.

96. For ease of reference the relevant part of the Agreement, although set out in the Findings in Fact, is reproduced here:-

"Terms of Agreement

The offer is with effect from April 2015.

1. *To extend this settlement period to cover 2 years inclusive of 2015/16.*

2. *To recognise that 1%/£300 whichever is the greater is an interim payment.*

3. *That in addition to the above, there will be a further flat-rated element of £100 paid in April 2016.*

4. *That this offer provides for a flat-rated pay uplift for 2016/2017 of £450."*

97. The contentious clause is clause 3. Ms O'Neill submitted that the ordinary meaning of the words *interim payment* at clause 2 of the Agreement indicates that 1%/£300 was only part of the 201 5/16 pay increase. She submitted that an interim payment is usually followed by a final payment. The £1 00 in clause 3 is the final payment completing the pay increase for 2015/16.

98. She submitted that the phrase *"in addition to the above"* in clause 3 links the £100 to the 1%/£300 in clause 2. She submitted the use of the word *further* referring to a *further flat-rated element* of £100 suggests that the £100 was in addition to the 1%/£300, both being flat-rated awards.

99. Ms O'Neill submitted the claimant's argument that the £100 was attributed to the 2015/16 pay year is reinforced by the fact that the next clause in the Agreement, clause 4, expressly states that the pay uplift for 2016/17 is £450. She submitted that if the £100 pay increase was part of the 2016/17 pay increase the Agreement would have expressly stated so. The 2016/17 pay award could have been described as £550 with a £100 of that sum being paid

in advance. She submitted that the Agreement moves on from 2015/16 pay increase (clause 2 and 3 of the Agreement) to deal with the 2016/17 pay increase.

100. Ms O/Neill also submitted that without express inclusion as part of the 2016/17 pay award the £100 is naturally included as part of the 2015/16 pay award along with the interim payment of 1%/£300. The wording of clause 2 links the two pay increases, and the 2015/16 pay award is dealt with chronologically, before the Agreement moves on to 2016/17 award.

101. Ms O'Neil submitted that Mr Thomson accepted that the 1%/£300 pay increase fell within the 2015/16 year due to his knowledge of the context in which it was agreed, and the fact that it had already been paid by the time the Agreement was ratified. She submitted that to read the Agreement as the £100 falling in the year 2016/17 just because it was (and it had to be) paid in that year would be a stretch.

102. Ms Sangster, on the other hand also submitted that the language of the Agreement was clear and ambiguous; it provided for a payment of £100 in April 2016. Nothing further was stated. April 2016 falls within the second year of payment; pay year 2016/17. There is no reference in the Agreement to £100 being paid in relation to a previous year or to being consolidated into the pay throughout 2016/17. The terms of the Agreement are clear and there is no justification to depart from the natural and ordinary meaning of the words. The claimant's witnesses gave evidence in relation to the intention of the staff side when conducting the pay negotiations, but this was irrelevant, as the parties intentions should be disregarded when interpreting a contract.

103. The Tribunal began by considering the natural and ordinary meaning of the clause which is in dispute, clause 3. That stated: *"That in addition to the above, there will be a further flat-rated element of £100 paid in April 2016*".

104. The Tribunal considered that the natural and ordinary meaning this clause was unambiguous, and that it referred to another provision in the Agreement.

It provides *that in addition to the above* a further flat-rated element of £100 will be paid in April 2016. Giving the words their natural and ordinary meaning *the above* can only refer to clause 1 or 2 or both.

105. Reading clause 3 alongside clause 2, the Tribunal considered that giving the words their natural and ordinary meaning the reference to *interim payment* in clause 2 plus the inclusion of the words *"that in addition to the above"* and *further flat rated element* in clause 3, naturally linked clause 3 with clause 2.

106 The natural and ordinary meaning of *interim payment* in clause 2 is that it is not a final payment, and there is some other element to it. Clause 3 refers to a *further flat rated element.* On an objective reading the further payment element referred to in clause 3 is in addition to the interim payment in clause 2.

107. It appeared to the Tribunal that clause 4 is not naturally linked to clause 2 and 3 in the same way. Firstly, clause 4 did not include the words *that in addition to the above.* Ms Sangster suggested that *in addition to the above* could have been added to the beginning of clause 4 and made no difference to the meaning of that clause. That may be correct, however those words are not included in clause 4, but they were inserted at the beginning of clause 3, where they had to be read alongside the reference to an *interim payment* in clause 2 and *further flat rated element of £100* in clause 3.

108. Secondly and significantly, clause 4 specifically identified the pay uplift (£450) is for the year 201 6/1 7. Reading the words of the Agreement objectively, the fact that clause 4 specifically identifies the pay year 2016/17, in the context of the Agreement which at clause 1 provides that the settlement period covers two years inclusive of 201 5/6, means that that clause 2 and 3 apply to the year 2015/16.

109. The Tribunal did not consider that too much weight could be attached to the significance of clause 3 specifying that payment was to be made in April 2016, in circumstances where because of the timing of the meeting, payment could not have been made earlier. This is a matter which an informed reader would

have been aware of. The fact that clause 3 provides for payment to be paid in April 2016, has to be read against the factual background of when the Agreement was reached, and the practicalities of when payment could be made.

110. This is reinforced in that clause 2 refers to an *interim* payment, which the informed reader would have been aware had already been paid for the pay year 2015/16, and the natural and ordinary meaning of the words which link clause 3 to clause 2.

111. Had it been intended that the £100 was referable to the 2016/17 pay year, then as suggested by Ms O'Neill, the Agreement could have specified this by referring to a £550 pay increase for the pay year 2016/17 with part of it being paid in advance in April 2016.

112. The Tribunal was not satisfied that interpreting the contract in the manner contended for by the claimant involved it in implying a term into the Agreement which was not already there. Clause 1 identifies that the settlement period covers 2 years inclusive of 2015/16; clause 4 details the pay award for the year 201 6/1 7. Reading the Agreement as a whole, and giving the words their natural and ordinary meaning, (against the background of the 1%/£300 having been paid in respect of the year

2015/16, and the timing of the March meeting), clause 3 applied to the pay settlement for the year 2015/16.

113 The Tribunal also considered Ms Sangstefs argument on the application of ***Rainy Sky -v- Kookmin Bank.*** She submitted that as was accepted from the witness statements, both parties were aware that the Colleges Scotland were negotiating within a maximum budget of 2.5% over 2 years, and she referred to the earliest iteration of the Agreement which passed between the parties. Ms Sangster submitted the claimants were well aware of the maximum amount that could be agreed for the year 2016/17 was 1.5% of lecturer's salaries; that sum for the year 2016/17 was quantified at £550 and

this became £100 flat cash payment made in April 2016 and £450 pay across the year 2016/17.

114. Ms Sangster submitted the fact that Ms Currie, who was present during the negotiations agreed to a communication that a staff college (page 99) agreeing with the technical implementation note was compelling evidence of staff sides understanding of the position. She also submitted that in relation to commercial common sense the respondents' witnesses were clear that it would not make commercial sense for the Agreement to be backdated to 201/16 and then to be consolidated into salaries for 2016/17 as this would result in lecturers being paid twice and receiving a significant additional payment which had not been budgeted for.

115. The Tribunal notes as a matter of fact it was not accepted by the claimant's witnesses that were aware of what 2.5% of lectures salaries over 2 years amounted to in terms of overall funding. Leaving that aside however, the Tribunal did not consider that it could properly have regard to the pre-contractual negotiations which had taken place at the March meeting in order to determine the proper meaning of the words in the contract. In the Tribunal's view that meant that it was not entitled to take into account the various drafts of the Agreement which passed between the parties on 18th March, which were included in the bundle, in reaching its conclusion as to how the contract was to be interpreted. The only evidence which the Tribunal of any mention of 2.5%, or £500 for the year 2016/1 7, was in relation to the negotiations which the parties had at the meeting of 18 March, therefore the Tribunal did not consider this could relevantly be taken into account.

116. It did however conclude that as part of the factual matrix that the staff side was aware that the management side was subject to some financial constraint in terms of their ability to fund lecturer's salaries.

117. In relation to the commercial common sense point the Tribunal recognises that financial pressure could have been a driver for the Management side to limit the pay award for the year 2015/16, particularly in light of the fact that it was known support staff would also benefit from any pay award negotiated

with the lecturing staff. Equally the Tribunal recognises that from the staff side there could have been a driver not to accept the imposition of £300 pay deal for the year 2015/16 without more, in circumstances where the EIS membership have roundly rejected it. Therefore considerations of commercial or industrial common sense supported the interpretation of the contract contended for by the claimant and the respondents in this case, and was of little assistance.

118. The Tribunal rather, focusing on the wording of the relevant clause and the Agreement, taking into the facts and circumstances known to the parties at the time, concluded that the Agreement should be interpreted as contended for by the claimant, and that in terms of the Agreement there was a contractual term in the claimant's contract of employment, which at clause 3 provided for payment of £100 attributed to the pay award for the year 2015/16, to be paid in April 2016.

119. The Tribunal did not understand it to be in dispute that any reference to pay was a reference to consolidated pay, and therefore the effect of this conclusion is that the £100 referred to in clause 3 of the Agreement was consolidated for the year 2016/17.

120. The respondents, having failed to pay the amount which was contractually due, the claim under Section 27 of ERA succeeds. The Tribunal shall accordingly make an award in flavour of the claimant in the agreed sum of **£100.**

Employment Judge: Laura Doherty
Date of Judgment: 07 December 2017
Entered in register: 18 December 2017
and copied to parties