



EMPLOYMENT TRIBUNALS

Claimants: Mrs Jayne Clement & Mr Andrew Clement

Respondent: The Chief Constable of Cumbria Constabulary

Heard at: Manchester Employment
Tribunal (via CVP)

On: 27th September 2022

Before: Employment Judge Howard

REPRESENTATION:

Claimant: Mr Chegwidden, counsel

Respondent: Mr Oulton, counsel

JUDGMENT

The claimants were entitled to be paid both double time and plain time for the 8 hours shift worked on 25th April 2021 in accordance with a proper interpretation of clauses 1.5 & 1.7(d) of the Police Staff Council Terms and Conditions Handbook as incorporated into the claimant's terms and conditions of employment.

The claimants' claims of unlawful deduction from wages pursuant to the provisions of Part II Employment Rights Act 1996 succeed.

The respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2019 and an uplift of 10% is awarded to those sums under TULR(C)A 1992, S207A to reflect that unreasonable failure.

The respondent is ordered to pay to the claimants the total sum of **£187.62**, consisting of the following:

Ms Jayne Clement: £91.05 (net) + 10% uplift: £100.16

Mr Andrew Clement: £79.51 (net) + 10% uplift: £87.46

REASONS

1. In support of their claims, I heard evidence from Mrs and Mr Clement and, on behalf of the respondent, from Ms Dianne Johnson, HR Manager. I was referred to documents contained with an agreed bundle and was assisted by a written submission from Mr Oulton and I heard oral submissions from both counsel at the conclusion of the evidence.

The Issues

2. At the outset of the hearing, we agreed the issues to be determined in the case to be as follows:
 - 2.1 As a matter of proper construction of the Police Staff Council Terms and Conditions Handbook ('PSTC'), should the claimants have been paid both double time and plain time for the 8-hour shift worked on 25 April 2021?
 - 2.2 If not, should such a payment have been made as a matter of custom and practice?
 - 2.3 If such payments should have been made as a matter of proper construction of the PSTC and/or by custom and practice, what amounts are owed to the claimants? The claimants agreed with the respondent's calculations which had differed slightly from their own.
 - 2.4 Did the Respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?
 - 2.5 If so, and if it is held that unauthorised deductions have been made, should an uplift be made under the Trade Union & Labour Relations (Consolidation) Act 1992, s.207A? If so, in what amount?

The Findings of Fact Relevant to the Issues

3. There is little dispute as to the sequence of events which gave rise to these claims.
4. The claimants work in the Command-and-Control Room at police headquarters in Penrith. Mrs Clement is a supervisor and Mr Clement is an operator.
5. Their normal hours of work are 37 per week on a shift work basis of 12 hours, usually 2 days and 2 nights, followed by 4 rest days. This is averaged out over an 8-week period.
6. As Mrs Clement explained, a rest day is a day not at work or on the roster. On rest days employees can undertake any overtime available.
7. The claimants' terms & conditions of employment were in the hearing bundle. Both contracts provide that the rate of remuneration payable for the employee's work will be in accordance with the nationally negotiated PSTC . It is agreed that the PSTC is expressly incorporated into the claimants' terms and conditions of employment and lays out the provisions for working hours and remuneration.
8. The relevant clauses of the PSTC are:

1.5 Working Additional Hours (“Overtime”)

a) Posts at or below SCP 28

Police Support Staff in receipt of a salary at or below pay point 28 who work unsociable hours or additional hours in excess of an average of 37 hours per week will be eligible for enhanced rates of pay detailed below:

Periods of work of 30 minutes or more should be aggregated over one pay period and completed periods of half an hour paid for at the rate of:-

- Monday to Saturdays - Time and a half
- Sunday and on general Public holidays - Double time

“Overtime” is defined as any hours worked in excess of the normal contractual hours.

d) Part Time Working And Additional Hours

Additional hours worked will be paid at plain time unless a total of 37 hours has been worked in the week unless the following criteria apply:

Normal Pattern of Work	Additional hours worked	Recompense
Monday to Friday	Between 8pm and 6am	1/3
	Saturday	½ time
	Sunday / Public Holiday	½ time
7 days per week	Between 8pm and 6am	1/3 or a shift allowance
	Saturday / Sunday	½ time or Rostered Weekend Working Allowance

Where hours worked exceed 37 hours per week the following overtime rates will apply:

- Monday to Saturdays - Time and a half
- Sunday and on general Public holidays - Double time

g) Short Notice Overtime

Managers can request individuals to work short notice overtime to meet the needs of the service, maintaining minimum staffing levels. Managers can

require individuals to work additional hours (4 hours maximum) at short notice to meet the needs of the business, giving due consideration to personal circumstances, i.e. caring responsibilities. Extra hours of this nature will be compensated at normal overtime rates.

h) Duties and Responsibilities of Employees Offered Overtime

When offered the opportunity to work planned overtime the employee is free to turn the extra contractual work down. However, once the employee has agreed in principal with their line manager / Duties Management to work an extra shift on a given date, the employee will not be expected to withdraw and they must fully accept the commitment to work the shift, as if the additional hours were part of their contracted hours. *(Should the member of staff withdraw and cancel, without good reason (i.e. caring responsibilities), following management consideration they may not be able to work any further overtime for a fixed period. This would normally be a period of up a maximum of two weeks).*

Should the employee be unable to carry out their overtime due to sickness they should contact their line manager providing as much notice as possible, but in any event line managers must be contacted at least 12 hours prior to the commencement of the overtime. Such periods of sickness will be subject to the normal sickness monitoring procedures.

1.7 Shift Working Arrangements

a) Shift Working And Planning Of Shift Rosters

In devising rosters for shift working provision shall be made for an interval of not less than 11 hours between the end of an employee's planned period of duty and the beginning of his or her next planned period of duty. Where, owing to the exigencies of duty, it is necessary to alter a planned shift roster, the manager responsible for making the alteration shall endeavour, unless a shorter interval is unavoidable in an emergency, to provide for an interval of at least 11 hours between periods of duty. The number of shifts within the rota to be kept to a necessary minimum.

The Police Support Staff Council discourages strongly split shift working for Police Support Staff and advises that split shifts should be avoided. However, it is recognised that there may be occasions on which they are operationally unavoidable.

Temporary changes to shifts would be managed in the below order to priority:

1. Temporary changes to rostered shifts with more than 72 hours' notice

2. Temporary changes to rostered shifts with less than 72 hours' notice, change of less than 5 hours
3. Temporary changes to rostered shifts with less than 72 hours' notice, change of 5 hours or more
4. Short notice overtime *
5. Cancellation of rest days with more than 72 hours' notice *
6. Cancellation of rest days with less than 72 hours' notice *

However, whilst this would be the preferred method of managing temporary changes to shifts, it must be emphasised that in some situations this will not always be possible. (* these options will only be considered once all other alternatives have been explored and are to be reviewed on monthly basis).

b) Shift Swaps

Employees can swap (hours / shifts) with colleagues doing the same type of work at different times of the day. Although the Constabulary is committed to providing all employees with the opportunity to swap shifts where necessary, the needs of the business must continue to be met.

All parties must agree formally via a formal agreement to the change of shift, and these must be approved by the relevant supervisor or line manager. It is the responsibility of employees to ensure that shifts are covered. The shift swap must not be of detriment to the Constabulary and must be of equal length. Any mutual shift swaps must be agreed within 60 days to prevent open ended arrangements.

Employees must have regard to any other work commitments, including internal and external training commitments, before agreeing to swap shifts with a colleague.

Employees who have made a request to swap shifts with a colleague are expected to rearrange any existing work arrangements that they will not be able to perform.

Where an employee is unable to honour a commitment to swap shifts for legitimate reasons (e.g. sickness), all normal arrangements will apply for the notification of management, who must consider the request in line with Constabulary procedures.

Where an employee fails to turn up for all or part of his / her rearranged shift without good reason this may result in disciplinary action.

b) Changes to Rostered Shifts

Rostered shifts can be changed and a requirement to work imposed to meet the need of the service, maintaining minimum staffing levels.

Temporary changes to shifts will not be used in a liberal way to enforce continual changes of shifts without proper justification.

Where the Constabulary needs to implement a permanent change to a shift pattern, a minimum of 45 days' notice must be given to staff of their new shift pattern, however, **wherever possible a longer period of notice will be given.** Notification of this permanent change shall be either in writing or email. Such changes do not incur enhanced rates of pay.

c) Changes to Rostered Shifts – Notice of More Than 72 Hours

Where 72 hours or more notice of a temporary change in rostered shift duty occurs, no compensation will be made except where hours worked on the re-rostered shift exceed the length of the shift. Extra hours of this nature will be compensated at normal overtime rates

d) Changes To Rostered Shifts – Notice of Less than 72 Hours

Where less than 72 hours' notice of a temporary change in rostered shift duty occurs and alters the starting time by less than 5 hours, the hours worked on the re-rostered shift will be paid at plain time. Any hours worked beyond the normal length of a shift, calculated from the beginning of the revised start time, will be paid at normal overtime rates only, in complete recompense.

Where less than 72 hours notice of a temporary change in rostered shift duty occurs and alters the starting time by 5 hours or more, the hours worked on the re-rostered shift will be paid at time and a half. Similarly, any hours worked beyond the normal length of a shift, calculated from the beginning of the revised start time, will be paid at normal overtime rates only, in complete recompense.

e) Requirement To Work On a Rest Day

Rest days can be cancelled and a requirement to work imposed to meet the needs of the service, maintaining minimum staffing levels.

Where 72 hours or more notice of the cancellation of a rest day occurs, the hours worked will be paid at the appropriate rate (inclusive of allowances). Similarly, any hours worked beyond the normal length of a shift, will be paid at normal overtime rates only in complete recompense.

Where less than 72 hours' notice of the cancellation of a rest day occurs, the hours worked will be paid at time and a half and receive a day off in lieu. Any hours worked beyond the normal length of a shift, will be paid at normal overtime rates only in complete recompense.

9. In early April, the claimants were offered work from 12pm to 4pm on 25th. That date was a Sunday and the claimants' scheduled rest day. Both accepted the overtime.
10. As more than 72 hours' notice had been given of this request, the claimants were entitled to be paid overtime under clauses 1.5(d) and 1.7(e) of PSTC pay provisions at a rate of double normal hourly pay.
11. On 24 April 2021, Mrs Clement was contacted by Zach Henry, Communications Centre supervisor, asking whether she and Mr Clement would be prepared to start at 8am (instead of 12pm) the next day. The WhatsApp exchange was included in the bundle and showed an exchange between Mrs Clement and Mr Henry. Mr Henry stated that the change to the start time would not be 'a change of shift, just an extension of hours'. Mrs Clement queried this and agreed that she and Mr Clement would work the additional hours and that she would check the position later.
12. The claimants both worked the Sunday shift from 8am to 4pm. They were paid at double time for all hours worked.
13. Subsequently the claimants asserted that they should have been paid at plain time (i.e. normal rate of pay) in addition to the double time pay for all hours worked, relying on clause 1.7 (d) , which provides (where relevant) as follows: *"Where less than 72 hours notice of a temporary change in rostered shift duty occurs and alters the starting time by less than 5 hours, the hours worked on the re-rostered shift will be paid at plain time"*.
14. The Respondent disagreed. After some initial discussions, Tracey Barber, a Union representative consulted by the claimants, sent an email on 4 August 2021 to Ms Johnson, stating that the claimants felt that they had no alternative but to go ahead and submit a grievance. She added: *"Looking at T&C's, which we both agreed are somewhat unclear in some areas, we have probably interpreted them differently"*.
15. Ms Johnson confirmed the Respondent's position, in an email of 5th August 2021, that the change of shift provisions relied on by the claimants did not apply to entitle them to plain time in addition to double time for the shift which they had worked.
16. The claimants raised a grievance on 12 August 2021. In accordance with the respondent's grievance procedure, a Stage 1 manager, Supt Carl Patrick, was appointed.
17. On 19 August 2021, Mr Clement contacted ACAS for EC notification, followed by Mrs Clement on 27 August 2021.
18. On 20 August 2021, Tracey Barber had a meeting with Supt Patrick who told her that he would be unable to complete his enquiries and bring the grievances to a conclusion within the time frame of 10 working days set out in the grievance procedure. Tracey Barber agreed that, given the complexity of the case, it would take several weeks to undertake the enquiries.
19. On 28 September 2021, Supt Patrick held meetings with the claimants and produced a report summarising the enquiries which he had made. He concluding that there was nothing in the PSTC that indicated that the claimants were entitled to triple pay. He concluded: *"It may be that historically others in the Control Room have interpreted the PSTC in the same way"*

however this custom and practice is incorrect and should not have taken place. There is nothing within the PSTC that explains that staff are entitled to "triple" pay as recompense, and that double time is the appropriate level of recompense, this is something which Andy and Jayne disagree with".

20. The claimants elected to pursue their grievances to Stage 2, and on 12 October 2021 T/Ch Supt Kennerley was appointed to deal with them.
21. On 13 October 2021, the claimants issued claims in the employment tribunal.
22. On 19 January 2022, T/Ch Supt Kennerley held a Stage 2 meeting with the claimants. I accepted the respondent's evidence that it had not been reasonably possible to hold the meeting any earlier due to a combination of Annual Leave, Covid and a meeting that was unable to take place at the last minute.
23. After hearing representations from the claimants, T/Ch Supt Kennerley agreed with the stance taken by Supt Patrick and upheld his decision.
24. It was accepted that upon receiving the outcome of stage 2, the claimants immediately expressed their intention to proceed to stage 3. Ms Clement explained that she had received an email in April 2022 stating that arrangements for a hearing would be made but has heard nothing further. Ms Johnson could only speculate that the reason for the ongoing delay in arranging a stage 3 hearing (now 9 months) related to the ET proceedings that the claimants issued immediately after the stage 2 outcome, however she could give no further clarity on the respondent's rationale for this.

The law and submissions

25. Mr Oulton reminded me that when interpreting the PSTC, general principles of interpretation require the tribunal to give effect to what the parties intended; by reference to *'what a reasonable person, having all the background knowledge which would reasonably have been available to the parties would have understood them to be'*. The meaning of the contract must be assessed in the light of its natural and ordinary meaning and Mr Oulton referred me to **Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1)** 1998 1 WLR 896, HL for that proposition.
26. Mr Oulton pointed out that commercial common sense is a relevant factor. See **Campbell v British Airways plc [2018] UKEAT 0015/17** at paragraph 29, applying the observations of Lord Neuberger in **Arnold v Britton and ors [2015] AC 1619, SC**, as to the interpretation of pay terms within an employment context.
27. Mr Oulton had laid out the basis for the respondent's interpretation of the relevant clauses in his written submission, which he expanded upon in oral submission. He stated that clauses 1.5(a) & (d) applied; the claimants were entitled to double time. The clauses dealing with changes to rostered shifts with notice of more or less than 72 hours at 1.7 (c) & (d) did not apply to this situation as the claimants' rostered shifts; i.e. the 37 hours per week, did not change. The reference to 'temporary changes to shifts' throughout clause 1.7 illustrated the point; that the claimants were simply offered extra overtime

- which is not related to rostered shift patterns. Overtime does not equate to a change to a rostered shift, being simply an offer of additional work. Clause 1.7 deals with a different situation where there are temporary changes to shift working arrangements. Further that it is not suggested anywhere that the provisions contained in clauses 1.5 & 1.7 are cumulative. It makes no commercial common sense to pay, in effect, triple the hourly rate as overtime.
28. In respect of custom and practice, Mr Oulton stated there was simply insufficient evidence to rely upon.
 29. For the claimants, Mr Chegwidden agreed with the interpretative principles identified by Mr Oulton and he referred me to **Adams v British Airways 1996 IRLR 474 CA** as authority for the proposition that an employment contract must not be interpreted in a vacuum and where ambiguity exists it is proper to consider the context. The Tribunal must determine the contract based upon the evidence it has and not on assumptions or speculation.
 30. Mr Chegwidden stated that what constitutes a change of shift is clearly defined at 1.7(d); where a 'starting time' is altered by more or less than 5 hours. There is no category of 'shift extension or extension of hours' as Mr Henry had described it in his WhatsApp to Mrs Clement. Clause 1.7(d) simply refers to alteration of a starting time which has the effect of temporarily changing the rostered shift. The claimant's scheduled hours changed from 12pm to 4pm to 8am to 4pm and so fall within this clause.
 31. As clause 1.5(h) makes clear, once an employee has agreed to an extra shift, they are expected to fulfil that commitment. This clause is a 'deeming provision' in the sense that the additional hours become part of the employee's rostered shifts and contracted hours. That being so, clause 1.7(d) will apply equally when changes are made to those rostered shifts, whether the hours are overtime or not.
 32. The suggestion but forward by Ms Johnson that this clause only applies when both the start and finish time of a rostered shift is altered makes no commercial sense. Particularly given Ms Johnson's acknowledgement that 1.7(d) was an enhancement provision to compensate employees whose hours changed at late notice, thereby causing disruption to their plans for the day and to incentivise them to agree to last minute changes.
 33. Mr Chegwidden countered Mr Oulton's assertion as to no cumulative provision by pointing out that there was nothing in the PSTC which precluded employees from claiming additional pay under more than one clause in respect of the same period.
 34. In respect of custom and practice, Mr Chegwidden submitted that the evidence of 4 previous occasions when similar payments were made was sufficient to establish a practice.
 35. On the issue of any uplift for unreasonable failure to comply with the ACAS code on grievance procedures, Mr Chegwidden raised no issue with the conduct of stage 1. In respect of stage 2 he argued that the 3 months taken, when the policy stipulated 14 days, to conclude this stage amounted to unreasonable delay. In respect of stage 3 Mr Chegwidden asserted that the ongoing delay (some 9 months at the date of this hearing, set against a 21

day stipulation in the policy), without no adequate explanation for the delay, amounted to further unreasonable delay.

My conclusions

36. The respondent relied upon the evidence of Ms Johnson, HR manager as to the proper interpretation of the relevant provisions.
37. There was no dispute that the claimants were entitled to rely upon clause 1.5(d) to be paid double time for their shift on 25th April 2021. The dispute is whether they can rely on clause 1.7(d) to claim an additional payment at plain time in respect of the same shift.
38. In her evidence to me, Ms Johnson accepted that once employees had agreed to undertake an additional shift, under the terms of PSTC, they were contractually obligated to do so and clause 1.5(h) applied so that the hours undertaken as overtime were then deemed to be part of contracted hours. This is clearly stated in the clause itself; employees *'must fully accept the commitment to work the shift, as if the additional hours were part of their contracted hours'*.
39. Ms Johnson accepted that employees can rely, where appropriate, on more than one of the 'disruption clauses' in PSTC, including additional payments for overtime and variation of rostered hours, at the same time. This is consistent with the fact that there is no provision in the PSTC which limits employees to benefitting from only one additional payment provision in respect of the same shift. The various relevant provisions are not put in the alternative.
40. Ms Johnson explained that the rationale for the additional payment for changes to rostered shifts at short notice was to recompense people for the inconvenience of changing their plans at short notice.
41. There is clearly a commercial rationale for such a payment; to incentivise employees to agree to change their agreed hours of work at short notice to meet the employers' operational requirements and need to keep the service sufficiently staffed and running. As Mrs Clement stated in her evidence, overtime in the command-and-control centre was abundant and flexibility was required to cover the constant shortfall in staffing.
42. Ms Johnson accepted that payments for overtime and rostered changes could be and were made under the terms of PSTC in respect of the same shift. She stated that had the claimants' 4 hour shifts on 25th April simply been brought forward rather than extended, 1.7(d) would apply and the claimants would have been entitled to overtime at double time under clause 1.5 and a short notice payment at plain time. The distinction she sought to draw was that the claimants' rostered shift had been 'extended' rather than 'moved'.
43. What had happened was that, at the request of a supervisor, within 72 hours of the scheduled shift starting, the claimants had agreed to alter that rostered shift which changed from 12-16.00 to 8.00 – 16.00 hours.
44. When the claimants agreed to work additional hours on 25th April; by virtue of clause 1.5(g) those hours were deemed contractual and were recorded as a rostered shift.

45. Clause 1.7(d) states that 'where less than 72 hours' notice of a temporary change in rostered shift duty occurs and alters the starting time by less than 5 hours the hours worked on the re-rostered shift will be paid at plain time.'
46. There is no guidance in the PSTC on what 'temporary' means but on a plain, natural and ordinary interpretation of the word, it can cover a one-off event such as this situation.
47. The claimants' rostered shift was changed in 2 respects; the start time was brought forward by 4 hours and the duration of the shift was altered from 4 to 8 hours.
48. As the start time was altered by less than 5 hours, clause 1.7(d) applies and the claimants were entitled to a payment of 4 hours at normal hourly rate – plain time.
49. The natural and ordinary meaning of clause 1.7(d) clearly encompasses the change to the rostered shift of 25th April agreed by the parties on 24th April; i.e there was a temporary change which altered the start time to 8am. There is no reference in that clause to a commensurate change to finish time (which was Ms Johnson's interpretation of the clause) and given that the terms are clear and unambiguous, there is no need to imply such a limitation.
50. Given my findings, I do not need to consider whether such an entitlement has arisen through custom and practice. In any event, there was insufficient evidence presented for me to draw such a conclusion; limited as it was to anecdotal oral evidence from the claimants and Ms Johnson's evidence that payments in similar circumstances had been made on 4 occasions previously. It was not possible to accurately contextualise those payments as there was no indication of how many times a similar situation had arisen across the service in recent years.
51. I find that the claimants were entitled to be paid both double time and plain time for the 8 hours shift worked on 25th April 2021, in accordance with a proper interpretation of clauses 1.5 & 1.7(d) of the Police Staff Council Terms and Conditions Handbook as incorporated into the claimants' terms and conditions of employment.
52. By failing to pay the claimants in full, the respondent has unlawfully deducted wages from them and the claims succeed.
53. Turning to compliance with the ACAS code, there is no dispute that the respondent failed to meet its own timescales at every stage of the process. No issue was taken by the claimants in respect of the conduct of stage 1, but criticism was levelled at the 3 month time scale taken to complete stage 2. However, I accepted the evidence contained in the note of the stage 2 hearing and produced in evidence as to the reasons for that delay and do not consider that to have been unreasonable in the circumstances.
54. It was accepted that upon receiving the outcome of stage 2, the claimants immediately expressed their intention to proceed to stage 3. Mrs Clement explained that she had received an email in April 2022 stating that arrangements for a hearing would be made but heard nothing further. Ms Johnson could only speculate that the reason for the ongoing delay in arranging a stage 3 hearing related to the Employment Tribunal proceedings

that the claimants had issued immediately after the stage 2 outcome, however she could give no further clarity on the respondent's rationale for this. In any event the issuing of Tribunal proceedings does not preclude the respondent from determining an internal grievance process.

55. The ACAS code of practice provides that grievance meetings should be arranged without unreasonable delay, and that outcomes should be communicated as soon as possible.
56. I find that the respondent has unreasonably failed to comply with the Code in respect of arranging a stage 3 meeting without delay. To reflect that unreasonable failure, I find that the claimants' award should be uplifted by 10%.
57. The respondent is ordered to pay to the claimant Ms Jayne Clement the sum of £100.16 (£91.05 (net) + 10% uplift)
58. The respondent is ordered to pay to the claimant Mr Andrew Clement the sum of £87.46 (£79.51 (net) + 10% uplift)
59. No interest is payable on this award.

Employment Judge Howard
Date 11th October 2022

JUDGMENT SENT TO THE PARTIES ON

27 October 2022

FOR THE TRIBUNAL OFFICE