EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104661/2013

Held in Glasgow on 19 December 2022
Deliberations: 20 December 2022

Employment Judge D Hoey

Ms C McMahon **Claimant**

AXA ICAS Ltd **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application dated 12 August 2022 for reconsideration of the judgment sent to the parties on 29 July 2022 is refused.

REASONS

Background

1. Following a hearing lasting 5 days and following 3 days of deliberations, the claimant's claims of unlawful deductions was upheld and judgment was issued on 29 July 2022.

2. The Tribunal found that there had been an unlawful deduction from her wages and that the respondent was contractually due to pay the claimant monthly sums of one twelfth of three quarters of the claimant's fixed or normal annual salary (in respect of the 23 hours she was required to work) less state benefits received. The monthly sums were to be paid following the claimant's incapacity from work for a period of 26 weeks. The sums due were to increase by 5% on each anniversary of commencement of payment (ignoring any

salary increase had the claimant been at work). The Tribunal gave the parties 42 days to agree the specific sums due (as the claimant had not provided precise details of the state benefits she had received, which was in her possession).

3. References in this judgment to paragraph numbers are to paragraph numbers in the liability and remedy judgment.

4. The claimant sought reconsideration of the decision by email dated 29 July 2022 in 3 respects (each with regard to the sums to be paid). The application was contested and this Hearing had been fixed to consider both parties submissions, both parties having provided written submissions and having had the chance to respond to the points made.

The law

5. An application for reconsideration is an exception to the general principle that (subject to appeal on a point of law) a decision of an Employment Tribunal is final. The test is whether it is necessary in the interests of justice to reconsider the judgment (rule 70). What is in the interests of justice is a matter for the Tribunal on the facts.

The application

6. The application contained 3 matters and these are dealt with in turn.

Sums due to the claimant

7. The Tribunal found that the claimant's entitlement under the scheme was to the sum the claimant would normally earn, working her contracted hours, the guaranteed sum under her contract of employment. The claimant's agent argued that the sum due to the claimant should be her "normal earnings" which should include payments for regular weekend work/overtime carried out by the claimant.

8. The issue was to be decided by focusing upon the "ordinary and natural meaning". The Tribunal referred to the "normal and common sense interpretation of normal earnings within the context of the position the parties

found themselves" (paragraph 242) and concluded (paragraph 242) that "normal earnings" amount to the sums to which the claimant is "guaranteed under her contract". The claimant's agent argued the Tribunal should reconsider its decision, on the basis that the Tribunal has taken too narrow a view of the matter by focusing on what was "guaranteed" under the contract in the form of basic salary only.

9. Having regard to the ordinary and natural meaning of the phrase, the claimant's agent referred to the Collins online dictionary definition of "normal" as "usual, regular, common, typical". With reference, therefore, to what the claimant would normally earn, another way of putting it would be to consider what the claimant would usually or typically earn, or what she would earn on a regular basis.

10. The claimant's evidence was as follows: "The service the respondent provided was an employee assistance programme. They had to be available to assist employees in difficult circumstances. The service was offered to ICAS clients on the basis it was 24 hours a day and 7 days a week. After the office in Glasgow was up and running, it became necessary as things expanded for the weekends to be covered in the same way weeks were, 24 hours a day. There was a roster system, a rota, and people on the rota required to work weekends, and I was on the rota and I was required to work 1 in 4 weekends. Once rostered, there was no choice not to work on the weekend. This was a necessary and important part of the service to the clients. From around 2005 there were regular people required to work weekends who were put on roster for that purpose. From 2005 I was on the roster and worked 1 in 4 weekends until I was dismissed."

11. There was no challenge to the above evidence of the claimant, and no contrary evidence was provided by the respondent. Therefore the claimant regularly worked one in four weekends, as a matter of course over many years.

12. Although the Tribunal concluded payment for weekend work was not guaranteed and the sums could fluctuate (paragraph 243), it was argued that

there was no evidence to this effect. The only evidence in relation to this issue was that above which supports a conclusion that the claimant was regularly and as a matter of course paid for weekend work (one in four weekends).

13. In paragraph 243 the Tribunal placed reliance upon the contract stating that the claimant "may be requested" to work weekends. However, that was not consistent with the earlier statement that the Tribunal should have regard to the "normal and common-sense interpretation of normal earnings within the context of the position the parties found themselves". Having regard to the context should involve looking beyond the strict wording within the contract and see the position as it was in practice.

14. In this regard, in paragraph 243 the Tribunal stated that the claimant "chose" to accede to requests to work weekends, and in paragraph 244 that the claimant "believed she was required to work" weekends. At paragraph 60 it is said that the claimant "considered" that she required to work weekends when rostered. However, there was no suggestion or evidence that the claimant was under a mistaken belief around the requirement to work weekends. The evidence of the claimant was: "There was a roster system, a rota, and people on the rota required to work weekends, and I was on the rota and I was required to work 1 in 4 weekends. Once rostered, there was no choice not to work on the weekend."

15. In paragraph 60 it was said that the claimant would "often" be rostered to work one weekend in four. It was argued that this does not fully reflect the evidence of the claimant that "From 2005 I was on the roster and worked 1 in 4 weekends until I was dismissed." There was no suggestion or evidence that the claimant worked anything other than one weekend in four as a matter of course over many years.

16. In this regard, in paragraph 60 the Tribunal found the claimant "regularly worked one weekend in four from around 2005" which is consistent with the evidence of the claimant and supports a conclusion that the claimant worked one weekend in four as a matter of course.

17. In paragraph 246 it was said that due to the time which had passed "there was no clear evidence as to exactly what overtime the claimant had worked"; that it was not clear whether the claimant "actually worked every weekend in four"; and that it was not clear whether the claimant "did work one weekend in four for the entire period". It was argued that the passage of time should not impact on this, as the claimant provided clear evidence of her working pattern in the years leading up to her absence from work, and the Tribunal found that the claimant "regularly worked one weekend in four from around 2005".

18. In paragraph 245, reference was made to the ET1. The Tribunal concluded that the claimant viewed her normal take-home pay as being based on fixed weekly hours, not including any weekend work. It was argued the Tribunal was mistaken in this regard. The relevant section of the ET1, section 4.2, notes normal take-home pay as being £1054. That is the amount of net pay referred to in the payslip at page 119 of the bundle, and takes into account overtime. Section 4.2 also states that normal take-home pay should include overtime. This was also relevant to paragraph 49 and the mistaken conclusion that the claimant made no reference to her additional hours or pay in respect of weekend work in the ET1, when she did. Therefore, contrary to the conclusion of the Tribunal at paragraph 245, the claimant did consider that the sums she received for working the weekends were part of her normal pay.

19. It was submitted that from the evidence available to the Tribunal, and the Tribunal's own findings, on the balance of probabilities, the claimant worked one weekend in four as a matter of course for the period of around five years prior to her absence from work commencing, i.e. between 2005 and 2010.

20. With regard to authorities, the claimant's agent relied upon the holiday pay line of cases such as **Flowers v East of England Ambulance Service NHS Trust** [2019] EWCA Civ 947 where the issue was whether holiday pay should take account of non-guaranteed overtime and voluntary overtime. Part of the case involved construction of the relevant contract. While the terms were different to that of the claimant's case, as the Court in **Flowers** was interpreting a clause which specified that pay was to be calculated on the basis of what the individual would have received if they had been at work, it

was argued the Tribunal reached a conclusion which broadly reflects the terms of the contract in **Flowers**, hat the interpretation of "normal earnings" should reflect what the claimant would "normally earn" in terms of her contract. In that sense, the two cases are similar, as the claimant's case is essentially about working out the pay which the claimant would have earned had she not been absent from work (albeit due to ill-health, not holiday).

21. In paragraph 19 of **Flowers** the Court rejected an argument "that the omission from the clause of an express reference to overtime must be taken to represent a deliberate decision by the parties that it should be excluded from the calculation of holiday pay". The Court goes on to say that the "clause must be read as a whole".

22. In the claimant's case, the relevant contractual provision states that a "proportion of normal earnings are paid during a long-term absence" and that the benefit is 75% of "scheme salary" less state benefit. Like the position in **Flowers** (see paragraph 15 of the judgment), there is no reference to "basic" salary or "overtime". The Court stated that the clause "could have said that during annual leave the employee would receive basic pay plus certain specified supplements, but it did not". Similarly, in the claimant's case, the terms of the Scheme could have specified that payment was based only on basic pay, but it does not do so. What it does do is refer to "normal earnings".

23. In paragraph 19 of **Flowers**, the Court refers to the "natural interpretation" of the clause, which is similar to the Tribunal in the claimant's case referring to the "ordinary and natural" meaning of the words (paragraph 242). It was argued that applying this principle, and in the absence of the contract saying otherwise, "normal earnings" should include payment received for regular weekend work / overtime.

24. The claimant' agent argued that **Bear Scotland Ltd v Fulton** [2015] ICR 221 (paragraph 29 of the judgment in **Flowers**), noted that "'normal pay' is that which is normally received" and the claimant's case should be addressed in a similar way, by concluding that in order to understand what is meant by "normal earnings", it is necessary to consider what the claimant would

normally earn in terms of her contract (paragraph 242). In **Bear Scotland**, the Employment Appeal Tribunal went on to say that where a pattern of work is settled there is no difficulty in identifying normal as including non-guaranteed overtime.

25. It was argued that the Tribunal should conclude that normal earnings incorporates payment for weekend work / overtime where there is a settled pattern of work and that, in the claimant's case, there was such a settled pattern. Having regard to (a) the ordinary and natural meaning of "normal earnings", (b) what the claimant would normally earn, and (c) the context of the claimant being on the rota as a matter of course for one weekend in four over many years and being required to work when on the rota, the Tribunal should conclude that the claimant's salary for regular weekend work/overtime is to be included within "normal earnings" for the purposes of the contractual Scheme and the calculation of deductions from those normal earnings.

26. The respondent's agent argued that the Tribunal's original decision was sound. The Tribunal concluded that overtime and weekend work was not to be included as part of "normal earnings". Applying commercial common sense, it was determined that normal earnings "is the sum to which she is guaranteed under her contract since that is the sum she would normally earn." That was the correct interpretation.

27. The respondent's agent noted that the Tribunal concluded (paragraph 242 of the Judgment) that: "The scheme would replace the normal earnings, the sums to which the employee would be guaranteed if able to work, the normal rate of pay in terms of the contract." The claimant's contract stated that she "may be requested" to work weekends. This was not a guaranteed term and ultimately there was fluctuation in what the claimant earned. The Tribunal recognised this fluctuation and determined that "There is no suggestion that the entitlement was based upon an average of the sums the claimant would receive where her earnings would fluctuate or if she would earn more money by working hours in addition to her normal hours." What remained guaranteed and "normal" was the claimant's contractual rate of pay.

28. The respondent's agent noted that during the hearing Ms McGlone stated that it is the norm for payments under a permanent health insurance scheme to only cover base salary and not variable elements of pay. It was submitted at the time that the claimant had not provided the Tribunal with sufficient evidence to support an assertion that overtime payments were part of her "normal earnings".

29. The respondent submitted that the Tribunal's finding in relation to the ordinary and natural meaning of the claimant's "normal earnings" was well-reasoned and represents the reality of the situation. The Tribunal considered the position of the voluntary overtime noted in the claimant's contract "had normal pay included overtime" (paragraph 246). The conclusion reached, at paragraph 246 of the Judgment, was that it was unable to determine if, as a matter of fact, the claimant did work one weekend in four over the course of the relevant period, as argued by the claimant. The claimant has not produced any further evidence on this point, so the Tribunal is being asked to reverse its decision using only the same limited materials and arguments that were originally put to the Tribunal and which were deemed insufficient.

30. If the Tribunal decided that "normal earnings" in these circumstances could include overtime, it is submitted that whether they would is a question of fact for the Tribunal. That is clear from **Patterson v Castlereagh Borough Council** [2015] NICA 47, where the Northern Ireland Court of Appeal remitted the case to the Tribunal to find whether the payments were "normal". The Court held that "It will be a question of fact for each Tribunal to determine whether or not that voluntary overtime was normally carried out by the worker and carried with it the appropriately permanent feature of the necessary remuneration to trigger its inclusion in the calculation."

31. The European Court in **Williams and Others v British Airways plc** C-155/10 said to make the assessment of whether voluntary overtime was to be considered "normal remuneration", this would require "specific analysis" which requires the Tribunal to act on a case-by-case basis and make a determination on the basis of the evidence put before it. The claimant was not required under her contract of employment to work overtime and the

claimant has not, in the words of the Tribunal, produced "clear evidence as to exactly what overtime the claimant had worked and what the rate was." Consequently, the claimant has factually failed to establish the earnings she received pursuant to voluntary overtime and whether this had sufficient permanency to have formed part of her "normal earnings". From the Tribunal's interpretation of the phrase "normal earnings", it had made a simple factual finding on the evidence, or lack of evidence, before it.

Decision on payment due to the claimant

32. The key question for the Tribunal was to interpret what sums the claimant was entitled to. In answering this question it is important to consider the full context of the entitlement, and avoid a narrow view of the contractual matrix. This is important. As **Flowers** makes clear the full contractual matrix should be considered and not words in isolation. The relevant excerpts of the contractual matrix are as follows.

33. The claimant's offer letter set out her "hours of work" (referring to "standard hours" and that weekend roster work may be requested for which "additional payments" would be made) and "salary" (which referred to the salary for standard hours). There was no reference to how the additional payments for overtime would be calculated, whether under the heading "salary" or elsewhere.

34. The contract referred to "Benefits Package" including reference to the Royal and Sun Alliance Medical Insurance Plan.

35. The Handbook which was initially given to the claimant stated that the PHI scheme entitled employees to be paid a "proportion of salary" which sums were secured under an insurance policy (the cost of which was said to be borne by the respondent). Further details were available on request.

36. The document referred to life insurance which paid "a lump sum equal to 4 times your annual salary".

37. The PHI entitlement was to "a proportion of salary".

38. The information the claimant received when she asked for more information referred to the pension entitlement referring to employee contributions being "2% of basic salary" and death in service entitlement being "4 times annual salary".

39. With regard to PHI all permanent employees were eligible and "a proportion of normal earnings are paid during a long term absence". Critically the benefit is stated to be "monthly 1/12 of 3/4s of the individuals scheme salary less state benefit".

40. In other words reference is made throughout the documents given to the claimant to "salary" (referring to the guaranteed hours she was to work), "annual salary", "basic salary" and "individual's scheme salary". There is no definitions section pertaining to the PHI entitlement which must be construed within the context of the contractual position.

41. While it would be attractive to assume that the claimant was entitled under the PHI scheme to 75% of "normal earnings" (which is what the claimant contends), that is not what the entitlement is, since the entitlement is explicitly stated to be a proportion of the "individual's scheme salary". When the document refers to a proportion of normal earnings it must mean whatever the proportion 1/12 of 3/4s of the individual's scheme salary less state benefits is. If it meant 1/12 of 3/4s of the individual's "normal earnings" it would have said that but it did not. Reference to normal earnings was the result of the calculation rather than the calculation itself.

42. In order to give meaning to the words used in creating the entitlement, the natural and ordinary meaning is that the entitlement is to be governed by the individual's scheme salary, with the relevant calculation being carried out in relation to that sum (which would necessarily be a proportion of the individual's normal earnings). It would be inconsistent with what the parties said to simply say the claimant is entitled to 1/12 of 3/4s of her normal earnings.

43. Had the position simply been a calculation of the claimant's "normal earnings" the claimant's agent's submissions would have considerable force. While the

holiday pay authorities are considering holiday pay, the principles underpinning these issues are similar and "normal" could mean as contended by the claimant. However, the issue in this case is to determine what the parties meant in their contract when they used the words they did. The context of the words is vital and must not be ignored. The use of "normal earnings" must be viewed in context. That distinguishes the authorities relied upon by the claimant (which relate to a different entitlement in different contexts). There must be an analysis of what the parties said in this unique situation within the full contractual context at the relevant time.

44. The Tribunal had first to determine what the claimant's "scheme salary" was. In the absence of a definition this had to be considered using the principles of contractual interpretation in Scots law. What did the parties mean when they said "scheme salary"? They did not say "normal earnings" and clearly could have said this, given the earlier reference to it. It was likely that scheme salary was not identical to scheme salary given the use of both terms which do not appear to be synonymous. "Scheme salary" was more likely than not to be the claimant's "salary" under her contract, the sum to which she was guaranteed if she worked the normal hours under her contract.

45. The respondent's agent notes in her submissions that Ms McGlone stated that the norm was that "scheme salary" was basic salary in PHI schemes. That, however, did not have a bearing on the Tribunal's decision since the entitlement was based upon what both the employer and employee understood in this particular case. What happened elsewhere (unbeknownst to the claimant) could not affect the interpretation of her contractual entitlement. It may well be obvious to the respondent (not least given its area of business) that PHI entitlement is based upon "basic salary" but that again was not what the document said, given the reference to "scheme salary". The reference to "basic salary" was in relation to pension entitlement.

46. Looking at what the parties must have intended given the words they used in context, the Tribunal considered that "scheme salary" was likely to refer to the salary to which the claimant was guaranteed under her contract. It was clear (and the claimant knew) that the respondent had an insurance scheme in

place underpinning the entitlement (and the document made it clear that the insurance was paid for by the respondent). Reference to "scheme salary" would be the sum considered (by the parties) to be the claimant's salary for the purposes of that scheme.

47. The entitlement is therefore whatever the parties would have considered the claimant's salary for the purposes of the scheme to be, viewed at the time the contract was entered into. At the time the contract was entered into it was recognised that the claimant's entitlement was broken into 2 parts – her salary (for normal hours of work) and the additional payments (paid for the times she chose to accede to the request to work weekends as set out in her contract). Her contractual entitlement is part of the context and contractual matrix in assessing what the parties intended when the benefits document was issued. It was highly unlikely that scheme salary would be a variable sum, or a sum that could not be stated at the start of each year (or at a fixed point in the year when the policy was engaged). It was far more likely scheme salary was a fixed amount to which the claimant would be entitled each year (thereby allowing the relevant proportions to be identified, which would in turn become a proportion of her normal earnings). Were it otherwise, scheme salary would not be known at a fixed point each year, since it would depend on how many weekends the claimant had worked. Even if the claimant chose to work every weekend, that did not mean those hours and payment for those hours was included in "scheme salary". That was because scheme salary was more likely to be based upon what her salary was considered at a particular point in time for the purposes of the scheme, which would not include any overtime the claimant worked.

48. The Tribunal concluded that the respondent's agent's submissions had merit. Had the issue solely been one of identifying "normal earnings" the claimant's agent's submissions would have considerable merit but that was not what the contract said, particularly when viewed in context of the wording used by the parties and the specific facts which must be considered.

49. The claimant was entitled to a specific proportion of "scheme salary" less state benefit which would become a proportion of her "normal earnings" which is

paid to her. The issue is not simply identifying her "normal earnings" and calculating the proportion of normal earnings. Instead a natural and normal interpretation of the words the parties used (in light of the surrounding factual matrix at the time the contract was entered into) was to first identify the claimant's scheme salary. The next step required a calculation 1/12 of 3/4s of the scheme salary less state benefits. The sum arrived at is (necessarily) a proportion of normal earnings and is the sum due. The clause referring to a proportion of normal earnings simply explains that those to whom the provisions applied would be paid a proportion of normal salary when absent, the specifics of which (ie how to calculate the sum) was set out thereafter, being based on scheme salary. If the parties had intended the calculation to be 1/12 of 3/4s of normal earnings less state benefit the parties would have said that and the way in which the contract is worded shows that was not what was fairly intended.

50. The Tribunal did not consider the matter to be ambiguous such that any rules of construction were needed. Properly and carefully viewed and analysed, the parties' intention, viewed from the words they used, and importantly viewed in light of what was known at the time the contract was entered into, taking account of what the contract says. was that scheme salary meant the specific and guaranteed sum to which the claimant was entitled (ignoring any additional sums to which she may become entitled as a result of working weekends). That was used to calculate the sum due, which would be a proportion of normal earnings.

51. The fact the claimant did work most if not all weekends or considered that she had to or even that she considered overtime to be part of her normal pay did not alter the contractual interpretation which must be assessed at the time the bargain was entered into. The matter must be assessed at the time the contract was entered into, looking at the words the parties used in the relevant contractual documents.

52. The points made by the claimant's agent would be sound in relation to an interpretation of "normal earnings" in isolation but that phrase must be interpreted in line with the words used, particularly scheme salary which is a

different (and fixed) concept. The fact scheme salary was used rather than basic salary did not mean that scheme salary must mean normal earnings was intended since that was not the phrase used. The case law relied upon by the claimant is relevant in assessing "normal earnings" but does not properly take account of the context in this case which is clear given the specific words used. The specific sum is calculated by reference to scheme salary, which is the principal issue, thereafter arriving at a sum which is (necessarily) a proportion of normal earnings. The contractual matrix is such that the sum is not based on normal earnings but ends up, once calculated, to be a proportion of normal earnings. As indicated above the natural interpretation of scheme salary is to the fixed amount (excluding the additional payments received in respect of overtime). Reference to normal earnings is simply a shorthand way of saying what the end result of the calculation is, rather than intended to affect how the sum arrived at is calculated.

53. On that basis the Tribunal considers that it is not in the interest of justice to vary or revoke the original decision in this regard given the context and words used by the parties at the time the contract was entered into.

Amount of overtime

54. While it was not strictly necessary to consider the amount of overtime that should be included, since the Tribunal considered that properly interpreted, the entitlement was to scheme salary (which did not include overtime), the Tribunal considered the issue of the amount of overtime that should be included, were it to be included in the sums to be paid.

55. The claimant's agent argued that the amount of additional pay for weekend work should be 13.5% of basic pay. In paragraph 246 it was said that due to the time which had passed there was no clear evidence as to exactly what the overtime rate was. In paragraph 61, in respect of year 2, it was said that there was no evidence as to precisely what the overtime payment would have been for that year. However, the evidence provided to the Tribunal, in the form of payslips covering past years as well as year 1 of the claim, was such that it

could reasonably be concluded, on the balance of probabilities, that payment for weekend work/overtime was 13.5% of basic pay.

56. It was argued that the passage of time does not impact on this documentary evidence. The fact that the respondent was unable to give its own clear evidence on how overtime is calculated should not prevent the Tribunal from drawing a conclusion in this regard, with reference to the documentary evidence available. “Normal earnings” should include payment in respect of regular weekend work/overtime, the amount of the additional payment should represent 13.5% of basic pay.

57. The respondent’s agent observed that the Tribunal recognised that the claimant’s representative made a reasonable attempt to calculate what any overtime payment would have been (in respect of the second year in question). However it is clear from paragraph 246 of the Judgment that the Tribunal was unable to accept this as a sufficient basis to allow a calculation to be made to cover the whole relevant period. Whilst the proposed calculation is repeated by the claimant’s representative, this is restating what was submitted. It is unclear on what basis this demonstrates any additional information which would allow the Tribunal to reconsider its prior conclusion.

58. The respondent submitted that when the terms of the Judgment are considered in totality, there is no basis for it to vary or revoke its decision.

Decision on amount of overtime

59. The hearing had been fixed, and the parties had agreed that the hearing had been fixed, to determine liability and remedy. Both parties attended the hearing to provide their evidence they wished considered to determine each of the issues in this claim. The claim had been raised in 2013. It was not in the interests of justice to delay matters any longer than absolutely necessary. It had been open to the parties if so desired to ask to sever liability from remedy but neither party had done so and the Hearing progressed upon the basis that a final determination would be made.

60. The evidence with regard to the amount of overtime worked each month covered by the claim was not clear. While the claimant maintained she worked most weekends, the position in respect of payment was less clear, given the fact payslips had only provided a snapshot. It was not clear precisely how overtime was paid in respect of each month (and how the sum was calculated and any change month on month). Ms McGlone had noted when the claimant's case was put to her that the paperwork provided did not make it obvious since there were a number of different possible interpretations with regard to how overtime was calculated. It was not surprising given the passage of time that there was no clear evidence from either party but the Tribunal had to consider matters from the evidence that was presented to it, the onus being on the claimant to establish her claim.

61. The claimant was able to refer to the overtime payment of £160.43 (in respect of overtime work) in a payslip from December 2009 but she was unable to say precisely what the position was month on month (and year on year) with regard to how overtime was calculated specifically. While the claimant had provided some payslips the matter had not been explicitly covered in evidence and, as noted at paragraph 246, the claimant's agent "reasonably tried to estimate the position" and provide his view but that was an estimate and not the actual sums. 13.5% of basic pay was the claimant's agent's estimate which may or may not be right. The payslips before the Tribunal were for 23 December 2009, 28 June 2013 and then 27 July 2002, 27 January 2006 and 31 January 2007. It was not at all clear as to the position in respect of each month covered by the claim what the sums the claimant received by overtime were or how they were calculated. That was why the claimant's agent was required to reasonably estimate the position rather then precisely assess it.

62. The Tribunal considered whether it would have been possible to accept that reasonable estimate as sufficient. Had it been necessary to do so, the Tribunal would have concluded that it was not possible to do so. It was for the claimant to prove her entitlement. The parties could have agreed the position prior to the hearing and if agreement could not be reached the position should have been covered by the production of evidence, covering each month in

respect of which overtime was done and payment made thereby allowing a finding to be made on the basis of clear evidence. In the absence of evidence covering each period when overtime was worked and paid, it was not possible to confirm the precise amount and an estimate was not appropriate.

63. The claimant's agent submitted during oral submissions that the Tribunal should focus on the evidence it had and not on the evidence it did not. He noted that a "snapshot of different years" had been provided which he said showed that overtime was 13.5% of basic pay. The parties had tried to reach agreement on this but it was not possible to do so and it was ultimately a matter of proof. The claimant's agent argued from the evidence presented it was more likely than not that overtime was 13.5% of basic pay and there was sufficient evidence to make that finding and if more clarity is needed a further hearing could be fixed. The difficulty with that submission is that it was for the claimant to set out the precise basis of the sums sought. While a snapshot of various years was produced there was no clear evidence that showed what was paid (or how it was calculated) in respect of each month in question. That was a matter that could have been done, by providing payslips for each month in question or some other breakdown and estimating the amount is not appropriate in this area.

64. As the respondent's agent noted during oral submissions the evidence in respect of each overtime period for each of the months covered by the claim was not clear and had not been established in evidence. While the claimant believed she had worked one weekend in four, the position in respect of holidays was not clear nor of the hours worked on each occasion. There was a lack of precision which was why the claimant's agent had sought reasonably to assess the position but that was necessarily an estimate in the absence of evidence that would have allowed precision.

65. Given the hearing had been fixed to assess remedy and the time that had passed it would not have been appropriate to fix a further remedy hearing to allow the claimant a further opportunity to set out the position. Even by the time of the reconsideration hearing, there was no precision with regard to this matter. Relying on some payslips for some years with a reasonable estimate

does not allow certainty with regard to a key financial element. In any event it was not necessary to carry out this calculation given the decision reached with regard to the payment due.

66. The Tribunal did allow the parties time to confirm the position with regard to statutory benefits since there would be clear evidence in the claimant's possession in this regard and delays could be avoided. It would not be consistent with the overriding objective to estimate benefits and issue judgment for a sum likely to be in excess of that to which she was entitled nor to delay that matter further.

The 5% escalator

67. The final ground upon which reconsideration was requested related to the escalator entitlement (or annual uplift), the Tribunal having found that the entitlement was to increase the initial scheme salary by 5% each year (irrespective of any wage increase).

68. The claimant's agent argued that reference to "scheme salary" is the salary paid by the respondent to the claimant at any particular point in time, to include any increase in salary. It was accepted that the claimant's salary increased in April 2012. In paragraph 61, the Tribunal found that the claimant's salary had increased in April 2012 to £1233.50 per month (basic pay). The Scheme provides for an increase of 5% each year. It was submitted that this 5% increase is separate from the amount of salary which is normally paid.

69. In paragraph 247, the Tribunal concluded that the 5% increase only applies to the initial salary when the entitlement was triggered. However, by drawing this conclusion the Tribunal has essentially added its own "gloss", which does not include any reference to initial salary, on the basis that this would otherwise provide the claimant with a windfall. It is not for the Tribunal to fix what might be perceived to be a bad bargain.

70. The benefit should first have been paid in May 2011. The claimant's salary increased in April 2012, and the anniversary of when the benefit should first have been paid was May 2012 (one month after the increase). This close

proximity between the increase in salary and the anniversary of payment may have resulted in a conflation of the scheme salary and the benefit payment. If the benefit had instead first been payable in January 2011, and if the claimant's salary had increased in April 2011, then the first anniversary of payment would have been January 2012. In that scenario, it would be clear that the 5% escalator would apply from January 2012 (the first anniversary), and would apply to the actual salary of the claimant, as increased.

71. The Tribunal stated (paragraph 247) that regard should be had to the "normal and natural meaning of the words used". Applying this to the terms of the contract, and without introducing any additional terms, "scheme salary" is the salary payable to the claimant at any particular point in time. Separately, the contract provides for a 5% annual increase in the sum payable.

72. The respondent's agent argued that such an approach is not provided for by the terms of the contract. The only increase provided for in the Benefit Document is the annual increase of 5%, nothing further. There is nothing in the contractual documentation which states that the claimant will continue to receive a salary increase in addition to the 5% escalator which applies.

73. The Tribunal concluded "There was no suggestion the entitlement increased both by any wage increase to the normal scheme salary and by 5%. To provide the claimant with a 5% increase to any normally increased salary would be to confer upon the claimant a windfall and would not be consistent with the normal and ordinary meaning of the words taken in context, applying commercial common sense."

74. The respondent's agent argued that the Tribunal was entitled to conclude, applying commercial common sense, that this was the correct interpretation of the relevant provisions, and when it did so it had all of the information available to it as it has been presented with here. It is submitted that no further information has been provided which demonstrates why the Tribunal ought to reverse its decision. It is submitted that it would not be in the interests of justice to reconsider this finding.

Decision on escalator sum

75. The issue here was to interpret what the parties meant from the words they used within the context of the contract concluded. The only reference to the increase was in the additional information the claimant received which referred to the entitlement being 1/12 of 3/4s of the individual's scheme salary less state benefit and then it stated "increased by 5% on each anniversary of commencement of payment for as long as the benefit may be payable."

76. The dispute was whether the sum which increased by 5% each year was itself fixed or whether the 5% was added to any increase in salary to which the claimant was entitled each year. In other words when the entitlement was triggered was "scheme salary" fixed (static) or was it to increase (be dynamic). There is no suggestion from the document that the scheme salary changes once the scheme is engaged and payment is due. A natural and ordinary interpretation would be that the year in which the sums begin to be paid would provide the basis for the sums to be paid for the duration of the absence during which the sums would be payable.

77. The claimant's agent submitted this is placing a gloss upon the actual words used. It is not since the interpretation reached is done so using the words the parties used. There is no suggestion that the 5% is to be on the basis of any increased salary each year. It may well be that the 5% is intended to cover any salary increase but there is no reference to what the 5% is intended to cover. The Tribunal would be adding to what the parties had agreed if it found that the 5% was to be in addition to any salary increase to which the claimant would have been entitled if she were at work. Interpreting scheme salary as salary which is increased year on year would be to add a gloss to the words used by the parties. It is not what is said nor reasonably what is intended.

78. The Tribunal require to interpret what the parties intended to mean using the words they used and the context, at the time the bargain was concluded. The entitlement is clear – to 1/12 of 3/4s of the individual's scheme salary less state benefit increased by 5% on each anniversary of commencement as for as long as benefit continues to be payable. Reference to "scheme salary" is to the claimant's basic salary as detailed above. The parties could have said "scheme salary from time to time in force". By not making it clear that the

intention was that scheme salary would increase each year, the natural interpretation is that scheme salary is fixed from the word used by the parties and context in this case at the time the contract was concluded.

79. Scheme salary is to be identified at the point in time when the entitlement is engaged. When entitlement is engaged, the scheme salary is identified – the claimant's annual salary (without any additional payments that may become due). That specific sum, as calculated, is increased by 5% on each anniversary on commencement of payment.

80. The parties kept it simple – after a year has passed, the sum to which the claimant is entitled increases by 5% from what it was before. Had the parties intended the sum to increase in addition to 5% (such as by pay increases each year) the entitlement would have made that clear, since the calculation would be more complex, potentially with an increase falling due during the year when the benefit had become payable. Had the parties intended that to be the case, it would have stated that. There was no basis from the words the parties used to put the gloss the claimant seeks to the words used.

81. The wording used by the parties within the context in which the agreement was entered into, viewed at the time of the bargain, is clear. Entitlement was based on the fixed scheme salary pertaining at the time the policy was engaged. Entitlement increased only once a year, by 5% on the anniversary of the first payment. There was no suggestion of any other increase (or decrease) in the sums due and it is not necessary or fair to insert this.

82. The interpretation placed upon the wording by the claimant's agent is not a natural interpretation of the wording used within context. Had, for example, the respondent required to reduce all employees' salary such that staff's annual salary decreased, on the claimant's agent's analysis, the claimant's entitlement under the contractual scheme would also decrease (and then be subject to the 5% increase). That is plainly not what was intended by the words the parties used. The parties intended to keep the calculation simple – provide those who are unable to work due to absence for lengthy periods of time with a fixed sum (based upon the scheme salary at one point in time)

and then increase that sum yearly by 5% (with no other adjustments). Any other interpretation places a gloss on the words the parties used and is not a fair interpretation of the words in context.

83. It was not a natural interpretation to assume, as the claimant's agent contended, that scheme salary meant "from time to time". It was a term used to describe a sum of money – the scheme salary at the point payment was due. There is no suggestion that scheme salary can vary year on year by anything other than the escalator.

84. It is correct to say that whether or not a windfall is generated is irrelevant since the assessment is to what the parties contractually agreed (and they may well have agreed to provide the claimant with a windfall or not). Given the entitlement was to 75%, as the claimant's agent notes, the claimant was unlikely to receive more than 100% (unless the respondent had reduced salaries during the claimant's absence).

85. The entitlement is to the sum set out in the document – not to what the claimant would get if she was working, since by definition she would not be working. Ultimately the issue is what the parties reasonably intended to happen referring to the natural interpretation of the words used within the context of the agreement struck at the time. Using a dynamic interpretation of scheme salary is not in accordance with the context and approach and it is more likely that the parties intended the entitlement to be based on the fixed scheme salary as identified when the entitlement arose, increasing by 5% each year. That is the natural and reasonable interpretation of the words.

86. For those reasons the Tribunal does not vary or revoke the original decision reached in this regard.

Conclusion

87. The Tribunal carefully analysed the wording the parties used within the context of the bargain reached at the time the contract was concluded. The claimant's agent's analysis with regard to normal earnings is powerful in relation to "normal earnings" in isolation but that ignores the context and

words the parties used in identifying the sums to which the claimant was entitled in this unique case – which were based on the scheme salary. The most natural and fair interpretation of that is the claimant's base salary (without any fluctuating or additional payments).

88. On that basis the sum to which the claimant is entitled is based on her scheme salary at the time payment is due. That does not include overtime or additional payments (whether or not the claimant believed she was required to work overtime or not). That was what the parties intended from the words they used. On that basis overtime is not included. While overtime might be part of normal earnings, her entitlement was to a defined proportion of scheme salary (which did not include overtime) with the resulting figure being a proportion of normal earnings. From the context and the words used, "normal earnings" was not the figure used to calculate the sums due. The sums arrived at, applying the calculation by reference to scheme salary, led to a sum which was a proportion of normal earnings. It was wrong to use normal earnings within the calculation.

89. It would not have been appropriate to have estimated the position in respect of overtime for each month when evidence could have been led as to the precise sum and calculation.

90. Finally, the parties intended to increase the sum payable when absent once a year. That increase was 5% on each anniversary of payment. No other changes to salary (increase or decrease) were to be taken into account.

91. The foregoing represents what the parties intended to achieve, by considering the words used within the context at the time the contract was concluded.

92. On that basis, the reconsideration application is refused.

Employment Judge: **D Hoey**
Date of Judgment: **23 December 2022**
Entered in register: **23 December 2022**
and copied to parties