

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102708/16

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Held in Glasgow on 12, 13, and 15 June 2017

Employment Judge: Ms L Doherty

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Ms Christina Walker

**Claimant
Represented by:
Mr Edwards –
Advocate**

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Greater Glasgow Health Board

**Respondent
Represented by:
Ms Stobart –
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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Judgment of the Tribunal is that the respondents did not make unauthorised deductions from the claimant's wages contrary to **Section 13** of the Employment Rights Act 1996 and the claim is dismissed.

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REASONS

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1. The claimant presents a complaint under Section **13** of the Employment Rights Act 1996 (ERA) in respect of unauthorised deduction of wages. The claimant's complaint relates to pay which she received for shifts out with standard hours since February 2015 following implementation by the respondents of the Scottish Government Circular PSC (AFC) 2012/14 (the Circular).

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2. The claimant's position is that the amount properly payable to her for working out of hours shifts since the implementation of the Circular is the rate of pay which she had received prior to February 2015.

5 3. Alternatively, it is the claimant's position that she is entitled to pay protection, therefore to receive the same rate of pay following implementation of the Circular as before.

10 4. The claims are resisted. The respondent does not accept the claimant has been paid less than she is contractually entitled to receive for working out of hour's shifts since the implementation of the Circular. It is their position that she has been paid what she is contractually entitled to receive for working shifts. The respondents also have a preliminary issue, in that they contend that if the claims are found to be for damages arising from breach of contract, the Tribunal does not have jurisdiction as the claimant remains in
15 respondents' employment.

20 5. Mr Edwards accepts that in the event the Tribunal found this was a claim of breach of contract, as opposed to a claim which the Tribunal had jurisdiction to consider under Section 13 of the ERA, then the Tribunal had no jurisdiction to consider it.

25 6. The issue for the Tribunal is to determine whether the total amount of wages paid to the claimant from February 2015 is less than the amount of wages properly payable to her.

30 7. This will involve the Tribunal in determining the claimant's contractual entitlement to pay for out of hours shifts which she undertook in the period from 1 February 2015 up until the date of the claim, which will involve consideration of whether she was contractually entitled to the pay protection claimed.

8. The claimant gave evidence on her own behalf, and for the respondents, evidence was given by Jane Gibb, Assistant General Manager for Laboratory of Medicine; Martin Wight, the Clinical Services Manager for Clyde Haematology, and Mr Farrelly a senior HR Officer with responsibility for Acute Medicine at the relevant time, and who sat on the Implementation Committee, for the proposes of the Circular.

9. The parties produced a joint bundle of documents.

Findings in Fact

10. From the information before it the Tribunal made the following findings in fact.

11. The respondents are a large organisation responsible for the provision of health care service in the Greater Glasgow and Clyde area.

12. Across the UK the NHS carried out a Job Evaluation exercise, under the name of Agenda For Change (AFC), with a view *inter alia*, to providing a common set of terms and conditions applicable to all job families, (with the exception of doctors, dentists and senior managers) that would include all elements of pay and annual leave. Negotiations to introduce AFC terms and conditions were carried out between the employer, and the recognised trade unions. These negotiations were carried out UK wide via the NHS staff council and in Scotland, via STACC (the Scottish Terms and Conditions Committee).

13. After implementation of AFC, NHS employees were employed under AFC Terms and Conditions. The effective date of implementation of AFC was 1 October 2004.

14. Operational assimilation into AFC across the NHS occurred on numerous dates after 1 October 2004, because in of the number of staff involved and the complexity of the process. In order for all to be assimilated into AFC on a practical level, the job description had to be agreed, and then that job description had to be banded under AFC.
15. Employees working in the Laboratory Medicine were assimilated into AFC contracts between August 2006 and summer 2007.
16. The AFC terms and conditions were incorporated by way of a Terms and Conditions Handbook. These Terms and Conditions were amended from time to time, and new versions of the Handbook were published to reflect this. The first Handbook was published in January 2005, (a section which is produced in the bundle from page 191). A section from the amended version of 2012 (Version 26) is produced from pages 247/263.
17. The AFC terms and conditions were amended in Scotland by way of NHS Pay and Conditions of Service Circulars issued by the Scottish Executive; a number of these are produced in the bundle. This was the means by which collective terms were incorporated into employee's contracts of employment in Scotland.
18. The introduction to the Handbook provides:-
- "This Handbook is amended whenever new agreements are reached in the NHS Staff Council. Amendments to the Handbook are published in numbered pay circulars which set out details of the changes, **including the effective date(s) of changes to pay and conditions.**" (emphasis added).*
19. Section 2 of that Handbook provided for "Working or providing emergency Cover out with normal hours" and provided for an *Interim Regime* for payment of out of unsocial hours and on call work, pending the agreement

of harmonised terms and conditions for payment of out of hours work. Out of hours work incorporated on call working and shift working during unsocial hours.

5 20. Section 2.28 provided:-

10 *“Where agreed locally, all current on-call arrangements may be protected for groups of employees for up to 4 years from the effective date of assimilation (into AFC) irrespective of whether they were nationally or locally agreed. This extended protection will apply to existing staff and new staff during the period of protection.”*

15 21. Section 2.14 of the Handbook provided that the NHS council would review and may devise new harmonised arrangements during the 4 year period of protection for on-call.

20 22. A Circular PCS (AFC) 2006/3 was issued on 16 June 2006. It provided at 2.2 that from 1 October 2004 until a new system of payment was introduced, the definition of unsocial hours and the enhancements payable was that set out in the Interim Regime. It went on to provide at 2.3 that the NHS staff council was reviewing and devising new harmonised arrangements for pay for unsocial hours.

25 23. The effect of this Circular was *inter alia* that employees of the respondents (and of the NHS in Scotland) continued to be paid for unsocial hours working in line with whatever local agreements were in place.

30 24. Prior to the introduction for AFC, each Health Board in Scotland had local arrangements in relation to conditions of pay, including the terms and conditions applicable to payment for shift work or on-call. It was the intention for the AFC to harmonise terms and conditions for pay, including payments for out of hours work performed either by way of shifts, or on-call.

25. In March 2008, the Scottish Government issued an NHS Circular PCS (AFC) 2008/1, which provided for *Maintaining Round the Clock Services*. Under *Summary*, the Circular stated:-

5 “1. *This pay Circular informs employees of the agreed arrangements for remuneration of Agenda for Change staff working at unsocial times in standard hours. A new system of unsocial hour’s payment replaces the interim regime in Section 2 of the NHS Terms and Conditions of Service Handbook.*

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 2. *A new harmonised system of unsocial hours payments has been agreed to replace the interim regime in paragraphs 1 to 12 in Section 2 of the Handbook. Staff will receive pay enhancements for work in standard hours which is done at the time specified in the agreement. There are arrangements for phased transition to the new system of payments for staff who are moving to lower or higher levels of unsocial hours payments.*

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 4. *The interim regime preserving local and national on-call arrangements is not affected by those new arrangements for unsocial hours payments. (The reference to “pathology” in paragraph 2.7 in Section 2 of the Handbook should be read to include all laboratory medicine (e.g. biochemistry, haematology, microbiology, immunology, histopathology, and cytology etc.) and is not restricted to histopathology.”*

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26. Section 2.7 of that Circular stated:-

5 *“during the interim regime staff have been able to retain their existing on-call provisions (both national and local). This has been a particular feature in NHS pathology departments. These arrangements remain unaffected by this agreement and all pathology out of hours working programmes will be regarded as included in these arrangements and the provisions outlined in paragraph 8 to 30 will not apply.”*

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27. The 2008 Circular introduced a payment structure for unsocial hours under AFC. That payment structure was set out at 2.13 (page 210), at table 2, and provided *inter alia*, that employees at Bands 4 to 9, would receive time plus 30% for time worked on Saturday (midnight to midnight), and any
15 weekday after 8pm and before 6am, and time plus 60%, for Sundays and public holidays (midnight to midnight).

28. Under the *Action* Section at point 8 the Circular provided:-

20 *“Employers should assimilate Agenda for Change staff onto the new system of unsocial hours payments with effect from 1st April 2008. Staff on national and other contracts described at paragraph 46.1 of the Handbook who have not yet been assimilated onto the Agenda for Change pay system will continue to receive unsocial hours payments in accordance with the interim regime. When these staff are fully assimilated to Agenda for Change the new system of unsocial hours payments will apply to them with effect from 1 April 2008.”*

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30 29. Pathology’ is a generic term for all Laboratory Medicine in the NHS.

30. The 2008 circular distinguished between work which was carried out during unsocial hours, and on-call work.

5 31. The effect of Section 4 of the Circular was that those working in Laboratory medicine were excluded from the pay structure for unsocial hours introduced by the 2008 Circular. The Interim Regime continued to operate so as to preserve the local and national arrangements which applied to Laboratory Medicine for payment for unsocial hours worked.

10 32. The Intern Regime also remained in place for payments for on call work, payment terms and conditions for which still had to be agreed.

33. By 2008/2009, an agreement for payment for on-call work had still not been achieved.

15 34. An NHS Circular was issued on 28 July 2009 (PCS/AFC 2008/9), (page 211), which provided at Point 1 under Summary *“this circular informs employees of the NHS staff council’s agreement to extend the period of protection of existing on-call arrangements until the joint review is finished.”*.

20 35. It went on to provide at paragraph 3:-

25 *“the target date for completion of the review is September 2009. This will allow sufficient time for consultation and NHS preparation before new arrangements could be implemented in April 2010. The review will ensure that on-call arrangements are consistent with the equal pay for work of equal value. Existing arrangements for on-call can remain in place until new arrangements are implemented.”*

30 36. The Circular provided at Point 5:-

“please note that the new arrangements mean that the last sentence of paragraph 2.7 of the handbook should be disregarded. This

change will be picked up in the next version of the handbook agreed at a UK level.”

5 37. The last sentence of paragraph 2.7, referred to protection continuing for up to 4 years from the effective date of assimilation.

38. The July 2008 Circular provided under *Action* at Point 7, that employers would be able to continue to use the existing local and national agreed systems for remuneration of on-call until the national review was finished.

10 39. The July 2008 Circular contained an Appendix, which effected alterations to Section 2 of the NHS Terms and Conditions of Service Handbook (the Interim regime), and provided that the present paragraph 2.46 was deleted, and replaced by the following:-

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“Unless locally it is agreed otherwise, all current on-call arrangements will be protected for groups of employees up to 31 March 2010, irrespective of whether they were nationally or locally agreed. This extended protection will apply to existing staff and new staff during the period of protection.” (page 214).

25 40. The effect of the Circular of 28 July 2008 was to extent the protection period, referred to in paragraph 2.7 of the handbook, beyond 4 years, until such times as an agreement on on-call payment terms and conditions could be reached. It was the anticipation at the point when the Circular of July 2008 was issued, that this would be achieved in September 2009.

30 41. By 2010, the review had not been completed, and the respondents entered into a local agreement with Unite and Unison, to introduce a new working arrangement for the provision of appropriate round the clock Laboratory Services, in compliance with the Working Time Regulations. This was *The Department of Laboratory and Medicine Agreement Provision of Round the clock Laboratory Services* (the Lab Agreement) (pages 220 to 224).

42. The Lab Agreement was a local arrangement, permitted in terms of Section 2.46 of the AFC terms and conditions.

5 43. The parties to the agreement were the respondents, Unite and UNISON, representing the Bio-medical Scientists (BMS) Bio-medical Support Workers (MLA,) and Cytology Screeners, employed within Greater Glasgow and Clyde Laboratory Medicine, and was signed on behalf of the respondents, and Unite and Unison.

10 44. The purpose of the Agreement, set out under Section 2, was *inter alia*, to:-

15 *“ensure the continued modernisation of Laboratory Medicine services across NHS Greater Glasgow and Clyde by introducing new working arrangements for the provision of appropriate round the clock laboratory services that are in compliance with the Working Time Regulations. This may be by means of shift working (including when necessary 24/7 coverage), extended day working or on-call from home or a combination of these as appropriate.*

20 45. At paragraph 3, under Scope, the Agreement provided:-

25 *“This agreement applies with effect from 1 January 2010 to **all** BMS, MLA, and Cytology Screeners and Staff within Laboratory Medicine. The Agreement is reached under an Annex “ D” of the Whitley Council PTB Handbook as provided for by the AFC Terms and Conditions of Service Handbook, Section 2, Paragraphs 2.7, 2.31, 2.32, ad 2.46 (NHS Circular PCS (AFC) 2008/9) and does not affect any other terms and conditions of service.*

30 46. Section 5 of the Lab Agreement dealt with Remuneration, and provided for BMS staff, that payment for work done be at time and a half at the top point of the relevant scale. This was a much higher rate of pay than that provided for under the unsocial working hours scheme under AFC.

47. Section 13 of the Laboratory Agreement (page 223) under *Variation to the Agreement* provided:-

5 *“All current out of hours and associated allowances will cease on the adoption of this agreement. Further, any variation to this Agreement will be subject to negotiation and agreement between NHS Greater Glasgow and Clyde, Unite the Union and UNISON. The application of this Agreement may be subject to and superceded by any future decision of the UK Staff Council.”*

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48. At the point when the Laboratory Agreement was entered into, there were ongoing negotiations with the UK Staff Council about payment for on-call work.

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49. Another NHS Circular, NHS Circular PCS (AFC) 2010/4 was issued on 8 November 2010, and in relation to On Call it provided that the NHS Staff Council had agreed a set of principles to underpin local negotiations to harmonise on-call payments, following the review of on-call and consultation on the draft principles. It went on to provide that in Scotland the negotiations around harmonised on-call arrangements would be taken forward on a Scotland wide basis through the STACC.

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50. The effect of this Circular was that a sub-group was set up in STACC, to review the principles set out by the NHS Council. The timescales however against slipped, and the first meeting with STACC did not occur until 2011.

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51. In the meantime, Laboratory staff continued to be paid unsocial hours in terms of the Laboratory Agreement.

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52. An NHS Circular was issued on 14 January 2011 PCS (AFC) 2011/2, which provided for the Extension of Protected On-Call Arrangements under Agenda for Change beyond 31 March 2011.

57. A new AFC Handbook was issued at some point after the issue of March 2008 Circular. The 2102 version of the Handbook is Amendment No 26 (referred to above), and a section of it is produced in the bundle at page 247 to 255.

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58. The Handbook contained a Section 2 on *Maintaining Round the Clock Services*. It incorporated the payment structures for unsocial hours working which was implemented by the 2008 Circular (page 249/50)

10 59. Paragraph 2.8 of this Handbook in effect replicated the provisions of paragraph 2.7 in the earlier edition of the staff handbook. Paragraph 2.8 provided:-

15 *“During the “Interim Regime” staff were able to retain their existing on-call provisions (both national and local). This had been a particular feature in NHS pathology departments. These arrangements remain unaffected by this agreement. All pathology out of hours working provisions will be regarded as included in these arrangements and the provisions outlined in paragraphs 2.9 to 2.31 below will not apply. Protection will continue up to 31 March 2011.*

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60. Section 2.20 under *Protection* provided:-

25 *“20.20- On assimilation to the new unsocial hours system the overall level of payment will be recalculated using Table 8 and paragraphs 46.18 to 46.20, If the overall level of pay falls after assimilation to the new system of unsocial hours payment protections will apply in line with paragraphs 46.22 to 46.27. The period of protection will end on the dates in paragraph 46.25.”*

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61. Paragraph 2.48 provides:-

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“2.48 - “Unless locally, it is agreed otherwise, all current on-call arrangements will be protected for groups of employees up to 31 March 2011 irrespective of whether they were nationally or locally agreed. This extended protection will apply to existing staff and new staff during the period of protection.”

62. Paragraph 2.49:-

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“On-call payments made under such arrangements should be excluded from the pre and post assimilation pay used in the calculation of any protected level of pay (see Section 46”).

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63. Section 46 of the AFC terms and conditions under the heading *Assimilation and Protection - Assimilation to the new pay structure*, (page 257) and was included under *Transitional Arrangements*.

64. Section 46.1 provided:-

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“Staff on national contracts and other contracts which incorporate, or permit employers to incorporate, national agreements on pay and conditions of service, will assimilate to the new pay system on the effective date determined below.”

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65. The Handbook provides for *Effective dates and operational dates*, at paragraphs 46.6 to 46.8.

66. Paragraph 46.6 provides:-

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“The operational date for national roll out will be 1 December 2004, with the effective date for any changes in pay and conditions of 1 October 2004, except for hours of the working week where staff will

retain their existing hours until 30 November 2004, after which the new hours will apply, subject to the transitional arrangements set out in paragraphs 46.30 to 46.32 below.”

5 67. The Transitional Arrangements provided for pay protection, at paragraphs 46.18 and 46.19, under the heading “*Calculating pay before and after assimilation*”.

68. Paragraph 46.18:-

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“In the case of the minority of individual staff whose regular pay might otherwise be lower under the new system, the following arrangements will apply to ensure that such staff will be no worse off on assimilation.”

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69. Paragraph 46.19:-

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“The level of pay before and after assimilation should be calculated taking account of the payments set out in Table 8 below, subject to the qualifications set out in paragraph 46.20”.

70. Table 8, contains two columns, the left hand column headed Payment before assimilation, and the right hand column headed Payment after assimilation. Table contains on the left hand column *inter alia*:-

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*“On-call payments (unless special transitional arrangements are in force – see paragraph 2.48) (That is where it is agreed locally to retain existing on-call arrangements for a transitional period from the effective date of assimilation. In such cases, on-call payments should be excluded from the calculation): **plus**. The right hand column, against this entry states: “On-call payments (unless special transitional arrangements are in force – see paragraph 2.48): **plus**.*

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71. Paragraph 46.20:-

5 *“The level of pay before assimilation for the purpose of this calculation will be the average level of the payments in the left-hand column of Table 8, over a reference period of 12 weeks or three months ending at the assimilation date, except:...”*

72. The effect of pay protection is that the figure on the left hand column of Table 8 was protected in the event that it was higher, than the figure on the right hand column of Table 8, and that protection was on a ‘mark time’ basis.

73. Paragraph 46.25 provided that for protection arrangements in NHS Scotland, reference should be made to the relevant website.

74. The AFC guidance from this website is produced at page 349 in the bundle, and includes reference to a letter from a Mark Butler of 2 April 2003 (page 350).

75. This is letter from Mark Butler, Director of Human Resources within the Health Department of the Scottish Executive, and the Chief Executive of the respondents. It stated:-

“AGENDA FOR CHANGE – PROTECTION

25 *You will no doubt be aware that, for the last few years, the Trades Unions in Scotland have been pressing to have the Organisational change Protection Agreement extended to cover the implementation of Agenda for change (Afc).*

30 *Ministers have indicated that such a move would not be feasible.*

However the Minister has been keen to ensure that no member of NHS Scotland staff should suffer a reduction in salary due to the introduction of the new pay systems.

5 *The specific protection arrangements agreed under the AfC proposals allow for one years protection with a pay uplift and a further five years 'mark-time' protection (i.e with no pay uplift). Modelling suggests that there are potentially a small number of staff who could see their salary reduce at the end of this six year period.*

10 *The minister has therefore confirmed to the Trades Unions (on Monday, 31 March) that he would extend the AfC 'mark-time' provisions (i.e protection of the salary but with no pay uplift) beyond the currently agreed six year period, for so long as is necessary to ensure that no member of staff suffers a salary reduction. The estimated costs of this are small and the Minister believed that the ability to stipulate that 'no-one loses' under AfC was a strong message, and one that might be helpful during the current period of consultation.*

20 *I thought it was important to let you know of this directly and quickly, to reduce any room for misunderstanding."*

76. The Minister referred to that letter was Malcolm Chisholm, and the arrangement put in place is referred to as the "*Chisholm Agreement*".

77. On 11 October 2012, the Scottish Government issued PCS (AFC) 2012/4 (the Circular), the purpose of which was to standardise on-call payments on a national basis in the Scottish NHS. This was the last piece of AFC to come into force, and it introduced the agreed on-call system for Scotland across all the Health Boards. The changes which the Circular introduced were agreed by the NHS Staff Council, and STACC. The Circular amended

the AFC terms and conditions, to form part of the terms and conditions of employment for NHS employees.

78. The Circular provided:-

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“1. – Summary -Following a national review of on-call systems in place across the UK, the NHS Staff Council agreed a set of principles to underpin local negotiations to harmonise on-call payments. In Scotland, these local negotiations took place under the aegis of the Scottish Terms and Conditions Committee, and the parties have now reached agreement on a unified system for NHS Scotland.”.

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2. - The Agreement -The full Agreement is set out at Annex A and a Q&A is included at Annex B. This circular supersedes any arrangements put in place under paragraphs 2.32 to 2.56 or Annex D of the Agenda for Change Handbook. An up to date version of the Handbook can be viewed at (the Website address).

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3.-It also supersedes any previous circulars covering on call working specifically or any issue now covered within the Attached Agreement.

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4 – These new provisions will be effective from 1 October 2012”

79. Under the heading Action, at Point 6, the Circular provided:-

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“NHS Boards and Special Health Boards should take steps to ensure that their arrangements for on-call working comply with the circular and that these provisions are applied with an effective date of 1 October 2012. Employers currently in receipt of Variation Orders covering on-call work will need to consider whether these are still required, and where appropriate work to align practices with the Agreement.”

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80. The Circular was issued on 11 October 2012, and was therefore issued after the effective date for the purposes of Action under the Circular (1st October 2012).

5 81. Annex A of the Circular (page 267) set out the arrangements for a new on-call system in Scotland, and provided that:-

10 *“These new arrangements comply with the NHS Staff Council principles and fully reflect the provisions of the Agenda for Change agreement as laid out in the Agenda for Change NHS Terms and Conditions of Service Handbook” (Section 3.1).*

82. Section 2.1 dealt with the *Effective Date*, and provided that: *the agreement will come into effect on 1 October 2012.*

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83. The *Scope* of the agreement was dealt with at paragraph 3, and provided that *the arrangements applied to all staff covered by the Agenda for Change agreement, as laid out in the Agenda for Change NHS Terms and Conditions of Service Handbook.*

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84. Section 12 of Annex A dealt with *Protection*, and provided:-

25 *“12.1 -“Staff who suffer a loss of earnings as a consequence of the new on-call payment system will receive protection of earnings on a mark-time basis. The level of protection will be assessed according to total earnings in a reference period prior to the implementation of the agreement on 1 October 2012, such reference period to be agreed locally (NHS Board/service area) in partnership.”*

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85. Section 13 dealt with *Implementation* and at provided;

5 “13.1.- *It is required that local NHS Boards/systems establish an implementation group in partnership through their respective partnership for a to implement this agreement.*

 13.2 - *It is expected that this agreement is fully implemented by 31 January 2013 backdated to 1 October 2012.*

10 86. Annex B, contained Q&A for Staff and Managers. Question 5 asked “*If an employee could elect to retain his current system of on-call payments?*”, Answer ‘*No, that the new payment arrangements for on-call have been agreed by Trades Unions and Management and will apply to all staff.*

15 87. Question 13 dealt with Protection, and asked “*What happens if I’m worse off under the new arrangements from 1 October 2012?*” Answer; “*You will not be worse off under the new arrangements. Any member of staff who finds that the new arrangements provide lower earnings will have their earnings protected in line with the ‘Chisholm Agreement’.*” This type of
20 *protection is not time limited and will continue on a ‘mark time’ basis for as long as is required.*

88. Question 14 dealt with what the “Chisholm Agreement” was, and Question 16 dealt with what ‘mark time’ protection meant.

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89. Question 17, dealt with reference period for the purposes of protection, and asked *If protection is required, what reference will be used to calculate pay protection?.*” Answer “*The effective date of implementation is 1 October 2012. This means that the reference period will be a period immediately prior to 1 October 2012. The standard accepted reference period in paragraph 46.2 of the Agenda for Change Terms and Conditions is 12 weeks or 3 months. However if this does not fairly reflect average earnings e.g. because of length of rota or maternity leave, another reference period*
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of up to 52 weeks/12 months should be agreed by local management, HR and staff organisers.

- 5 90. The respondents established an on-call Implementation Group to deal with the implementation process, in negotiation with the trade union. Mr James Farrelly, the Head of Human Resources, Acute Services Division was appointed to lead this project. The Implementation Group, agreed with the trade unions, Unite and UNISON, for all relevant employees, the pay protection period would be the AFC default position of the 3 month period preceding 1 October 2012. This agreement was signed off by all the participating trade unions.
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- 15 91. The Implementation Group had to consider roll out across a large number of staff. The number of staff involved meant that this took some time, and it decided to firstly roll out the arrangements in the Circular for those employees who would benefit from them, and to leave the roll out for employees who would lose money under the arrangements put in place by the Circular till towards the end of the roll out. Laboratory staff were among the staff would lose most, and therefore the roll out for these staff was at the end of the process.
- 20
- 25 92. Employees who were contractually entitled to more pay under the pay structure put in place by the Circular than they had been paid, received back pay calculated from 1 October 21012 until the new terms and conditions were operationally applied to them.
- 30 93. For employees who were overpaid (i.e. paid more than they were contractually entitled to in terms of the pay structure put in place by the Circular from 1 October 2012 up until the date the new terms and conditions were operationally applied to them) the respondents could have exercised a right of claw back, but elected not to do so. This was a feature of the introduction of AFE terms and conditions.

94. The 2012 Circular was put in place in the claimant's workplace on 1 February 2015, with the result that shift working was paid at the AFC unsocial hours rates as opposed to the rates which had applied under the Lab Agreement.

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95. The claimant, commenced employment with the respondents as a Medical Lab Assistant, in 2007. Her role was an AFC role, and she was engaged under AFC terms and conditions of employment. The terms and conditions contained in the AFC Handbook, were incorporated into the claimant's terms and conditions of employment, and the Circulars issued by the Scottish Government, which amended AFC terms and conditions, were also incorporated into her contract of employment.

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96. The claimant was successful in obtaining the position of a Bio-Medical Scientist, which is a Band 6 role, at Inverclyde Royal.

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97. The advertisement for the job specified the job banding, and job description, but did not specify additional payments for out of hours work, as this was contingent on the amount of hours of work performed, and depended on the intensity of the rota.

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98. The claimant was interviewed for this post in March 2012, by Mr Martin White, Technical Services Manager, and Steven Kenny, the Senior Bio-Medical Scientist, and Margaret Jane Cartwright, the Site Manager.

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99. In the course of the interview, there was a discussion about the requirement to work on-call; the claimant was told that this was mandatory. The Bio-chemical Lab operated on a 24/7 basis, and employees worked a shift pattern. The shift pattern comprised 4 shifts, 8.30am to 5pm, 10am to 6.30, 1.30 to 10.30, and 10.30pm to 8.30am. The shift system operated in a rota, and the number of particular shifts worked, depended on the number of people who could work on the rota. There were around 12 bio-medical scientists available for the rota on this shift pattern.

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100. At interview Mr White told the claimant, that she would receive around £15,000 gross per annum, in addition to her annual salary, in consequence of working on the rota.

5 101. The respondents wrote to the claimant on 17 April 2012 (page 175) confirming her appointment to Band 6 Biomedical Scientist post in Haematology, Inverclyde Hospital working 37.5 hours per week from 1 June 2012. The offer was made subject to the claimant obtaining HPC registration. The letter stated:-

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“As advised at interview this post will require full participation on the 24/7 Out of Hours rota following your training.

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Should you accept the foregoing variation(s), the remaining terms and conditions of your employment shall be those contained in your original contract of employment previously issued to you.”

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102. The claimant accepted this offer and commenced her employment in the Band 6 role on 1 June 2012. She had to undergo training and achieve certain competencies, before she was eligible for lone working, and hence inclusion on the rota. The claimant managed to complete her training within a period of around 9 months.

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103. The claimant was included in the rota, from March 2013. From her inclusion in the rota, the claimant was then paid for the shifts she worked. Her monthly income from her shift work was between £1,083 and £1,669 (page 351).

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104. Prior to March 2013 the claimant was not paid for unsocial hours shifts, as she had not worked them. In 2013 the payments made to the claimant in respect of the unsocial shift working were paid under the Lab Agreement. At the point where the claimant was interviewed, the Circular, which introduced the arrangements for AFC staff who performed on-call duties, had not been

published, and the only pay structure in force for out of hours work for an employee in the position which the claimant held was the Lab Agreement.

5 105. When the Circular was issued, it immediately became apparent that a number of employees who had been paid under the Lab Agreement would suffer a drop in wages in respect of the shift work which they performed. A number of employees contacted Mr White, the Technical Service Manager, with queries as to how they would be affected, and many sought estimates of what they would expect to receive.

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106. Mr White held monthly staff meeting with the Haematology senior staff at the Inverclyde Royal Hospital, where the claimant worked. The impact of the Circular was discussed at a meeting which took place on 31 October 2012, which the claimant attended. The minutes of that meeting (page 15 297), record that the impact of AFC remains unknown, and staff were advised to maintain a current status quo. It was noted that the date of implementation has been re-affirmed by respondents Management Team as 1 October 2012.

20 107. The respondents conducted two Road Shows in which Mrs Gibb was involved, to advise staff about the impact of the Circular. This included explanation of the pay bands which would apply under AFC (Table 2 from the AFC Handbook), and work examples, showing how this would affect payments. Mr White gave staff estimates of what they would be likely to receive, contingent on the new rates of pay, and the intensity of the rota.

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108. The Circular was not applied to Laboratory staff in Inverclyde, until 31 January 2015.

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109. The respondents wrote to the claimant by letter dated 13 January 2015 (page 347) advising as follows:-

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“NHS Circular PCS(AFC)2012/4 introduced new National On Call Arrangements for NHS Scotland. The new arrangements became effective on 1st October 2012. The Circular supersedes all local payment arrangements for on call working and removed paragraph 2.8 from the Agenda for Change (AFC) Handbook in relation to out of hours working for Laboratory Medicine.

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As you are currently participating in out of hours working within Haematology at Inverclyde Royal Hospital, this will affect you.

Shift Working (Unsocial Hours) Payments

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Consequently, staff working shifts will be paid under AFC unsocial hours as detailed in the undernoted table.”

110. The letter then set out the table which is contained in the AFC Handbook.

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111. Under the heading **Implementation** the letter stated:-

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*“Implementation arrangements for the Circular have been taken forward by the NHS Greater Glasgow and Clyde On-call Implementation Group in full partnership and as previously advised the implementation within Laboratory Medicine will be **applied from 1st February 2015** with payments for shift working as detailed above.*

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As the new arrangements are effective from 1st October 2012 it will be the case that you will have received shift allowances above the payment level that would have been due to you between then implementation on 1st February 2015. There will be no claw back of those monies from you.”

112. The claimant was therefore paid for unsocial hours worked under AFC terms and conditions from 1 February 2015. This resulted in a significant drop in the claimant's salary.
- 5 113. The claimant contacted Mr White about this, and it was suggested that she contact her trade union representative with Unite, Donald Sime, to advise him of a time line of events in relation to her situation, where she was employed prior to 1 October 2012 but unable to join the new rota until after date. The claimant wrote to Mr Sime on 20 October 2014 regarding this, 10 advising that she was concerned about her loss of earnings.
114. Mr Sime replied on 23 October advising the Trusts had no employer freedoms in relation to terms and conditions of service which were at the direction of Scottish Ministers. He advised the Scottish On-Call Agreement 15 was issued to the Board in the Circular, and the effective date of the Circular was 1 October 2012 and thus the correct payments from that date onwards were as per the Circular in the case of those doing on-call, or in the case of staff working their standards hours over a shift, as that provided in the Agenda for Change Handbook for unsocial hours. Mr Sime advised 20 that the Circular also provided the Agenda for Change Protection on a mark-time basis for any staff that would suffer a loss of earnings the received prior to 1 October 2012. That date was set in the Agreement and could not be changed by the Health Board.
- 25 115. Mr Sime indicated that the Circular acknowledged that the Health Board would take time to work through the implementation of the Agreement and that in all likelihood staff would be overpaid. It was therefore agreed that Board would not seek to retrieve such overpayments. Mr Sime expressed the view that although the claimant had joined the out-of-hours service prior 30 to 1 October 2012 she had not participated in the service until after 1 October 2012 and as a consequence she had no earnings prior to that date for the Board to take into account in calculating protection.

116. The claimant also lodged a grievance in relation to payment but this was not upheld.

Note on Evidence

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117. There were no significant material issues of credibility or reliability in this case, and although from time to time the passage of time affected the recollection of the witnesses as to certain matters on some occasions, there was no impact on any material evidence as a consequence of this.

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118. There was a suggestion in cross examination to Mr Wight that staff were unaware of the consequences of the Circular in terms of pay; however the Tribunal accepted his evidence that that was not the case, and that it was well known among Lab staff that the 2012 Circular would reduce pay unless they qualified for pay protection. This evidence was supported by the minutes of the meeting produced (page 279) in the bundle.

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Submissions

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Claimant's submissions

119. Both parties helpfully provided written submissions, which they supplemented with oral submissions. Mr Edwards took the Tribunal to the history of the claimant's employment, the Lab Agreement of 2010, and the new pay system which was applied to her in February 2015. He submitted that the Circular did not mean that by default the ACT terms and conditions for payment of unsocial hours applied.

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120. Mr Edwards addressed the Tribunal on the 2012 Circular, and the ambiguities which he submitted it created. He submitted that the claimant was entitled to pay protection and he relied upon the terms of the AFC Handbook Transitional Provisions. The interpretation advocated by the

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respondents would give an absurd result and it was not a reasonable interpretation. He submitted the claim should succeed.

Respondents Submissions

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121. For the respondents Ms Stobart addressed the Tribunal on Section 13 of ERA, and made submissions as to the facts which the Tribunal should find. Those facts encompassed both the history of AFC terms and conditions, and the particular history of the claimant's employment. Ms Stobart submitted the claimant had not explained why the terms of the Circular did not apply to her despite the fact that she accepted she was on AFC terms and conditions, and that the changes to AFC are incorporated into her contract of employment.

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122. Ms Stobart submitted that while Section 46 of the Handbook provides for pay protection in general terms the Circular gives specific right to pay protection which takes precedence over the right under Section 46. Ms Stobart submitted that even if the claimant was right, and she was entitled to ignore the terms of the Circular, Section 46 did not avail her of a right to pay protection as of 1 February 2015. The right to pay protection needs to be considered in the context of assimilation and what was happening at the time, and the effect of the assimilation which may or may not give rise to a need to protect pay.

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123. Ms Stobart addressed the Tribunal on assimilation onto AFC terms and conditions. There was no ambiguity but there was, then this could be resolved by looking at the contract as a whole, and she addressed the Tribunal on when the Circular came into effect, and the effect of its incorporation into the claimant's contract as of 1 October 2012.

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124. Ms Stobart submitted that the respondents had paid the claimant what she was properly entitled to receive in terms of her contract. The application of pay protection is in line with the Chisholm Agreement, which refers to the

loss of existing earnings. The claimant did not have existing earnings and therefore suffered no loss. AFC terms and conditions applied to the claimant regardless of what might be said at the interview. The claimant was paid what was properly due to her, and the claim should fail.

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Consideration

125. Section 13 of the ERA provides:-

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“Section 13

(1) *An employer shall not make a deduction from wages of a worker employed by him unless –*

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(a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of a worker’s contract or*

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(b) *the worker has previously signified in writing his agreement or consent to the making of the deduction...*

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(3). *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.*

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126. As the Tribunal understands it, the claimant’s claim is in respect of unauthorised deduction from wages said to have taken place from 1 February 2015 for shifts worked on a rota to cover a 24/7 shift pattern

127. The first issue for the Tribunal to determine is therefore what terms and conditions of the claimant's contract of employment applied to payment for working hours on a 24/7 shift pattern in that period?

5 128. There is no dispute in this case that the claimant was employed on an AFC contract. At the start of her employment the claimant was appointed to the BMS post at Band 6, she was employed under AFC terms and conditions of service. The terms and conditions which applied to her contract of employment were therefore those to be found in the AFC Terms and
10 Conditions Handbook, as amended by Pay and Conditions of Service Circulars issued to the Health Board by the Scottish Ministers.

129. Those terms and conditions of service allowed, by virtue of Section 2.28 of the original AFC handbook (page 196), and paragraph 4, of the PCS
15 Circular 12 March 2008 (page 204) the preservation of local and national on-call arrangements, and the exclusion of Pathology medicine from the AFC unsocial working hours pay structure.

130. It was this exception, which allowed the respondents to negotiate the Lab
20 Agreement in 2010.

131. The Lab Agreement was the local arrangement which was in place when the claimant commenced her employment, therefore at the point where she took up her post, the claimant was subject to the AFC terms and conditions,
25 (to include the provisions in relation to the Interim Regime preserving local and national arrangements, with specific reference to Pathology), and to the terms of the Lab Agreement.

132. The effect of the March 2008 Circular was to introduce a harmonised
30 system of unsocial hour payments to replace the Interim Regime, (subject to the exceptions noted above). The effect of the 2008 Circular, was therefore that all members of NHS staff (other than those to which the exception applied), were subject to the unsocial hours payment regime set out in

paragraph 2.13, Table 2 of that Circular. This included provision that those employed at Bands 4 to 9, were paid at time plus 30% for any time on a Saturday and any weekday after 8pm and before 6am, and time plus 60% all time on a Sunday and public holidays.

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133. The question then for the Tribunal, was what effect, if any, did the introduction of the 2012 Circular have on the terms and conditions under which the claimant was employed.

10 134. The Tribunal firstly considered the effect of paragraph 2 of the Circular under the heading *The Agreement*, which provides:-

15 *“The full Agreement is set out at Annex A, and a Q&A is included at Annex B. This circular **supersedes** any arrangements put in place under paragraphs 2.32 to 2.56 or Annex D of the Agenda for Change Handbook (emphases added).”*

135. Sections 2.32, to Sections 2.56 in the AFC Handbook, include section 2.48 which provides that:-

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25 *“Unless locally, it is agreed otherwise, all current on-call arrangements will be protected for groups of employees up to 31 March 2011 irrespective of whether they were nationally or locally agreed. This extended protection will apply to existing staff and new staff during the period of protection.”*

30 136. The Lab Agreement was a local agreement made under Section 2.48. The Tribunal was satisfied that on a plain reading of it, the effect of paragraph 2 was that the 2012 Circular superseded that local agreement. Mr Edwards made that point that 2.48 is not specifically referred to, however ‘2.34 to 2.56 ‘ is inclusive of 2.48.

137. In the event that the Lab Agreement was not such an arrangement under section 2.48, or if 2.48 is not included under paragraph 2 of the Circular, the Lab Agreement was in any event superseded by paragraph 3 of the 2102 Circular which provided that the Circular; '*superseded any previous Circular covering on call working or any issue now covered within the attachment*'.
5 The previous Circulars dealing with in call working included specific reference to Pathology.
138. That being the case, the question relevant to the section **13** claim was what
10 terms and conditions applied to the claimant for payment of a 24/7 shift pattern for the period of her claim?
139. The position contended for by the respondents is that by default, following
15 implementation of the Circular, the claimant's out of hours shift working was governed by the AFC provisions for unsocial working hours, which had been introduced in 2008.
140. The position contended then for the claimant, is there was no specific
20 reference in the Circular to the AFC provisions for unsocial hours working provisions introduced in 2008 applying, and they did not apply to the claimant. Agreement was reached at some later date between management and the Trade Unions to apply the AFC unsocial hours pay structure and this was applied to Laboratory staff on 1 February 2015.
- 25 141. The Tribunal was satisfied that the position contended for by the respondents was correct. In reaching this conclusion, it takes into account that a specific exception was created in paragraph 4 of the 2008 Circular. The 2008 Circular introduced a standardised system for unsocial hours
30 payments into the AFC terms and conditions, but paragraph 4 created an exception to this, in that the Interim Regime provided that local and national on-call arrangements were not affected by the AFC arrangements for unsocial hours payments, and there was specific reference to this including Laboratory medicine (Pathology). The effect of the 2008 Circular was

therefore that all NHS staff, who were subject to AFC terms and conditions were subject to the system of unsocial hours payments in the AFC Handbook, unless the exception created in paragraph 4 of that Circular applied to them, as it did to Laboratory Medicine staff at that time.

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142. It was accepted by Mr Edwards that the AFC unsocial hours system of payment is the one ultimately introduced, however he submitted there was no documentary evidence that this was the agreed system in October 2012, and in the absence of such an agreement in October 2012, the Lab Agreement remained in place. Mr Edwards suggested that there was an agreement reached between management and the trade unions in the course of the implementation discussions, which led to the new payment system being implemented on 1 February 2015 for the Lab staff. It was submitted in any event when the claimant began working shifts in March 2013 she was paid according to the rates in the Lab Agreement. No other agreement for a system of shift payments was in place at that time and the claimant continued to be paid under the system until the new system was implemented on 1 February 2015.

20 143. The Tribunal did not accept this argument. The Circular (by which AFC terms and Condition were amended) specifically superseded the arrangements put in place under the Interim Regime provided for within AFC, which preserved local and national on-call arrangements. Therefore the exception created in the 2008 Circular and permitted by it (in this instance the Lab agreement), was superseded, and by therefore by default, the system of unsocial hours payments set out at 2.13 in Table 2 of the 2008 Circular applied, and that was the case, regardless of the fact that the Circular did not specifically spell out the terms and conditions which would apply to payment of unsocial hours for Laboratory medicine.

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144. There is no issue in this case that the claimant's terms and conditions were subject to collective agreements, and the evidence in this case was that the NHS Staff Council negotiated collective terms for UK NHS staff who work

under AFC contracts, and the NHS Staff Council pass the agreements to STACC to be negotiated and implemented in Scotland, and this is done by way of Pay Circulars. The Tribunal was satisfied that the Circular had the effect of implementing the unsocial hours payment system for Laboratory Medicine (Pathology).

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145. There was no evidence to support the position contended for by Mr Edwards that it was discussions and agreement between management and the Trade Unions which led to the implementation of the unsocial hours pay regime in Laboratory medicine in 2015 .The Tribunal was not satisfied that it was the absence of such an agreement in 2012, which meant that laboratory Staff continued to be paid under the 2010 Lab Agreement till early 2015. Rather, the Tribunal was satisfied on the basis of the Mr Farrelly's evidence that the reason why the claimant continued to be paid under the Lab Agreement, was because of the time it took to implement the Circular across the number of staff within the respondents' organisation who were affected by its terms, and the respondents decision to roll out the arrangements for those staff who would be adversely effected by the new pay provisions later rather than earlier.

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146. Mr Farrelly gave convincing evidence to the effect that in terms of implementation, the respondents first implemented the Circular for members of staff who were likely to gain from its implementation in order that they would not suffer any loss in earnings, and the effect of this was that for those members of staff who were going to lose out by the implementation of the Circular, (absent the effect of pay protection) they were in fact paid more than they were entitled to contractually from the effective date of the Circular which implemented the unsocial hours pay system, but there was no claw back for wages paid in excess of employees' entitlement under the unsocial hours pay system.

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147. The Tribunal was satisfied that following the local agreement (in this case the Lab Agreement) being superseded by the provisions of the Circular, the claimants contractual entitlement to payment for 24/7 shift working were governed by the AFC provisions on unsocial working hours introduced in 2008 as incorporated into the AFC terms and conditions.

Pay Protection

148. That however was not the end of the matter, and the Tribunal went on to consider if the claimant was entitled to pay protection.

149. The question here was whether as contended for by Mr Edwards, the date upon which the claimant began to be paid under the AFC unsocial hours pay structure was the trigger for pay protection, or as contended for by the respondents the reference period for pay protection was three months prior 1 October 2012, which was the effective date of the Circular.

150. There was no dispute that although the claimant commenced her Band 6 post in 2012, she did not commence shift work until March 2013. She therefore commenced her band 6 role before the effective date of the 2012 Circular, but did not commence working shifts until after the effective date of the Circular.

151. Mr Edwards submitted that in March 2013 when the claimant began working shifts, the AFC Handbook contained provisions regarding pay protection and the aim of these provisions was to protect the payment of an employee who assimilated to a new rate of pay under AFC changes. He relied on section 20.20, and sections 46.18 to 46.25 of the Transitional Arrangements all the Handbook.

152. Mr Edwards then made submissions in relation to Table 8, and 46.2 which talks about *the level of pay before assimilation for the purpose of the calculation*".

153. He submitted that the new system for shift work was implemented by the respondents on 1 February 2015 and the new shift payments which the claimant received were substantially lower than the pre AFC payments which she had been receiving. The claimant had assimilated to the unsocial hours pay system and her overall level of pay was lower, and she was entitled to the protection set out in Section 2.20 of the AFC Handbook.
- 5
154. Mr Edwards submitted the reference period which ought to have been used to calculate the protection was pay in the 3 months prior to the claimant's assimilation of the new system i.e. 3 months prior to 1st February 2015. The average level of pay which ought to have been protected was the average level of payments for shifts received over November/December 2014 and January 2015. He also made reference to the *Chisholm Agreement* which was in addition to the protections in the AFC Handbook. In March 2003 the Scottish Executive issued a guarantee that no NHS employee would suffer a reduction in salary due to the introduction of the new AFC pay rates (the Chisholm Agreement). There was a guarantee that *no one loses under AFC*. The position of the Scottish Executive was communicated to NHS Trusts in a letter of 2 April 2003 and the AFC Handbook at 46.25 referred to the NHS Scotland website for guidance and in turn referred to this letter.
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- 15
- 20
155. On any view, the claimant had become worse on movement to AFC rates and she was entitled to protection from the removal of that contractual entitlement caused by moving to AFC pay system.
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156. Mr Edwards submitted that the respondents' position that any protection should be calculated by way of reference to the implementation date in the 2012 Circular of 1 October 2012 was incorrect. The Circular provided that the reference period was to be 3 months prior to the implementation date of 1 October 2012, but it was silent as what the reference period would be if the agreement was not implemented by 1 October 2012, and he referred in this connection to Question 17 under the Q&A Annex B of the Circular.
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157. He submitted the reference period stated was based on an expectation that implementation would be on 1 October 2012 but the new pay rates were not implemented until 1st February 2015. He submitted a reasonable person would infer that what was intended by the Circular was the protection of pay would and would look to 3 months prior to 1 February 2015.

158. Mr Edwards submitted that looking at the contract overall including the Chisholm Agreement, the method of calculation of pay protection in the AFC Handbook, the method of calculation of pay protection in the 2012 Circular, and the Q&A Question 17 of Annex B to the Circular, a reasonable person would interpret the agreement between the parties as being (1) that an employee moving to a lower rate of pay under the AFC would not be worse off; (2) the employee's pay would be protected by reference to the period of 3 months prior to them moving to a new rate of pay.

159. He submitted that the respondents' position, that the claimant was not entitled to protection as she had no NHS shift work prior to 1 October 2012, created an ambiguity in the contract. The Circular did not remove the *Chisholm Agreement* from being part of the claimant's contract, nor did it purport to do so. Mr Edwards submitted on the respondent's case the contract would then contain contradictory provisions regarding pay protection.

160. The Tribunal began by considering the AFC terms and conditions which dealt with pay protection. Section **20.20** provides for pay protection as follows:-

"On assimilation to the new unsocial hours system the overall level of pay will be re-calculated using Table 8 at paragraphs 46.18 to 46.20. If the overall level of pay falls after assimilation to the new system of unsocial hours payments protection will be apply in line with paragraphs 46.22 to 46.27. The period of protection will end on the dates at paragraph 46.25."

The Transitional Arrangements in the Handbook provide:-

5 **46.18;** *In the case of the minority of individual staff whose regular pay might otherwise be lower under the new system, the following arrangements will apply to ensure that such staff will be no worse off on assimilation.”*

10 **46.19 –** *‘The level of pay before and after assimilation should be calculated taking account of the payments set out in Table 8 below, subject to the qualifications set out in paragraph 46.20”.*

15 **46.20:-** *“The level of pay before assimilation for the purpose of this calculation will be the average level of the payments in the left-hand column of Table 8, over a reference period of 12 weeks or three months ending at the assimilation date, except:...”*

161. The 2012 Circular contained a specific provision on pay protection at paragraph **12.1:-**

20 *‘Staff who suffer loss of earnings, as a consequence of the new on-call payment system will receive protection of earnings on a mark-time basis. The level of protection will be assessed according to the total earnings in a reference period prior to the implementation of the agreement on 1 October 2012, such reference period to be agreed locally (NHS Board/Service Area) and partnership.’*

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162. The Tribunal considered if these provisions led to ambiguity or inconsistency in the claimant’s terms and conditions by virtue of the fact that clause 20.20 and 46.18/19/20 provides that *assimilation* to the new pay structure is the trigger for pay protection and the Circular provides that *implementation* of the agreement is the trigger for pay protection?

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163. In order to consider this the Tribunal had regard to the contract terms as a whole, and had regard to Section 46.1 of the Transitional arrangements. Under *Assimilation and protection*, section 46.1 provides:-

5 “*Staff on national contracts and other contracts which incorporate, or permit employees to incorporate national agreements on pay and conditions of service, will **assimilate** to the new pay system on the effective date determined below.*”

10 164. Paragraph 46.6, under the heading *Effective and operational dates*, provides: “*The operational date for national roll out will be 1 December 2004, with an effective date for any changes in pay and conditions of 1 October 2004*”

15 165. The Tribunal was satisfied reading sections 46.1 and 46.6 together, that the assimilation date for AFC was the effective date as defined by the contract (1 October).

166. In terms of Section 46.6 the *effective* date of AFC was 1 October 2004, however as referred to in the Findings in Fact, it was not implemented on
20 that date, but took some considerable time to roll out across all the staff groups. Section 46.6 makes separate provision for an operational date for national rollout of AFC.

25 167. The 2008 Circular which introduced the unsocial hours pay structure makes a similar provision. At point 8 under *Action* the 2008 makes specific reference to the fact that “*employees should assimilate Agenda for Change staff on to the new system of unsocial hours payments with effect from 1st April 2008*”. That was the date upon which the new pay system for unsocial
30 work came into effect.

168. The Tribunal was satisfied therefore that the concept of an *effective date* was one which was utilised in the AFC terms and conditions, and that this was in distinction from the date when provisions might be applied from an operational point of view.

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169. Sections 20.20 and 46.18/19 of the Handbook provide that that assimilation to the new pay structure is the trigger for pay protection. '*Assimilation*' is not defined for the purposes those sections, and no assimilation date is identified. It is however it is clear that there needs to be a trigger for the protections provided in those clauses.

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170. Section 12.1 of the 2012 Circular provides a specific right to pay protection in respect of the introduction of the AFC unsocial hours pay structure for Laboratory Medicine.

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171. The Tribunal was not persuaded by Mr Edwards' that there was an ambiguity in Section 12.1, on the basis that the phrase "*according to total earnings prior to implementation of the agreement on 1st October 2012*".

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172. Mr Edwards submitted that earnings prior to the implementation of the agreement were to earnings prior to 1 February in the claimant's case. The Tribunal did not consider that this was correct. Section 12.1 states; '*implementation of the agreement on 1 October 2012.*'

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173. The section makes specific provision for the date upon which agreement is implemented. The fact that 12.1 is silent on what happens if the regulations are not implemented on 1st October in the Tribunal's view underpins the fact that implementation can only be on 1 October 2012. Clause 12.1 did not provide for implementation on any date other than 1 October, regardless of when operational roll out took place

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174. The effective date of the regulations and the date of implementation was fixed at 1st October 2102 in terms of the Circular, and this date was not contingent on some other event taking place. This is also in keeping with regulation 13.2, under *Implementation* which provides that it *is expected that the agreement will be fully implemented by 31 January 2013*. This, it appeared to the Tribunal made it clear that date identified in clause 12.1 was fixed, and not contingent on the practical implementation of the regulations, which in the claimants case did not occur until February 2015.
175. The specific right to pay protection was therefore triggered by the implementation of the agreement on 1stOctober. The Tribunal did not consider that this was inconsistent with Sections 20.20 and 46.18 to 20 of the Handbook, all of which require a trigger for the protection they provide. The Tribunal did not consider that there was any ambiguity or uncertainty caused by the fact that Section 20.20 and 46.18 to 20 are drafted in terms of *assimilation* onto the new pay structure and Section 12.1 of the 2012 Circular provides for *implementation of the agreement on 1 October*. If there was any such ambiguity this would in any event be resolved by consideration of the contract as a whole and its use of the concept of an effective date.
176. Nor was the Tribunal persuaded by Mr Edwards' submission to the effect that a reasonable person would interpret the agreement between the parties as being that an employee moving to a lower rate of pay under AFC would not be worse off, or that an employee's pay would be protected by reference to the period of 3 months prior to the new rate of pay being implemented
177. Again consideration of the contract as a whole, demonstrates there has throughout the history of AFC there has been provision for effective dates of assimilation/ implementation. This was supported by the evidence before the Tribunal as to how the introduction of AFC terms and conditions worked in practice. Employees were paid back pay to reflect their contractual entitlement to pay from the date of the introduction of the new terms and

5 conditions, and it was open to the respondents to reclaim wages which had been overpaid against the new contractual entitlement introduced by AFC (albeit they did not exercise this right). Section 46 of the original AFC Handbook provided that the effective date of Assimilation was 1 October 2004, albeit that was not the date when in practical terms all members of NHS staff moved on to AFC contracts.

10 178. The Tribunal was satisfied that the pay protection provided for in Section 12.1 of the 2012 Circular was an explicit contract term, which set out the pay protection which the claimant was entitled to upon the Lab Agreement being superseded by the unsocial hours payment structure provided for in the AFC terms and conditions.

15 179. The Tribunal accepted the evidence of Mr Farrelly to the effect that there was agreement among the Implementation Committee that the reference period would be the default reference period provided for in the AFC terms and conditions, which was a period of 3 months prior to the date of implementation of on 1 October 2012.

20 180. It was not in dispute that the claimant had not worked a shift pattern prior to 1 October 2012, and therefore had no earnings to protect in consequence of that.

25 181. The Tribunal did not consider the Chisholm Agreement assisted the claimant, in that agreement refers to a loss of existing earnings, and the claimant had no existing earnings in the reference period which attracted protection. The claimant's terms and conditions were amended by the issue of the 2012 Circular, and the effective date of that amendment was 1 October 2012. The fact that she continued to be paid in excess of her
30 contractual entitlement between then and February 2015 is not a basis upon which she can invoke pay protection under the Chisholm Agreement.

182. In the circumstances, the Tribunal was satisfied that the respondents had paid the claimant the wages which were properly payable to her in terms her contract of employment, and her claim under Section **13** of the ERA, is dismissed.

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Employment Judge: Laura Doherty
Date of Judgment: 12 July 2017
Entered in register: 14 July 2017
15 And copied to parties

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