EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122854/18 (previously S/101194/11 and others)

Considered in chambers on 29 and 30 January 2019

Employment Judge: Susan Walker (sitting alone)

Ms Johan Jarvie and others (as per attached schedule)	**Claimants** ***Represented by:*** **Ms Hardie**
Strathclyde Joint Police Board ***Sub nom*** **Scottish Police Authority**	**Respondent** ***Represented by:*** **Ms Marsh, of counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that respondent had not exercised the discretion set out in clause 41.1 of Part 4A of the Scheme of Conditions of Service and that the claimants were entitled to be paid allowances as set out in clause 41.4.

The respondent is therefore ordered to pay to the claimants the following sums (subject to deduction of applicable pension contributions, tax and national insurance):-

1	June Duggan	£694.98
2	Johan Jarvie	£18,697.79
3	Jean McFall	£4,891.25
4	Andrew Stacey	£1,561.08
5	Helen Meldrum	£25,842.17
6	Anne Hardie	£7,322.39
7	Janet Sloan	£2,911.66

REASONS

1 This long running case was, in essence, a dispute about whether the claimants were contractually entitled to allowances for night working. The final decision of the Employment Tribunal, which found that they were entitled to these allowances, was appealed to the Employment Appeal Tribunal ("the EAT") on a number of grounds. The respondent's appeal was allowed in part in relation to the correct interpretation of clause 41.1 of Part 4A of the Scheme of Conditions of Service. This was a collective agreement applicable to civilian employees of the respondent. It was not in dispute that this clause of the collective agreement was incorporated into the claimants' contracts of employment.

2 The relevant parts of Clause 41 are as follows:

41.1 "The normal hours of duty are 35 per week exclusive of meal breaks. The normal office hours are 0845 – 1645 Monday to Thursday 0845 – 1555 Friday with 50 minutes for lunch daily. (A scheme of Flexible Working Hours is currently in operation at Force headquarters). For certain types of post the normal office hours may be adjusted to suit the requirements of the service

and when this is necessary details of the hours to be worked will be notified in the contract of employment."

……

"Where such working arrangements are necessary employees in receipt of a basic salary not exceeding spinal column point 37 shall be entitled to the appropriate allowances detailed in the following paragraphs. The Force shall have discretion to apply the allowances to employees in receipt of a basic salary exceeding spinal column point 37.

Alternatively, the Force shall have the discretion to apply an inclusive salary to take all features of the post into account."

……

41.4 "An employee required to work at night as part of normal working week shall be paid an allowance at the rate of time and a third for all hours worked between 2000 and 0800 hours."

3 The Tribunal had interpreted clause 41.1 as including a default position that there was an entitlement to night allowances and that it was for the respondent to establish that they had exercised the discretion set out in the clause to pay an "inclusive" salary. Lady Wise, sitting alone in the EAT found that was an error. She considered that there was no default position and that the clause envisaged two alternative and equally valid possibilities.

"The first is that employees on a certain salary level (including the Claimants) shall receive appropriate allowances. It is not in dispute that clause 41.4 includes night working in that. As an alternative, the Respondent can, in the exercise of discretion, apply an inclusive salary to take all features of that post into account".

4 Lady Wise directed that which alternative applied was a matter for evidence. She considered there was available evidence to make that assessment. She also considered that as the terms of clause 41.1 were not known to the Claimants before they entered into the contract, the Tribunal had erred in

concluding that the reasonable person test was to be applied to the written contractual documents. She considered that the Clause was not ambiguous and the literal rule should apply.

5 The case was remitted to the Employment Tribunal *"to assess which of the two alternative and equally viable alternatives in clause 41.1 was incorporated into the Claimants' contracts".*

6 At a case management hearing, as the EAT had directed that no further evidence was required, I directed that the matter could be dealt with by written submissions to be exchanged and provided to the Tribunal. There was then an opportunity to provide supplementary submissions which both parties provided. In particular, parties were asked to set out in their submissions any evidence that had been provided at the original hearing which they considered supported the alternative that they were asking me to find applied in this case.

Respondent's submissions

7 Ms Marsh set out the background to the remit and, for the avoidance of doubt, stated that the respondent relied on the evidence of Nichola Page as explanatory of, and supportive of, the correct construction of clause 41.1.

8 Ms Marsh submitted that because the Tribunal had applied the wrong test (the *Investors Compensation* "reasonable person" test) to the issue of what the claimants reasonably knew or did not know at the time of contracting, in consequence it would not matter at all whether they were informed of the position of allowances or not at interview (other than as a factor going to credibility) because if they were not informed they could not now rely on a condition they had no knowledge of at the time; thus this issue has been rendered nugatory.

9 Secondly, and central to the task remitted to the Tribunal, Ms Marsh submitted is the sufficiency of evidence to support the correct construction of Clause 41.1. Essentially the EAT had applied the *"literal rule"* and had said there were two alternatives. The EAT said that *"There is no entitlement as such on the part of the employee to be paid appropriate allowances in addition to basic*

salary. The entitlement is to have any element of working unsociable hours such as night working reflected either as a separate allowance or included within the employee's overall salary as evidenced by the terms and conditions of employment."

There was "*no need to go beyond the words of the clause"* It was for the Tribunal to assess the evidence and determine the issue of whether the Claimants posts were to be paid an inclusive salary against a backdrop of there being two equally available alternatives.

10 Ms Marsh submitted that it was patent from the outset that the intention was to pay the claimants an inclusive salary and there is no evidence of inadvertence, error, mistake or confusion as to how all grades of claimants were to be paid. She points to the finding of fact in the Tribunal judgment that *"when the claimants were recruited it was the intention of the respondent that allowances would not be paid for night working for the CSR role, the team leader role or the Duty Contact Centre Manager".*

11 Secondly it is accepted by the respondent that where a contract provides for discretion to be exercised by the employer, it must be exercised in good faith and not arbitrarily, capriciously or irrationally (Supreme Court in *Braganza v BP Shipping Ltd and another* [2015] ICR 449.) Ms Marsh submitted that the evidence complies with this principle.

12 Ms Marsh then turned to identify the evidence relied on to demonstrate the exercise of the discretion by the respondent to pay inclusive salaries to CSR staff.

13 Firstly she pointed to the Best Value Review commissioned by the respondent before September 2003 which recommended a call centre model. This evidence of background research into how best to manage this aspect of service demonstrates how the policy and strategic decision making was initiated.

14 She then pointed to the Union Liaison meetings of 17 September 2003 and subsequent meetings. The Unions were advised in advance of the proposal

that no allowances would be paid for fixed shift working. The Unions dissatisfaction with the decision is identified in Document 93 (at p90-91); in Document 95 (at p90) and Document 96 (p102). This is also reflected in Nichola Page's statement at para 31 and in the finding on fact in the Tribunal's judgment para 7 p6 (viii). Ms Marsh submitted that this demonstrated that the trade union accepted that the respondent had the right to invoke the discretion, unilaterally. Further, when the unions decided to back members claims of unlawful deductions, they intimated that "there is no guarantee of success". Ms Marsh submitted that had the Union officials believed there was any error of construction in relation to the exercise of discretion, it is inconceivable that they would not have acted sooner.

15 Ms Marsh also asked the Tribunal to take into account the Report to the Strathclyde Joint Police Board by the Chief Constable dated 22 September 2003. Para 3.3 of that Report states that *"basic salaries will apply to such staff with no allowances being paid".* It is submitted that this Report, which was approved by the Board, is not only indicative of intention (as found by the Tribunal) but demonstrates that staffing needs had been fully costed, specifically on the basis that no allowances would be paid. The fact that the term "inclusive salaries" was not used, Ms Marsh submits is a distinction without substance. It is patently clear to all actors at the time and all subsequent times that in the context of clause 41.1 "inclusive salary" is synonymous with "basic salary with no allowances". There is no question of the contractual term in issue being an ambiguous term requiring the application of any sophisticated construction techniques beyond the "literal rule".

16 Ms Marsh also asked the Tribunal to take into account the Report: Recruitment and Retention of Contact Centre Staff (2004). Nichola Page said she believed this report was commissioned by Chief Superintendent Blair in late 2004 and that it had been presented to the Force Executive, where the recommendations were accepted as evidenced in the recruitment advert that followed in 2005 (Doc 79 p 31) which shows the starting salary as AP1 rather than GS3/AP1 as originally intended. (Tribunal's Finding in Fact para 7, page

5 (v)). It was accepted by the respondent that the fixed shift recruitment had caused some difficulties and would impact on retention. The respondent therefore undertook research to consider options. This was a thorough evaluation exercise which included an analysis of what shift allowances if implemented instead of an inclusive salary would cost. This demonstrates compliance with *Braganza* duty. The decision of the Force was to accept the recommendations in the report which included regrading the CSR posts from GS3/AP1 to AP1 and the retention of the original decision that no allowances would be paid. Nichola Page explains this in her witness statement paras 26-30.

17 The recruitment information is silent on allowances citing only grade and salary. The "Recruiting: Best Practice Document" issued to interviewers reminds them that candidates should be advised of the conditions of service and specifically states for these posts "Allowances N/A". The letter of appointment is silent on allowances but does at point 5 refer to overtime. This accords with normal practice, which according to Nichola Page was to state any additional payments applicable, such as allowances. This was accepted by the Tribunal at para 49, p24 line 14-16. All claimants signed acceptance slips being evidence that they had accepted the appointments on the terms offered, on documentation silent on the matter of allowances and, on the basis of their submissions, they had no knowledge of the existence of allowances, *inter alia* for night working, until later. The respondent submits that this demonstrates conclusively that the claimant had no knowledge of the existence of allowances until after taking up employment. They were offered and accepted employment on the basis of an inclusive salary (i.e. a salary absent the allowances identified in Clause 41.1) and on the basis that the respondent lawfully exercised the Clause 41.1 discretion.

18 The fact that the respondents started paying allowances to CSRs (backdated to 1 September 2011) appears to have been considered by the claimants as an admission of liability. The evidence of Nichola Page was emphatically that this was not. The reasons were the ongoing risk to exposure to equal pay

claims and there were sound business reasons to streamline provisions ahead of the merging of the 8 Scottish Police Forces into 1.

19 The respondent submits in conclusion that the evidence clearly demonstrates that the respondent has satisfied the evidential burden that there was no unlawful deduction of wages and that the claims should be dismissed.

Claimants' submissions

20 The claimants submitted that they were entitled to the allowances payable under Clause 41.1 for hours worked between 20.0 and 0800 hours from the start of their employment until September 2011.

21 They submit that there is no material or written evidence to support a discretion being exercised to apply an inclusive salary. There is no evidence of communication to the claimants which had a contractually binding commitment removing the clause 41.4 or exercising a discretion to apply an inclusive salary taking all features of the post into account

22 It is not in dispute that the claimants were employed under the terms of the Strathclyde Joint Police Board Schedule of Terms and Conditions of Employment APT&C Staff and the Conditions of Service were incorporated into the claimants' individual contracts of employment.

23 These terms and conditions included clause 41.4 which provided that those required to work at night as part of their working week shall be paid an allowance at the rate of time and a third for all hours wholly worked between 2000 and 0800 hours. The wording of clause 41.4 is clear and unambiguous.

24 Clause 41.1 para 5 states that *"where such working arrangements are necessary, employees in receipt of a basic salary not exceeding spinal column point 37 shall be entitled to the appropriate allowances detailed in the following paragraphs."*

25 The claimants were in receipt of basic salary which did not exceed spinal point 37 and they are properly entitled to receive the terms of their contracts of

employment to be paid the night working allowance at the rate of time and a third for all hours wholly worked between 2000 and 0800.

26 There is written evidence before the Tribunal that confirms that basic salary is what applies to staff employed within the contact centres. The claimants point to the Chief Constable's report which states *"basic salaries will apply"* and a letter from John Gillies dated 29 March 2010 which states *"when the CSR role was being established the question of whether allowances would be paid to CSRs was considered. Ultimately it was agreed that CSRs would be offered a basic salary."*

27 The claimants submit that their contractual documents do not contain any term removing the entitlement to Clause 41.4 and do not contain any reference to a discretion having been exercised to apply an inclusive salary to take all features of their posts into account.

28 The claimant accepted the offer of employment which said, *"Your terms and conditions are enclosed".* The claimants did not accept an offer of employment that stated a discretion had been exercised and they were being paid an inclusive salary. They did not accept an offer of employment that stated that clause 41.4 would not apply. There was no communication either verbally or written to the claimants that stated the employer had exercised discretion to apply an inclusive salary. It would need to be made clear not paying allowances or paying inclusive salary to be contractually binding. There was no documentation produced in evidence to conclude that there was an intention or contractually binding action taken to exercise a discretion to apply an inclusive salary taking all features of the post into account.

29 September 2011 the respondent started paying full allowances as per clause 41.3 and 41.4. to all support staff working in the contact centre. If they were already being paid an inclusive salary this would be overcompensating.

30 The claimants again point to the Chief Constable's report which says that basic salaries will apply. It does not propose or seek approval to pay an inclusive salary or exercise a discretion. Strathclyde Police Board agreed to

approve the establishment of the posts on the grades detailed in the Chief Constable's report. They were not requested to and did not approve inclusive salaries or did they approve for a discretion to be exercised to apply an inclusive salary. The minutes show that the board agreed to "*approve the establishment of 164 (FTE) posts on the grades detailed in the Chief Constables report".* They did not approve inclusive salaries.

31 The claimants point to the options identified to assist with the recruitment and retention where they say there was no mention at any time of any consideration to exercise a discretion to apply inclusive salary for any posts.

32 The claimants point to Nichola Page's evidence where she states, *"It is only as a result of the recruitment experience that the recommendation to commence at AP1 was made"*; *"Effectively subsequent recommendation was made to allow the Force to be a more attractive employer*" "*again to address recruitment issues".* The claimants submit this demonstrates that this was the true factual reason for the CSR post being regraded to an AP1 and not as an inclusive salary as alleged.

33 The claimants submit that there are inconsistencies in Nichola Pages evidence. The first mention of an inclusive salary was introduced by Nichola Page in her witness statement in 2017. This is inconsistent with the paperwork presented to the Tribunal as there is no evidence of inclusive salary or basic inclusive salary within the paperwork and no evidence of the source of this information as evidence.

34 Secondly, the events recorded in Ms Page's statement are known to the witness as a result of verbal briefings from individuals who were involved at the relevant time. If a decision had been made to exercise a discretion to apply an inclusive salary taking all features of the post into account it is reasonable to expect that this would have been known to Senior Management who could have used this information to close the matter at the beginning rather than wait until 2017 and present Nichola Page's statement to the Tribunal and in particular not to use this information during the extensive dragged out grievance process.

35 It would be reasonable to expect the people who provided the briefings to Nichola Page to give evidence, the decision not to call any of them as witnesses is unclear.

36 The claimants point to point 46 of Ms Page's statement where she states "*it is important to note that no mention was made within the grievance paperwork of the fact that the aggrieved staff had an inclusive grade"* and the "*This appears to indicate a lack of understanding that the CSR post was an inclusive salary".* The claimants ask, *"A lack of understanding by all of the Senior Officials involved in the matter?"* Also, they note that there is no mention of an inclusive salary for employees other than CSRs, specifically Team Leaders and Duty Managers.

37 Nichola Page states that *"because of the intention to use the discretion as outlined under the national terms and conditions (i.e. to offer an inclusive salary) the role was proposed as GS3/AP1"* and she refers to the Chief Constable's report as evidence. However, under cross-examination, Ms Page agrees that the Chief Constable's report does not say *"inclusive*" or "*discretion"*. The claimants submit that not paying allowances does not mean "inclusive". This was accepted by Ms Page but she suggested that *"anyone working with it would see no allowances applied. Would understand intention".*

38 The claimants submit it is important to highlight there was no evidence presented to the Tribunal to support an intention to exercise a discretion to apply an inclusive salary to staff employed as CSR, team leader or Duty Manager. The respondent's position is that they exercised a discretion to apply an inclusive salary to take all features of the post into account. The claimant point to the words *"to take all features of the post into account".* The claimants submit that as features of the posts were working permanent backshifts, night shifts and weekends, it would be reasonable to expect allowances payable for working night and weekend hours would be important relevant factors that would be taken into account in considering whether to exercise discretion, ensuring staff are sufficiently compensated for all features of their posts. For example, to expect that staff working constant

nightshifts and across weekends would be fully compensated against staff who worked day time hours Monday to Friday. A reasonable person would expect there to be written evidence/documentation showing the decision-making process to exercise the discretion and also detail what features of the post were taken into account.

39 The references by Nichola Page to job evaluation are irrelevant to the whether there has been an unlawful deduction. It is clear that when evaluating posts, this did not include allowances for working unsocial hours.

Respondent's supplementary submissions

40 The claimants' points require to be considered in terms of what the remission by the EAT requires namely *"no further evidence is required in order for the Tribunal to assess on that evidence which of the two equally viable alternatives in Clause 41.1was incorporated into these Claimants' contracts"*

41 The claimants predicate their case on the absence of the word "inclusive" as it appears in Clause 41.1 in the documentation leading up to the creation of CSR posts and in the contractual documentation they received. They say that is sufficient for it to be found that the discretion was not engaged. The respondent submits that that approach to construction is wrong. The word "inclusive" can only be determined from the context in which it appears. In the instant case the term "inclusive" is more comprehensively defined by what it does not include – that is the allowances set out in clause 41.4. The respondent submits that the fact that the term "inclusive" did not appear in various reports generated in 2003 and 2004 is nothing to the point. The use of phrases such as "*basic salary with no allowances*" as in the 2003 Report and contractual documentation consistently silent on the payment of allowances, along with the fact that no allowances were ever paid until late 2011 is clear evidence that the discretionary alternative was engaged when the claimants were appointed and, given the ratio in the EAT's judgment, the respondent submits it is determinative.

42 The claimants submit that the evidence about job evaluation has no part in the facts of this case. The respondent submits that is wrong. The claimants are conflating how jobs were evaluated in 2003 prior to the recruitment exercise and how that were subsequently re-evaluated and banded following a force-wide exercise in 2009. Ms Page's evidence was that the jobs were evaluated at the outset as GS3. They were authorized as GS3/AP1 – meaning they would start at the bottom of GS3 and following a lengthy progression could reach the top of the AP1 scale. It was only in 2004 that the grading was adjusted to make the starting basic salary starting point AP1 enabling staff to reach higher pay levels more quickly. This was to incentivise and aid recruitment levels and retention. The purpose of her evidence in respect of the JES implemented in 2009 was to demonstrate that in terms of the job evaluated CSR role, that had not changed and CSRs were earning a higher salary than other posts that had been comparably evaluated, this is indicative of taking "*all features of the post into account*".

43 The claimant make much of what they see as an unfairness from fixed shift working absent a pay differential. What they have failed to take into account was the rationale for the original grading and the operating factors that underpinned the grading of the posts and the subsequent re-grading. It was evidence that fixed shift working was not particularly popular at least with some CSRs particularly those who were not working a permanent dayshift. Nichola Page said in evidence that the inclusive salary allowed staff to mutually swap shifts at their convenience because there were no pay differentials. Had an inclusive salary not applied this practice would have been prohibited because of the impact of pay. Therefore CSRs had a higher base level pay rate than other GS3 workers and flexibility. She reiterated that managers and supervisory staff in call centres having no budgetary responsibility could enable the unpopular fixed shift regime to be operated flexibly by allowing shift swapping and thus the inclusive salary across all shift patterns was reflected both in salary and working practice at centre level. The suggestions that the respondent had somehow failed to take into account "all features of the posts" when establishing the type of working (fixed shift) and pay practice (uniform and inclusive by exercising the discretion) and

subsequently enhancing it above the JES level for recruitment and retention purposes are simply unfounded.

Claimants additional submissions

44 Basic salary with no allowances is not synonymous with an inclusive salary which clause 41.1 clearly states that all features of the post are to be taken into account. This proves that basic salary is not synonymous with inclusive salary.

45 The employer's obligation of trust and confidence is a reason itself for requiring cogent evidence to show the discretion having been exercised to apply an inclusive salary taking all features of the post into account. It is expected to see written evidence to show an intention, option or recommendation to exercise the discretion to take all features of the post into account and for clear written evidence on the decision making and what relevant features were taken into account to ensure post holders would be sufficiently compensated for relevant factors such as working permanent night shift and weekends against the staff employed to work Monday to Friday day time hours, It would be reasonable to expect staff working permanent night shift to be paid a higher all-inclusive salary against staff who work Monday to Friday 0715 – 1515 when taking all features of the post into account.

46 It is not uncommon for contracts of employment details to be in different documents or for other particulars of your employment to be provided in instalments or contained in separate collective agreements. The particulars and collective agreements still remain incorporated into the claimant's contract of employment. The claimants are provided with all other benefits contained within the collective agreement and scheme of conditions such as overtime.

47 The claimants do not agree with the view taken by the EAT Judge that there is no need to go beyond the words of the clause. They point to clause 41.1 which says that employees in receipt of basic salary not exceeding spinal column 37 shall be entitled to the appropriate allowance in the following

paragraph. The claimants submit that there was no evidence to support the respondent's contention that it was patent form the outset that they intended to pay claimants an inclusive salary. The grades to be paid were approved. The finding by the Tribunal was not a finding in fact of an intention to pay an inclusive salary. An intention not to pay allowances for night working is not synonymous with paying an inclusive salary to take all features of the post into account. The contact centre staff were employed and paid at the bottom scale of the approved grades.

48 There is no cogent evidence to prove a decision-making process or to conclude a decision to exercise discretion to apply an inclusive salary to take all features of the post into account. In the absence of such, there is no scope for the Tribunal to review it as having been exercised in good faith. The evidence required to support the respondent's position is not based on an intention to not apply clause 41.4, but it is required to support the fact that the respondent exercised that discretion to apply an inclusive salary to take all features of the post into account. It is the claimants understanding the it would be the decision-making process to evidence the actual exercising of the discretion to apply an inclusive salary that would be subject to a *Braganza* duty in this case and the relevant factors taken into account or discarded. There is no evidence material or otherwise to demonstrate adherence to *Braganza* duty. There is no evidence to show that all relevant matters were considered. In the absence of such evidence it is clear there was no intention to exercise a discretion to apply an inclusive salary taking all features of the post into account.

49 Point 17.2 – the document relied on does not illustrate that the trade union accepted that the respondent had the right to invoke the discretion. Para 3.4 of the document referred to says "Unison reiterated their opposition to any plans to reduce the level of payment for working shifts and restated their view that enhanced payments should be made for working fixed shift! Had Unison been aware of a discretion being exercised to apply an inclusive salary why would they wasted their time and effort on backing their members through a lengthy internal complaint and grievance procedure which resulted in full

allowances and compensation offers being made to all members of contact centre staff.

50 There is no evidence of costings in the Chief Constable's report linked to what features of the post would be taken into account and what features would be discarded. For example permanent night shift v permanent Monday to Friday dayshift.

51 If "inclusive salary" was synonymous with "basic salary with no allowances" and this was patently clear to all the actors at the time and subsequent times, why did all the senior officials and Unison representatives fail to bring this to the attention of all concerned before 2017?

52 Why did the recruitment and retention document only refer to CSRs and not team leader and duty manager posts if this action is relied on by the respondents to pay an inclusive salary instead of allowances, the consultants were not asked as part of their remit to review payment of allowances and therefore no recommendations were made? The research was undertaken as a result of recruitment difficulties with CSRs.

53 The respondent's position is based entirely around that the respondents considered an intention to not pay allowances to the claimants automatically means they exercised a discretion to apply an inclusive salary to take all features of the post into account. This is not the default position and there is no evidence that the respondent exercised a discretion to apply an inclusive salary taking all the features of the post into account. There are two options – payment of allowances as referred to or the exercise of discretion applying an inclusive salary to take account of all feature of the post. In the absence of clear evidence that the respondent exercised the discretion to apply an inclusive salary to take all features of the post into account, the alternative option that allowances under clause 41.4 are payable is incorporated as part of the contract of employment.

Discussion and decision

54 I am conscious of the restricted terms of the remit. It is not in dispute that clause 41 was incorporated into the claimants' contracts. The EAT has concluded that Clause 41.1 includes two equally valid alternatives. My task is to asses, on the basis of the evidence presented at the original hearing, which alternative applies in the claimants' contracts of employment. The literal rule is to apply.

What is the scope of the discretion?

55 It important to look at the wording of the discretion. This is a discretion, as an alternative to paying allowances for unsocial hours, to *"apply an inclusive salary taking all the features of the post into account."* The respondent argues that this is synonymous with a discretion not to pay allowances. The claimants disagree. I accept that there is clear evidence that the respondent intended to pay basic salary only to the claimants and not to pay allowances for night working. The question is whether having that intention and acting on it amounts to exercising discretion under clause 41.1.

56 Ms Marsh invites me to read the term "inclusive salary" in context and conclude this means the respondent can exercise discretion to pay "basic pay and no allowances". I consider it helpful to consider how the EAT described clause 41. Lady Wise said:

"There is no entitlement as such on the part of the employee to be paid appropriate allowances in addition to basic salary. The entitlement is to have **any element of working unsociable hours such as night working reflected either as a separate allowance or included within the employee's overall salary** as evidenced by the terms and conditions of employment." (my emphasis)

57 So the working of unsociable hours such as night work has to be reflected in some way whichever alternative is adopted. This does not give the respondent the right simply to elect not to pay allowances for night working and to pay basic salary instead. I do not, therefore, accept Ms Marsh's

principal submission which is that an "inclusive salary" under clause 41.1 is synonymous with paying basic salary and no allowances. Read in context, if no allowances are to be paid, then the "inclusive salary" must "include" reflection of the unsociable hours working that is one of the features of the post.

58 Paying an "inclusive salary" would not necessarily mean that the employee would receive an enhanced rate of pay above basic pay. That might be the result but, it could be that having taken all the features of the job into account, the element of unsociable hours was in some way offset by some benefit meaning the "inclusive salary" ended up being the same as basic pay. However, some consideration of all the features of the post (including the fact of night working) must be undertaken if a discretion to pay an inclusive salary is to be properly exercised in accordance with the Clause 41.1 (and therefore in accordance with the claimants' contracts of employment).

Did the respondent exercise that discretion in 2003?

59 I turn, then, to see whether there is evidence that the respondent has exercised that discretion in the case of the claimants. The Chief Constable's Report ("the 2003 Report") states *"Both of the Contact Centres will be operational to provide a 24 hour 7 day service. Members of staff will work fixed shifts to cover this period.* ***Basic salaries will apply to such staff with no allowances being paid****".* (my emphasis). This report was approved by the Joint Police Board.

60 The respondent's primary position is that this follows the Best Value Review and that it demonstrates that the discretion in Clause 41.1 being invoked "ab initio" (Para 17.3 of the respondent's submissions). It is submitted by Ms Marsh that this is not only evidence of the discretion being exercised but that is demonstrates that staffing needs had been fully costed, specifically on the basis that no allowances would be paid and so there was a rational basis for it. I agree this is evidence that the respondent intended not to pay allowances but I do not consider this is evidence of consideration being given to an inclusive salary as required by Clause 41.1. There is no mention of how the

element of night working has been taken into account. There is no mention of an "inclusive salary" only "basic salary".

61 Ms Page said in her witness statement that the intention to use what she called *"inclusive base salary" allowed "the costs of the model to be clearly established and understood".* (Paragraph 19) She continued, "*The understanding and control of costs is central to "best value" principles and would therefore be an important consideration and influencing factor at the time of looking at the options for setting up the Contact Centres".* In Paragraph 20 of her witness statement, Ms Page says that *"the intention to pay an inclusive salary under the provision outlined above was express not only within the reports submitted to the SJPB but was exhibited through the process of setting up Contact centres. Recruitment at the time expressly stated what allowances would be payable and those for the Contact centre staff outlined only "inclusive basic salary provision".*

62 Ms Page accepted in cross-examination that the use of the term "*inclusive salary"* did not appear anywhere in the documentation from the time the claimants were being recruited. My understanding of this part of Ms Page's evidence was that she was using *"inclusive salary*" in the way that Ms Marsh had advocated (and which I have not accepted) that "*inclusive"* simply means basic salary with no allowances. I accept that the relevant documents show an intention not to pay allowances and the posts may well have been costed on that basis. However, I do not consider these documents show any consideration of what an "inclusive salary" should be. I don't think this part of Ms Page's evidence affects my consideration of whether the respondent had exercised the discretion in accordance with Clause 41.1.

63 Ms Page's evidence was that the jobs were evaluated at the outset as GS3 but that they were authorized as GS3/AP1. She concluded (at paragraph 27) that "*because of the intention to use the discretion as outlined under the national terms and conditions (i.e. to offer an inclusive salary) the role was proposed as GS3/AP1 and this is documented within the Report by the Chief Constable"* (the 2003 Report). She noted that this meant that the relevant

employees would have earning capacity beyond the top increment of the GS3 grade by progressing to reach the top of the AP1 scale. Ms Page concludes that this produced *"the effect of an inclusive salary as it allowed earning to exceed the basic salary of that grade (in a similar way that allowances increase earnings over basic* pay".

64 I understand Ms Page to be suggesting that there was a conscious decision to pay CSRs over 2 grades (GS3/AP1) instead of just GS3 and that this decision was made to take account of the fact that allowances were not being paid for unsocial hours. Ms Page was not, of course, involved at the time but she gave evidence in cross-examination, that she understood that to have been the case having spoken to "evaluation". Having considered the matter carefully, I do not consider that this evidence is reliable for the following reasons.

65 Ms Page was not herself involved in the process. Her evidence is second hand from unnamed individuals. There is no paperwork remaining to support that position. The 2003 Report clearly proposes a grading of GS3/AP1. It does not say anything about that grading having arrived at that grading in some way to compensate for no allowances being paid for night work. If a post spanning two grades in this was unusual, as suggested by Ms Page, it would be expected that there would be reference to it in the Chief Constable's report and an explanation of why that was being proposed. There is nothing to that effect.

66 Ms Page suggests this grading allows earning "to exceed the basic salary of that grade (in a similar way that allowances increase earnings over basic pay". I do not consider that this not logical. If there was an intention to reflect the requirement to do night work by some adjustment to pay, that would only make sense if it applied as an increase in the starting rate of pay as well as later. If the starting rate of pay is to be GS3, and that is the rate the job has been evaluated at, where is the consideration of night work in the salary to be applied at appointment? The possibility of more increments in the future would not be a logical way of *"taking all the features of the post into account*".

Further, the grade applies to all CSRs. It does not differentiate between those doing night work and those who were not and there is no similar argument made in respect of the other positions such as duty manager and team leader.

67 I think it is also significant that during the grievance process or in the discussions with the trade unions, the respondent has not explained that although allowances would not be paid, this element of the posts had been considered and was reflected in the grading. That would have been an obvious point to make. However, I have not been offered any evidence to that effect. On the contrary, we see in John Gillies response to the grievance dated 29 March 2010, he says *"When the CSR roles were being established the question of whether allowances were to be paid to CSRs was considered. Ultimately it was agreed that CSRs would be offered a basic salary with no allowances".* The respondent does not make this point either in the ET3 or at any stage of the process up until Ms Page's witness statement.

68 On the balance of probabilities, I do not therefore accept that there was any consideration at this stage of what would be an appropriate salary that reflected the element of night work. On the contrary, it seems more likely on the available evidence that the respondent believed it had the power simply to decide not to pay allowances for night work and that is what they chose to do. This is reflected in Ms Marsh's primary submission which is that "inclusive salary" is the same as "basic pay with no allowances".

69 I accept there may be a rational basis for the respondent deciding not to pay allowances for night working, essentially one of cost. However, as I have set out above, I do not consider that the scope of the respondent's discretion under Clause 41.1 entitles them simply to elect not to pay eth relevant allowances, however rational that decision might be. I do not consider that the 2003 Report demonstrates that any consideration at all was given at the outset to the night working element of the relevant posts and how that might be reflected in an appropriate inclusive salary. I do not think that Ms Page's evidence adds to that nor do any of the other contemporaneous documents.

70 Ms Page also suggested that the fact that allowances were not paid for night working meant that it was easier to operate a flexible shift system and local managers could agree changes to shifts because altering shift sis not affect pay. That may well have been the result in practice of having the same salary for those who were working night hours and those who were not. However, there is simply no evidence that this was any part of the rationale for not paying allowances in the first place.

If not, was the discretion exercised subsequently before the claimants were appointed?

71 I then considered whether the necessary consideration was undertaken at a later stage, after the 2003 Report and before the claimants were employed. Ms Marsh submitted that it was accepted by the respondent that the fixed shift regime had caused some recruitment difficulties and would impact on retention. An external firm was commissioned to undertake research to consider options to ameliorate these effects. She submitted that the 2004 Report on "Recruitment and retention of Contact Centre Staff" "(the 2004 report") was a thorough evaluation exercise which included an analysis of what shift allowances if implemented instead of an inclusive salary would cost. I have looked carefully at 2004 Report to see whether it does contain the proper exercise of discretion under Clause 41.4.

72 The Executive Summary of the 2004 Report states that *"The purpose of this paper is to review the remuneration and shifts of Contact Centre staff taking cognizance of external factors that may have an impact on the recruitment and retention of Contact Centre staff".* The focus, therefore, is on recruitment and retention. It starts from the basis that unsociable hours allowances are not payable to CSRs. Payment of allowances to CSRs is one of the options considered and rejected. The recommendation was that CSR posts were regraded as AP1 rather than GS3/AP1. This meant that someone appointed as a CSR had a higher starting salary than previously anticipated and would reach the top salary band quicker (in 3 years). This option was recommended

"in recognition of the external competition for high calibre experienced Customer Service Representatives" (Para 7.1 of the Report).

73 It seems clear that the rationale for instructing the 2004 Report was difficulty in recruitment and concern about retention. The report focuses on competition from other employers. In making their recommendation, the report clearly takes account of cost as well as the effectiveness of the different options at improving recruitment and retention of CSRs. The consultants carrying out the 2004 report were not asked to consider how the unsociable hours requirement was to be reflected in salary, they were merely asked to recommend ways to improve recruitment, in particular for night and late shifts. Ms Page in cross-examination confirmed that this report was about recruitment. She said the decision was to *"start everyone at AP1 to help with recruitment."* She stated that this exercise was *"not about inclusive salaries"* as the Chief Constable had *"already gone forward with that".*

74 So Ms Page appears to accept that the 2004 Report was about difficulties with recruitment and was not about considering an inclusive salary taking all features of the post into account. Her view was that that decision to pay "inclusive salaries" had already been made in the 2003 Report. Yet, as has been seen, that Report recommended the payment of *"basic salary – no allowances"* and I have found that there was no consideration of how the element of night working would be reflected in an inclusive salary.

75 I do not consider that the discretion in clause 41.1 has been exercised by the instructing of or acting on the recommendations from the 2004 Report. The decision remained that allowances would not be payable and a basic salary only would be paid, (albeit at a slightly higher starting grade than initially envisaged). The maximum salary was unaffected by the 2004 Report.

76 I also consider it is relevant that the Report was only concerned with CSRs not the other employees at the Contact Centre who also undertook night working and that the decision about starting salary was applied across all shifts, it was not specific to those undertaking night work.

77 The end result of the 2004 Report was a higher grading for CSRs. However, for the reasons set out, I do not consider this was as a result of the respondent exercising the discretion under Clause 41.1.

78 For completeness, I should say that I do not consider the fact that the respondent started paying allowances for night work and backdated that to 2011 has any relevance to the case. I accept the reasons given for that by the respondent.

Conclusion

79 My remit is to consider which of two valid alternatives applies in Clause 41.1. I consider the respondent has not exercised the discretion in terms of Clause 41.1. I am left with the other alternative, which is that the claimants are entitled to the night allowances set out in clause 41.4. The primary position of the respondent, that it was entitled simply to pay basic pay and no allowances, is not an option that I consider is permitted by Clause 41.1.

80 I am conscious that it might be suggested that I am simply applying the default position again, which the EAT has said was an error. However, for the avoidance of doubt I have not applied a default position. I accept that there are two alternative provisions. I have found that the discretion has not been validly exercised by the respondent under clause 41.1. That leaves the alternative of an entitlement to the night allowances in clause 41.4.

81 That conclusion may seem illogical because the evidence shows that the respondents did not intend those allowances to be payable and there was no evidence that the claimants were aware of the provisions about night allowances when they entered into the contract. Ms Marsh submits that the evidence shows conclusively that the claimants had no knowledge of the existence of allowances till after they were appointed and that they were clearly offered and accepted employment on the basis of an inclusive salary, which she describes as “a salary absent the allowances identified at Clause 41.4”.

82 I agree that there is no evidence that the claimants were aware of the existence of allowances for night work when they were interviewed or appointed. This also appears to have been accepted by the EAT. However it is not uncommon when the terms of a collective agreement are incorporated by reference into an individual's contract of employment, that the individual is unaware of the detailed provisions that they are agreeing to. That does not prevent these provisions being binding on both parties. The necessary agreement is to the terms of the collective agreement being incorporated into the contract of employment, not to any individual term itself. That can mean that an employee has the benefit of an advantageous term of which they were unaware. Equally it can mean the employee is bound by a term that is disadvantageous and of which they were unaware.

Disposal

83 I do not understand there to have been any appeal to the amounts awarded in my previous judgment, I order that the respondent shall pay to the claimants the sums set out in that judgment.

Employment Judge **S Walker**

Date of Judgment **27 February 2019**

Entered in register and copied to parties **27 February 2019**

Schedule of claimants

Name	Case number(s)
Mrs J Jarvie	112287/11 and 101194/11
Ms J Sloan	101210/11
Mr A Stacey	101213/11
Ms J Duggan	101187/11
Ms A Hardie	101193/11
Ms J McFall	101199/11
Ms H Meldrum	101202/11