EMPLOYMENT TRIBUNALS

Claimant: **Mr A Leyland & Others**

Respondent: **Nottinghamshire Healthcare NHS Foundation Trust**

Heard at: **Nottingham** **On:** **18 – 20 November 2019**

Before: **Employment Judge Victoria Butler (sitting alone)**

Representation
Claimant: Ms B Criddle, of Counsel
Respondent: Ms I Omambala, of Counsel

RESERVED JUDGMENT

The Employment Judge gives judgment as follows:

The Claimants' claim that the Respondent has made unauthorised deductions from their wages in not well-founded and is dismissed.

REASONS

Background

1. The Claimants are employed by the Respondent in varying roles and continue to be employed. Their claim is that the Respondent has made unauthorised deductions from their wages when it ceased making payments of a High Security Allowance ("HSA") on overtime hours worked.

2. The Claimants notified ACAS under the early conciliation procedure on various dates and ACAS issued the early conciliation certificates in respect of all current Claimants. The ET1s were presented to the Tribunal on 24 April 2018, 14 May 2018, 29 May 2018 and 2 July 2018 and ET3s were submitted in relation to each of the claims.

The issues

3. The issues before me were as follows:

    i. Was the payment of HSA on overtime properly payable to the Claimant's in accordance with s.13(3) Employment Rights Act 1996 ("ERA")?

In deciding this I need to consider:

ii. Were the Claimants entitled, by virtue of the terms of the 2011 collective agreement, to protected payments of HSA on overtime?

iii. If yes, did the terms of the 2014 collective agreement amount to a variation of the 2011 collective agreement such that the Claimants were no longer entitled to HSA payments on overtime?

iv. If no, are the Claimants by their conduct since January 2015 to be treated as having accepted the cut to their pay?

The hearing

4. This case was heard on 18-20 November 2019. Prior to the hearing the parties helpfully presented:

- An agreed bundle of documents; and
- Skeleton arguments

5. At the commencement of the hearing, Ms Criddle asked me to confirm whether I would be following the decision in *Bear Scotland Ltd & Others v Mr Fulton & Others UKEATS/0047/13/BI* in respect of any decisions on remedy. The Claimants are intending to argue that the EAT's decision was wrong in finding that a gap of three months ends a series of unauthorised deductions from wages and that argument is supported by the Northern Irish Court of Appeal in *Chief Constable of the Police Service of Northern Ireland v Agnew [2019] IRLR 782, NICA*. This would, of course, only be necessary if the Claimants are successful in their claim. Both parties made submissions in correspondence prior to the hearing on whether I should make that decision and made further oral submissions as a preliminary matter. After listening to those submissions, I declined to consider whether I would be prepared to depart from the law that I am currently bound by and confirmed that I would hear further submissions at a remedy hearing if appropriate.

The evidence

6. I heard evidence from:

On behalf of the Claimants:

- Mr Andrew Leyland, lead Claimant
- Mr Nicholas Cardy, POA Branch Secretary

On behalf of the Respondent:

- Ms Karen Waters, Deputy Director of Human Resources at the Respondent

7. I am satisfied that the witnesses I heard from were honest and genuine. This case is, in the main, a matter of contractual interpretation and the understanding and intentions of the parties at the time of the 2011 and 214 collective agreements.

The facts

8. The Claimants are all employed at Rampton Secure Hospital which is one of three high security psychiatric hospitals in England and Wales, the other two hospitals being Broadmoor and Ashworth. The Claimants work in a variety of roles but specifically, Mr Leyland is employed as a Staff Nurse and Mr Pywell as a Nursing Assistant. All the Claimants commenced employment prior to 1 January 2011.

9. The Claimants have contracts of employment which incorporate the NHS Terms and Conditions Handbook. Mr Leyland's contract of employment states:

"4.1 Terms and Conditions of employment apply in addition to these referred to in this contract as determined by the Department of Health. They are contained in the NHS Terms and Conditions of Service Handbook, as supplemented by locally negotiated variations within those terms as amended from time to time and collective agreements negotiated by the Trust and Trade Unions recognised by the Trust. Such variations will be incorporated into your contract of employment. Your salary will normally be subject to annual review on the 1st April.

4.4 In addition to your salary, you will also be eligible to receive the following allowances: - ***Special Hospital****.*

4.5 Should you be required to work overtime in excess of the whole time equivalent hours for your post, you may be paid in accordance with the appropriate rates relating to the Terms and Conditions of your employment."

The Respondent has a pay protection policy and the applicable policy at the relevant time was the 'Protection of Pay and Conditions of Service' policy dated March 2011. The purpose of the policy is to safeguard 'the pay and conditions of service of individual employees adversely affected by organisational change as an alternative to redundancy and early retirement'. The provisions apply to:

"4.1.1 Any employee who, as a consequence of organisational change, is required by management to move to a new post which results in a reduction in the employee's basic wage/salary/hours.

4.1.2 Any employee who, as a result of unsuitability in current post who subsequently accepts appointment to a lower graded post attracting lower wages/salary/hours (except where unsuitability is the subject of disciplinary, capability, conduct or personal preference which will be exempt from this policy)."

10. The definitions section of the policy provides:

"Basic pay; is the weekly or monthly sum due in respect of the basic hours worked by the employee within the standard working week including contractual overtime, plus

any payment made for statutory regulatory duties, any long-term recruitment and retention premia and for doctors and dentists clinical excellence awards, discretionary points or distinction award, but excluding any existing protection payments."

"Protection of earnings applies to basic payments and to a reduction in basic hours within a standard working week.

Basic payments will include:

Bonus payments
Special duty payments
Proficiency allowances
Unsocial hours
Forensic lead payments
On call and stand by duty Shift allowances
Night duty
Split Duty Recruitment and retention premia

These basic payments must be a contractual feature of the individual's employment for the items to be included in protectable earnings. The basic earnings exclude any acting up allowances, fixed term payments/additional sessions or non-contractual overtime."

11. The Pay Protection Policy did not strictly apply to the 2011 and 2014 negotiations, but the provisions contained therein were used to underpin the pay protections afforded in both negotiations.

Collective bargaining

12. The Respondent recognises a number of trade unions including the Professional Trade Union of Prison, Correctional and Secure Psychiatric Workers ("POA"), the Royal College of Nursing ("RCN"), UNISON, the University and College Union ("UCU") and the British Medical Association ("BMA").

13. The Respondent has a productive relationship with the trade unions and always seeks to consult and, where appropriate, negotiate with them. It also holds meetings throughout the year known as 'good to talk' meetings.

HSA

14. The Respondent pays an allowance to certain eligible categories of employee who work in conditions of high security, in addition to basic pay and other premium rates. The allowances have been called various names over time but are now known collectively as the High Security Allowance ("HSA").

15. Prior to 2011, the Respondent paid three allowances dependent on the duties carried out by employees These were the 'High Secure Allowance', the 'Secure Unit Allowance' (SUA") and the 'Higher Environmental Allowance' ("HEA").

16. The HSA is a fixed annual sum paid in twelve monthly instalments over the year and the amount payable varies depending on the category of employee. Eligible employees who worked unsocial hours or overtime, or both, also received a payment in respect of HSA for each hour worked, in addition to the overtime premium at time and a half. The applicable rate was based on the employee's annual HSA amount.

December 2001 negotiations

17. Prior to December 2001, the Respondent began negotiations with the relevant trade unions with a view to implementing a new policy of Leads and Allowances (HSA). The key change was to the amount of the annual sum payable and the transition from the Higher Environmental Allowance to the new Secure Unit Allowance ("SUA"). New employees in the affected category of post would receive the new SUA but any employees in receipt of the HEA would continue to receive the same amount of allowance which "will be paid on a mark time basis, so whilst the allowance continues to be paid there will be no annual uplift until such a time as the level of appropriate allowances reaches that of your protected allowance". In other words, the affected employees' allowance would be frozen until such time that the level of SUA payable to that category of employee caught up to the same level as previously paid HEA. Affected employees received a letter confirming the change and confirming the amount of their continued annual allowance. The changes to HSA were in respect of the annual payment only.

18. The Claimants were not affected by this change which was in relation to non-clinical staff. As such, the protection afforded in 2001 is not relevant to the Claimants.

December 2011 negotiations

19. In late 2010 and early 2011, the Respondent entered negotiations with the trade union representatives concerning the continued payment of HSA to employees working at Rampton Hospital. The Respondent proposed that the amount of HSA payable would be subject to several criteria going forward. These were a base allowance, a patient contact allowance and a clinical input allowance. The practical effect of the proposal was that those who had clinical responsibility for the assessment, planning and delivery of patient care would receive a higher HSA than those who had limited patient contact. The rates of HSA were also revised.

20. The proposal was against a background of significant cost pressures. If the proposal was not agreed, then it was likely that the Respondent would have to make cost savings elsewhere which may have included a recruitment freeze and/or possibly redundancies. Representatives from the POA, RCN, UNISON, and the BMA were involved in these negotiations which were led by Ian Tennant (former Deputy Director Forensic Services) and Ms Waters. The proposal and subsequent negotiations were confined to the annual allowance payable.

21. The new structure of payment for HSA was agreed with the unions in February 2011 and was implemented for existing employees with effect from 1 June 2011. The final terms were circulated on 10 February 2011 and provided that new employees

commencing with effect from 1 January 2011 would be subject to the new annual HSA rates. The new annual rates were clearly set out. The agreement also provided that:

*"**5 Existing employees (who commenced prior to 1st January 2011)***
5.1 The new allowances will be effective for existing employees (i.e. those who commenced prior to 1st January 2011) with effect from 1st June 2011.

5.2 Existing employees who commenced employment prior to the 1st January 2011, will have their previous Special Hospital, Higher Environmental or Secure Unit Lead protected on a personal basis with effect from 1st June 2011 (and without prejudice to any other situation which may require protection of earnings) until they move, of their own volition, to another post within the Hospital/Trust which attracts a different level of allowance whether this be higher or lower. In such cases the new High Secure Allowance appropriate to the new role will become payable. Nursing Assistants who move from a Band 2 to a Band 3 post will maintain their level of protection.

Any existing employee who, under the new arrangements, becomes eligible to receive an increased allowance will be paid this allowance with effect from 1st June 2011.

If any employees are the subject of protection arrangements from previously agreed adjustments to the range of high secure allowances, these protection arrangements will remain in force for the duration of the previously determined agreement. At the end of the protection period the employee will receive the new High Secure Allowance applicable to their role." (p. 187–188)

22. This agreement was a collective agreement and it was incorporated into the Claimants' contracts of employment by virtue of clause 4.1 (see paragraph 9 above). A letter was sent to all employees which differed dependant on how they were affected by the changes. Mr Leyland received the following letter which I refer to as Letter One: "*In relation to your personal circumstances there will be no change to the level of allowance you currently receive*". Accordingly, he did not require protection.

23. Mr Pywall received what I refer to as Letter Two: "*In relation to your personal circumstances your current level of high secure allowance will decrease to £3183 per annum with effect from 1st June 2011. Please note however as an existing member of staff who commenced employment prior to 1st January 2011, you are entitled to protection of your previous allowance on a personal basis (and without prejudice to any other situation which may require protection of earnings) until you move, of your own volition, to another post within the Hospital/Trust which attracts a different level of High Secure Allowance whether this be higher or lower. In such cases the new High Secure Allowance appropriate to the new role will become payable*." Accordingly, his annual allowance was protected.

24. There were two other template letters that served two further scenarios:

Letter Three: "*In relation to your personal circumstances your current level of high secure allowance will increase to £xxx per annum with effect from 1st June*."

Letter Four: "*Our records show that you are currently receiving protection in relation to a previously paid High Secure Allowance. Therefore, in accordance with the agreement reached, there will be no change to those protected arrangements. At the end of the protection period the employee will receive the New High Secure Allowance applicable to their role."*

25. The Claimants were not subject to any previous protection, so did not receive Letter Four.

26. The letters and briefing document confirmed it was the annual lump sum that had been reviewed and no reference was made to overtime. Any protection in place was in respect of the annual lump sum only. Reference to 'personal basis' is the annual amount individuals received in respect of HSA payments as these would vary from person to person dependent on their role and employment history with the Respondent. There was no mention of protection of payment of HSA on overtime, because it was not the subject of the changes. The Respondent had no intention of ceasing payment of HSA on overtime at this time, so it did not need protecting.

2014 negotiations

27. There is no contractual requirement for the Claimants to work overtime. If the Claimants worked overtime prior to 1 December 2014, they received a payment in respect of HSA for each hour worked.

28. As part of on-going monitoring of costs, a further review of HSA took place in or around July 2013. The 2013/14 cost of the HSA alone to the Respondent was circa £6.4 million so it began talks with the trade unions about potential options to reduce the cost. Ms Waters and her colleague Ms Denise Gezmis (Head of Workforce – Forensic Sciences) attended meetings with the local union representatives including Bill Black (RCN), Dean Farrell (POA), Nick Cardy (POA), Alan Watson (Unison), Bob Smart (BMA), Chris Clarke (BMA) and Chubby Ali (Unite).

29. The cost reduction affected all three Trusts, but negotiations were undertaken individually for each hospital.

30. The first meeting took place on 31 July 2013 with a view to discussing the potential options – formal consultation did not begin until December 2013. A subsequent meeting took place on 19 September 2013, at which both Mr Cardy and Mr Farrell from the POA were present, and the brief notes from the meeting indicate that the question of pay protection was being considered (p.208a).

31. On 6 December 2013, Ms Waters e-mailed the Respondent's formal proposals for changes to HSA to the union representatives in anticipation of a meeting on 9 December 2013. This proposal recommended, amongst other things, the cessation of payment of HSA for all staff, protecting allowances for existing members of staff and the cessation of payment of the HSA on overtime payments. The document acknowledged that the Pay Protection Policy did not cover the removal of allowances such as the HSA. However, it used it as the basis on which the protection would be afforded to existing employees. It also confirmed that "*no decision has been made*

regarding the future of the high secure allowances and that further detailed discussion and decision working in partnership will achieve an outcome which, whilst recognising that it will may not be liked, is able to be agreed as a way forward for the future."

32. At the meeting on 19 December 2013, Mr Farrell raised the issue of pay protection for existing staff, which formed a part of the ongoing negotiations. The proposal document was updated to include an option to freeze HSA for existing staff. No amendments were made to the proposal to stop payment of HSA on overtime, nor was there any reference by the unions to protection of the same.

33. The parties met again on 12 February 2013 and Mr Farrell was present. Ms Water's handwritten notes clearly reflect that the issue of overtime was discussed, and that the Respondent confirmed its view that overtime was not contractual (p.208A).

34. On 26 February 2014, Ms Waters e-mailed the updated proposal document to the union representatives in anticipation of the next meeting on 4 March 2014 (p.254–255). Mr Farrell attended the 4 March 2014 meeting and the notes reflect that the impact of not paying HSA on overtime was discussed (p.255A).

35. The parties agreed the changes in principle in March 2014 and Mr Tennant presented the proposed changes to the Executive Leadership Team, who approved them. Thereafter, Ms Waters worked with the relevant union representatives on briefing the changes to members and staff (p.257).

36. Ms Waters circulated an updated briefing document setting out the changes to the union representatives, including Mr Cardy and Mr Farrell, on 26 March 2014 (p.256). The briefing paper clearly set out that HSA would no longer be payable on bank and overtime hours (p.259 & 261).

37. The implementation date was originally planned to be 1 September 2014 but was delayed until 1 December 2014, pending a CQC visit. The unions were kept fully informed and a further meeting to discuss the revised implementation timetable was held on 9 May 2014.

38. On 4 June 2014, a further version of the briefing document, FAQ's and a cover note were sent to the union representatives and then sent to all staff the following day. The briefing document listed the union representatives who had been involved in discussions, including Mr Cardy and Mr Farrell (p.320 – 322). The Respondent agreed with the union representatives that they would meet with members and gather feedback before the next scheduled meeting on 16 July 2014. An e-mail account had been set up and employees with queries or concerns were advised to submit them via e-mail.

39. The Respondent met with the trade union representatives again on 16 July 2014 after they had had opportunity to seek feedback from their members (p.344A – 344C). Whilst the unions would have preferred no change to the HSA payments, they were understanding of the rationale behind them. During this meeting, Mr Farrell asked Ms Waters and Mr Tennant whether the protection agreements would be extended to cover payment of HSA on overtime. Both Ms Waters and Mr Tennant were somewhat

surprised to be asked this question so far down the line but explained to him that HSA would not be paid on overtime and that it was not possible to extend the protection arrangements to include overtime. Overtime has never been protected by the Respondent and the rationale behind the changes was to reduce the overall spend on HSA. Ceasing payment of it on overtime was part of that overall reduction. Ms Waters and Mr Tennant were clear that this did not form part of the proposals and Mr Farrell did not press the issue any further.

40. At the conclusion of this meeting, the union representatives signified their agreement to the changes. Mr Clarke of the BMA was not present, so Ms Waters e-mailed him on 28 July 2014 asking him to confirm that he was in agreement too. He replied "*I'm not sure the word "agree" is the correct one. We accept the proposed changes*." (p.345).

41. UNISON produced a newsletter in the summer of 2014 referring to the changes to HSA and the negotiations. It said "*Alan Walton, UNISON's lead convener spent months negotiating with employers at both a local and national level, along with UNISON colleagues from two other hospitals. Whilst the negotiations have ended with different settlements at different hospitals, Alan believed he had negotiated the best deal of the three. Whist the deal wasn't exactly what UNISON wanted it was the best that could be achieved through negotiation."* (p. 347).

42. The Respondent prepared template letters to be sent to employees depending on their circumstances. These were sent to the union representatives in advance for approval on 5 August 2014 (p.359).

43. The letters set out what had been agreed and what the new arrangements were. The letter relevant to the Claimants confirmed:

"As an existing member of staff who commenced employment prior to 1st September 2014 you are entitled to protection with effect from 1st December 2014 of your previous allowance on a personal basis (and without prejudice to any other situation which may require protection of earning).

The high secure allowance will be frozen (with no cost of living uplifts) for existing staff whilst they remain in post at Rampton Hospital.

Protection of allowance will be maintained in relation to unsocial hours payments, but will not be payable on any overtime or bank hours undertaken.

If you move to a new post in Rampton Hospital following implementation the following arrangements will apply:

i) Staff moving of their own choice to new posts which had previously attracted the same HSA – no change – the amount protected would remain unchanged. For example: Staff Nurse with protected HSA of £4012 per annum would maintain that level of protection if they apply and move to a Team Leader role.

ii) Staff moving of their own choice to new posts which had previously attracted a higher HAS – no change - the amount protected would remain unchanged. For example: Housekeeping staff with protected HSA of £1112 per annum applying for Nursing Assistant roles which would have previously attracted a HSA of £3215 per annum would maintain the allowance which was previously paid in their Housekeeping role.

iii) Staff moving of their own choice to new posts which had previously attracted a lower HSA – the amount of protection would be adjusted to reflect HSA which would have previously been paid. For example: Nursing Assistant with protected HSA of £3215 per annum moving to a clerical role would see the level of their protection reduced to the amount previously paid to clerical staff e.g. HSA of £828 per annum.

iv) Staff who are required to move to an alternative role as a consequence of organisational change will be subject to the Trust's Protection Arrangement applicable at the time of change in relation to all elements of their base salary, with exception of the protected HSA where they would maintain the level of protection previously notified to them.

If you have any queries or concerns regarding the above please contact your HR Manager/Advisor." (p.360 – 361).

44. The letter and protection referred to therein is in respect of the annual lump sum only and not payment of HSA on overtime.

45. The template letter applicable to those employees who were already the subject of a previous protection agreement regarding the HSA stated:

"Our records show that you are currently receiving protection in relation to a previously paid High Secure Allowance. Therefore in accordance with the agreement reached, there will be no change to these protection arrangements."

46. On 8 August 2014, Ms Waters sent the final versions of the agreed briefing notes and FAQs to the union representatives (p.366) and a slightly revised version was circulated on 11 August 2014 (p.376). On 12 August 2014 Mr Cardy of the POA replied saying "I have no problem with the documents." (p.383). Mr Black of the RCN said, "These are fine …". (p.384), and Dr Clarke of the BMA said, "Looks good to me". (p.385).

47. The final briefing document confirmed as follows (p.377–379):

"*2.1* ***Future employees***
Payment of the HSA will cease for all new staff that are offered posts from the 1st September 2014. This will mean that no new future members of staff who obtain posts at Rampton Hospital (either from an external or internal application process) will receive the HSA. The effect of this decision upon existing staff employed at Rampton is addressed in 2.2 below.

2.2 ***The effect on existing permanent employees***

The amount of the HSA paid to all existing substantive members of staff employed will be protected on the following basis with effect from 1st December 2014 with the exceptions relating to seconded staff as outlined in 2.4 below. The difference between the implementation date between new and existing employees is due to the notice period to be provided to existing staff of the change.

a) The HSA will be frozen (with no cost of living updates) for existing staff whilst they remain in a post at Rampton.

b) Protection of the allowance will be maintained in relation to unsocial hours payment, but will not be payable on any overtime or bank hours undertaken.

2.4 ***Bank and overtime hours***
HSA will cease to be paid to bank workers and also on any overtime payments…..

2.6 ***Staff already in receipt of a protected HSA***
The protection arrangements outlined in this document do not apply to those employees who are already the subject of a previous protection agreement regarding the HSA (e.g. protection of higher environmental lead payments) and which will have been previously notified to them."

4.0 Agreement
The above proposals were discussed and accepted at the meeting held on 16th July 2014 by members of the following group:

Alan Walton	*Unison*
Sean Farrell	*POA*
Nick Cardy	*POA*
Bill Black	*RCN*
Chubby Ali	*Unite*
Chris Clarke	*BMA*
Ian Tennant	*Deputy Director: Forensic Services*
Denise Gezmis	*Senior HR Director*."

48. At 2.2 the document sets out working examples of the effect of the protection arrangements as set out above. The agreement amounted to a collective agreement which was incorporated into employees' contracts of employment.

49. The non-payment of HSA on overtime came into effect in December 2014 and was visible on payslips with effect from January 2015. There was an initial glitch with the payroll system in that it was not configured to deal with the change to HSA no longer being payable. Accordingly, the system automatically applied the payment to overtime and payroll had to make manual adjustments to cancel it out. Whilst this may have been slightly confusing, it was clear that HSA was no longer being paid on overtime.

50. The Claimants did not challenge the change, and no queries were received via the e-mail account set up specifically to deal with any queries. The unions had accepted the changes on behalf of their members, so they of course did not complain after the changes came into effect, nor did they utilise the Respondent's grievance procedure.

51. In July 2015, Mr Tennant and Ms Gezmis met with Mr Farrell at an informal 'good to talk' meeting where he raised the issue of non-payment of HSA on overtime. He asked whether the protection put in place in 2011 extended to overtime. Ms Gezmis explained that it did not because overtime was not contractual, and the protection was only in relation to the annual lump sum. This was not a formal complaint, grievance or protest – it was simply a query (p.391).

52. A further informal 'good to talk' meeting took place on 1 September 2015 in which Mr Farrell raised this issue again. Ms Gezmis advised that the briefing would stand (p.392). Again, this was not a protest in any capacity.

53. Thereafter, the matter was not mentioned again until 16 February 2016. Ms Marie Hannah, Full Time Officer for the RCN (who was overseeing the work of the representatives in relation to Rampton following Mr Black's retirement) advised Ms Waters that she had '*been approached by members in Rampton to request the trust re-open negotiations on the deduction of hospital allowance on overtime and recruitment and retention premia'* (p.396). Ms Waters responded suggesting that they discuss it at their next meeting, but with a view to giving Ms Hannah the background on the agreement reached with the unions, not with a view to re-opening negotiations (p.393–396). Ms Hannah did not press the matter any further thereafter.

54. On 28 June 2016, Mr Cardy of the POA contacted Ms Waters asking for a signed copy of the agreement relating to HSA (p.399). Ms Waters queried why, and he replied, '*Our Solicitors have asked for the info as part of the "Lead on O/T query*" (p.399). Ms Waters confirmed that there was not a signed copy but said "*I'm assuming that you have already given your solicitors a copy of the published document sent to all staff and that you have informed them that it was agreed on behalf of the POA by yourself and Sean.*
I can't see why therefore that you need a signed document – unless yourself and Sean are now saying that you didn't agree it?

I'm concerned about these developments as all of the documentation, letters, briefings etc clearly indicate agreement and working in partnership with the local trade unions which of course included the POA.

I'd be grateful if could inform me of the POA's position on this, or alternatively I'd be happy to meet you together with Ian and Denice." (p.398).

55. Mr Cardy confirmed "*in a nut shell some of the members have gone to their own solicitors over the non-payment on Lead pay on O/T, they have said they might have a case if it has been paid for so long. Our solicitors wanted all the documentation and I thought Alan might have signed something as Staff Side Chair not as POA rep. It was agreed my (sic) Sean and I after we took it to Branch as the best option at the time and they agreed collectively so it was taken out of our hands at that point, but as I said some have sought their own legal counsel and they are now wanting us to look into this*." (p.397). Again, this was not a protest on any level, merely a request for information. It was also an acknowledgment that the changes had been agreed by the unions.

56. The Respondent heard nothing further until it received a letter before action on 3 March 2017, over two years since the changes were implemented.

The Law

57. Section 13 ERA provides:

> *13 Right not to suffer unauthorised deductions.*
> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
> *(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.*

58. I have also had regard to the following cases in arriving at my conclusions:

Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38;Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896; Adams v British Airways plc [1996] IRLR 574; Rainy Sky SA v Koomin Bank [2001] 1 WLR 2900; Persimmon Homes Ltd & Ors v Ove Arup & Partners Ltd & Ors [2015] EWHC 3573 (TCC); and Abrahall v Nottingham City Council [2018] ICR 1425.

Submissions

59. I had the benefit of oral submissions from Ms Criddle and Ms Omambala which were helpful. They are not set out in detail but both parties can be assured that I have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

60. In summary, Ms Criddle submitted that when HSA was protected in 2011, it 'does what it says on the tin'. The Claimants had always received payment of HSA on overtime so it should, therefore, continue. The pay protection was for all hours worked.

61. Ms Omumbala submitted that there was no protection of payment of HSA on overtime in 2011 and that a reasonable person would say that the protection was only referable to the annual payment.

Conclusions

62. In arriving at my conclusions, I have considered the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the collective agreements to mean. I have disregarded subjective evidence of either party's intentions and prior negotiations.

63. I have reminded myself of the Claimants' case. Their key argument is that payment of HSA on overtime was protected by virtue of the 2011 collective agreement. Their case does not relate to any protection prior to this date. The Claimants do not assert, nor have they provided any evidence to suggest, that they had the benefit of any HSA pay protection prior to 2011.

64. Both parties agree that the 2011 and 2014 agreements are collective agreements and were incorporated into the Claimants' individual contracts of employment.

65. The first question I must determine is whether clause 5.2 of the 2011 collective agreement protected payment of HSA on overtime. The Claimants assert that it did.

66. I am satisfied that the 'new arrangements' referred to in the agreement are changes to the amount of the annual lump sum only. There is no reference to overtime or unsocial hours payments in the scope of the agreement, whereas it is explicitly dealt with in the 2014 agreement. I am satisfied with Ms Waters' evidence that the scope of the changes was limited to the annual lump sum payment only and no other element of pay. It was not in the Respondent's mind to stop HSA payments on overtime in 2011.

67. The documents and letters do not reference payment of HSA on overtime or unsocial hours either, and nor would they if they were not subject to any change. The amount of HSA payable is an entirely separate matter as to when, and in what circumstances, it is paid. On plain reading of the documents, I cannot read something in to them that is simply not there. If payment of HSA on overtime was protected, the document and letters would have made this clear, but they are intentionally silent on this point. On considering the natural and ordinary meaning of the clause, I am satisfied that the protection afforded was only in relation to what was being changed, namely the annual amount of HSA payable. The overall purpose of the clause was to protect the annual amount payable and these were the facts and circumstances known to the Respondent and the unions at the time. This is what formed the basis of negotiations and subsequent agreement.

68. Considering the clause in context of the documentary, factual and commercial context this is the only conclusion I can arrive at. The Claimants have provided no evidence to indicate that the protection was wider than the annual sum and the burden of proof lies with them.

69. I am satisfied that the principles of the Respondent's Pay Protection Policy were used in the pay protection afforded in 2011. Whilst it was not strictly applicable in this scenario, Ms Waters gave evidence that it 'underpinned' the basis of the overtime pay protection and her evidence was entirely credible. The Pay Protection Policy only protects contractual elements of pay and specifically excludes non-contractual overtime.

70. Turning to the 2014 agreement, the changes included the removal of HSA payment on overtime but the payment on unsocial hours was not affected. The Respondent had a clear proposal which was subject to negotiation with the relevant unions. The final agreement provided:

> *"2.6* ***Staff already in receipt of a protected HSA***
> *The protection arrangements outlined in this document do not apply to those employees who are already the subject of a previous protection agreement regarding the HSA (e.g. protection of higher environmental lead payments) and which will have been previously notified to them."*

71. In light of my conclusions in respect of the protection afforded in 2011, it follows that the protection referred to in clause 2.6 is only in relation to the amount of the annual payment, and was not extended to protection of payment on overtime. This was reinforced by Mr Cardy's initial oral evidence that it was his understanding that employees would still be receiving enhancements, *but not HSA*. It was also all the Unions' understanding that this was the case and any previous protection was in relation to the annual lump sum, hence why Mr Farrell asked Ms Waters and Ms Tennant whether the pay protection would be extended to overtime. I am satisfied that the payment of HSA on overtime was not protected and payment of it ceased with effect from January 2015 at which point it was not wages 'properly payable'.

72. Even if I had concluded that payments on overtime were protected, I would have found that the Claimants' affirmed the reduction in pay by continuing to work without protest. The communications to the Claimants in 2015 were unambiguous that HSA would no longer be paid on overtime. The change to overtime payments came into practical effect in January 2015. Whilst there was a glitch in the payroll process after the change, I am satisfied that the Claimants were clear that they were no longer in receipt of HSA on overtime after this date, subject to when they first worked overtime. This is not a case where it could be said that there was no immediate impact on the Claimants. Even if the payslips were initially confusing, the Claimants' take-home pay reduced. None of the Claimants have asserted that they first worked overtime some considerable time after the change was implemented and that they have not, therefore, delayed in registering a protest. The payroll glitch was remedied within a matter of months.

73. None of the Claimants registered any form of protest and the unions did nothing proactive to suggest that they were protesting the change. The first time that the Respondent was made properly aware of a dispute was when it received the letter before action on 3 March 2017, over two years since the changes were implemented. If the Claimants wished to protest, they should have done so promptly so I am satisfied

that, after such a lengthy period, the Claimants cannot now say that they object to the changes.

74. For the reasons set out above, the Claimants' claim fails.

Employment Judge **Victoria Butler**

Date:16 January 2020

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE