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Case No: 1806436/2006



EMPLOYMENT TRIBUNALS

BETWEEN:Mr K C Pearce
Claimant

and

Hull & East Yorkshire NHS Trust
Respondent**At a Hearing**

held at: Hull

on: Thursday 15 March 2007
Friday 16 March 2007 (Reserved Judgment)before: Chairman Miss P A Molyneux Members Mr D Coxon
Mr P McNestry**Representation**Claimant - Miss K Smith, Counsel
Respondent - Mr J Boddy, Counsel

The Tribunal, having reserved judgment, gives judgment as follows. The reasons for the judgment are attached.

JUDGMENT

1. The Tribunal declares that the allowance paid to the Claimant from August 2000 until August 2006 constituted a locally determined unsocial hours provision within Paragraph 2.7 of the Agenda for Change Terms and Conditions, and a substantial proportion of the allowance should have been reflected in the Claimant's current contract of employment as a contractual entitlement.

2. The Respondent has made unlawful deductions from the Claimant's pay contrary to Part II of the Employment Rights Act 1996.

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3. Both claims are adjourned (in default of agreement between the parties) until 14 May 2007 to determine the appropriate proportion of the allowance which is to be covered by Paragraph 2.7 and the amount of unlawful deductions which the Respondent should pay to the Claimant.

P. A. McLaughlin
Chairman

Date: 3.4.2007

Judgment sent to the parties on

5 April 2007

[Signature]
For the Secretary to the Tribunals

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WRITTEN REASONS

1. The Claimant seeks a declaration against the Respondent concerning the term of his employment contract relating to his pay. In addition he seeks to recover, under Sections 13-27 of the Employment Rights Act 1996, the amount which he alleges he has been underpaid since August 2006.
2. The Tribunal heard evidence from the Claimant; from Mr Terry Cunliffe, the Trade Union officer who has acted in the Claimant's dispute with his employer; and from Mr Stephen Morrison, the Director of Human Resources for the Respondent. The Tribunal had a bundle of documents which included some of the documentation relating to the various collective agreements and meetings between the parties. In addition the Tribunal requested and received documentation relating to the job evaluation for the Claimant and for some of his colleagues.
3. The material facts for the purpose of this judgment are as follows:
 - 3.1 The Respondent Trust operates the hospitals in the Hull and East Riding of Yorkshire area which provide health care to approximately 500,000 residents. It has over 7,000 employees.
 - 3.2 The Claimant is a Biomedical Scientist and has been employed by the Trust and its predecessors since the 27 July 1970. He works in the blood sciences group based at the Hull Royal Infirmary.
 - 3.3 In 1996 discussions began between the Respondent and representatives of employees in the Pathology service to change the working arrangements so as to provide a complete 24 hour service, 365 days per year. Previously staff working in Haematology, Biochemistry and Microbiology worked Monday to Friday from 8.30am to 5pm and on Saturday morning from 8.30am to 12.30pm. For the rest of the time, cover was dependent on volunteers, who provided an on-call service. The work resulted in additional payments to the employee's salary but there were different rates in the different disciplines.
 - 3.4 The outcome of the above discussions was that on the 30 October 2000 a new method of working was introduced on a trial basis terminable by either party on 3 months notice. This new scheme was known as "The New Working Arrangements".
 - 3.5 Although the New Working Arrangements were not fully documented and were never formally signed, they were operated by the parties from October 2000 until August 2006.
 - 3.6 To provide the cover and quality of service required there were three categories which related to the working pattern adopted by the relevant employee. These were:

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- (a) Continuous process pattern ("CPP") staff who worked on a 12 week rota (including overnight and weekend commitment) with an average working week of 37 hours. The Claimant belonged to this category.
- (b) Multi-disciplinary extended working (known as "MD" or "middle box") staff who worked on a 5 week rota including working up to 10pm, but not overnight, and
- (c) Basic working pattern ("BW") who worked a 37 hour week Monday to Friday; some Saturday mornings and Bank Holidays.

3.7 A document produced in August 2004 entitled "New Working Arrangements – Final Document" provides that one of the key elements of the new arrangement is "a basic salary plus an allowance, to reflect the working pattern, working practice and level of responsibility" ("the Allowance"). The evidence given to the Tribunal by the Claimant was that this Allowance was intended to replace various previous payments including call out fees, taxis allowance, meal allowances as well as payment for hours actually worked. These were replaced by single allowance. Those staff working on the BW rate received no allowance. The MD group received a payment of between £2,000 and £3,000 allowance and the Claimant's group, the CPP initially received an allowance of between £6,500 and £7,000. Immediately prior to the change in the pay structure in August 2006, the Claimant received a basic salary of £21,345 and an Allowance of £8,803. His total salary was £30,148. These last figures are agreed by the parties.

3.8 A new job and pay structure for all the Respondent's employees which had been nationally negotiated and agreed, known as Agenda for Change should have been introduced in October 2004. However, some of the essential documentation was not published until December 2004. It was not until August 2006 that the Claimant and the other biomedical scientists were transferred to these new contractual terms.

3.9 The essential provision (which is relevant to this claim) of the Agenda for Change are that an employee on Whitley Council terms was automatically transferred on to the Agenda for Change terms and conditions once he had been assimilated on to the new pay spines following a process of job evaluation.

3.10 The documentation relating to Agenda for Change which was before the Tribunal consisted of an extract from the Agenda for Change Terms and Conditions Handbook which set out the basis for transferring staff from the old pay system to the proposed new system.

3.11 The job evaluations of the Claimant and his colleagues in the blood sciences department were duly carried out. The final outcome for the Claimant was that he had scored 415 points and was placed in Band 6 for salary purposes. The Tribunal also saw job evaluation for an employee who worked the basic pattern ("BW") who had scored 404 and was also placed in Band 6.

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3.12 The financial outcome for the Claimant of this banding was that his basic pay of £21,345 (in April 2005) was increased from 1 August 2005 to £22,328 and to £22,886 in April 2006. He received a further increment on 1 October 2006 bringing his basic salary to £23,789.

3.13 The contentious element of this claim relates to the withdrawal by the Respondent of the Allowance of £8,803 which was withdrawn in its entirety. Although the Claimant did receive payment at an enhanced rate for time actually worked during unsocial hours, the net result was that his contractual gross and net pay would be considerably less than he had been paid prior to the implementation of the Agenda for Change pay structure. However, in accordance with pay protection arrangements, the Claimant did receive additional payments each month in order to bring up his annual gross salary to £30,148 which was the total remuneration paid to him immediately prior to the introduction of the Agenda for Change salary and allowances package.

3.14 The Claimant complains of this arrangement since, although he appears not to have suffered any detriment in that his total pay is being maintained under the pay protection arrangements, the reality is that because of the adjustments that are made, he never gets the benefit of increases in basic pay, i.e. the increment of £903.00 awarded in October 2006 resulted in a corresponding reduction of the pay protection element.

3.15 In accordance with the Respondent's special arrangements for invoking grievance and appeals procedures in relation to the application of the Agenda for Change terms and conditions, the Claimant submitted a request for review in August 2006 after having been notified of the arrangements earlier that month. There was a hearing on 23 October 2006 when the Claimant's request for a review was rejected.

3.16 On 6 November 2006 the Claimant appealed. There was a hearing on 29 January 2007 which was adjourned until 16 February when the Panel gave its decision. The Appeal Panel confirmed the decision by letter dated 20 February 2007 when they found that an element of the Allowance paid to the Claimant was clearly designed to compensate for unsocial hours working and that the calculation of this apportionment should be the subject of mediation by the Appeal Panel, but in default, should be negotiated between the parties under the direction of the Director of Human Resources.

3.17 However, prior to receiving this letter, the Claimant had commenced these proceedings on 30 November 2006.

3.18 The material part of the contractual documentation (which was collectively negotiated and agreed) is contained in the Agenda for Change Terms and Conditions of Service Handbook. Section 2 is entitled "Working or providing emergency cover outside normal hours". The material paragraphs are 2.7 and 2.9 which state as follows:

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"2.7 In case of staff on contracts that are a combination of Whitley basic pay with locally determined unsocial hours provision, upon assimilation to the Agenda of Change package, they will continue to receive unsocial hours payments in accordance with their existing local arrangements.

[2.8 not relevant to this case.]

2.9 Staff employed on Whitley terms and conditions where there is no provision for unsocial hours payments or equivalent will be entitled to unsocial hours payments on the basis of the rules applicable to Nurses and Midwives. For staff in pay bands 1-4, the applicable percentages are 33.33% and 66.66%. For all other staff the applicable percentages are 30% and 60%."

4. Submissions of the parties

4.1. Miss Smith for the Claimant argues that the Allowance should have been paid under paragraph 2.7 of the Agenda for Change terms and conditions. The Allowance had been locally negotiated and determined and related to unsocial hours. She rejected the Respondent's assertion that because elements of the package that constituted the Allowance did not or might not relate to unsocial hours, therefore the Claimant's allowance did not fall within paragraph 2.7. She said the clear intention was to protect previously negotiated local arrangements and that this Allowance fell within this definition. Miss Smith had argued for 100% of the allowance to be covered by paragraph 2.7 since the evidence of the Claimant that the original sum was calculated by taking an average of the amount earned by each of the relevant employees over the previous year. This payment therefore related only to unsocial hours. It was important to distinguish between the consequences of the new pattern of working, such as the requirement that the Claimant should assist other colleagues late at night when each of them would be on their own and his increased responsibility because of having to work on his own. Miss Smith accepted that if it were to be found that some part of the Allowance did relate to other factors, the Allowance could be apportioned and that part which related to unsocial hours should then fall within the application of paragraph 2.7.

4.2 The Respondents (apart from the decision of their Appeal Panel) have throughout this process rejected the claim that the unsocial hours Allowance fell within paragraph 2.7. Their argument is that since the Allowance was described as "reflecting the working pattern, working practices and level of responsibility", it could not come within paragraph 2.7 which is confined to local agreements which are completely and solely concerned with unsocial hours provision. They say that the whole intention of the New Working Arrangements was to provide for a more composite service in the Pathology Department and that the allowance was to reflect the requirement that the employees should become multi-skilled and have an increased level of responsibility. These latter elements were now contained in the basic salary paid to the Claimant and his colleagues since they were reflected in the components in the job evaluation exercise. To find that the Allowance fell within 2.7

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and therefore should continue to be paid separately would mean (as Mr Morrison argued and said in evidence) that the Claimant would be being paid twice for the same factors.

5. The Law

Section 11 of the Employment Rights Act 1996 ("the Act") permits an employee to refer to an Employment Tribunal his personal statement of terms and conditions to determine what particulars ought to have been included. Section 12(2) provides that on determining a reference under Section 11 a Tribunal may:

- (a) Confirm the particulars
- (b) Amend the particulars or
- (c) Substitute other particulars for them.

6. The relevant contractual documentation for this Claimant is set out in a letter dated August 2006 which consists of some 6 pages. Under the heading of "Working or Providing Emergency Cover Outside Normal Hours" it states (third paragraph):

"As your current pay package covers more than just basic pay and unsocial hours payments and there is no Whitley provision for unsocial hours payments, you are therefore entitled to unsocial hours payments on the basis of the rules applicable to Nurses and Midwives. "

These are 30% enhancement for work during unsocial hours and 60% for Sunday and Public Holidays working.

There is provision for pay protection. Although this documentation does not expressly refer to paragraphs 2.7 and 2.9 of the Agenda for Change Terms and Conditions, subsequent correspondence and discussions between the parties, as well as the more formal review and appeal process, made it clear that this was the basis of the argument.

7. It is therefore for the Tribunal to decide on the evidence before it whether the Allowance received by the Claimant between 2000 and 2006 is within paragraph 2.7 or 2.9. In making this decision the Tribunal must construe the meaning of the words used in paragraph 2.7 and (by implication) paragraph 2.9 in accordance with the rules relating to construction of contractual documents. This means seeking to ascertain the intention of the parties to the agreement at the time it was made. The difficulty in this case is that neither the Claimant nor the Respondent negotiated this collective agreement although they were represented. For that reason the Tribunal did not have the benefit of any direct evidence at first hand of the intention of the parties.

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8. The Issues

The Tribunal identified the following issues.

8.1 What was the nature of the Allowance paid to the Claimant (and his colleagues) under the New Working Arrangements?

8.2 Does this Allowance fall under paragraph 2.7 or under paragraph 2.9?

8.3 If the Allowance does come within paragraph 2.7 does it cover the full amount or should the sum apportioned?

8.4 If the Claimant was successful in showing that paragraph 2.7 applies to this claim, what is the amount owed to the Claimant under his contract of employment in 2006, but taking account and giving credit for sums already paid to him?

The nature of the allowance paid to the Claimant

9. The Tribunal finds that the Allowance paid to the Claimant was primarily for working unsocial hours. It replaced the earnings which the Claimant had and would potentially lose under the old arrangement, not just for working overtime but also for other related items such as the cost of meals, taxis, telephone calls and payments for being on call. There was also the method which the Claimant said was used to calculate the amount, namely that the Respondent averaged the payments relating to overtime working of all the employees and awarded the average as the Allowance.

10. The Tribunal have taken account of the evidence given on behalf of the Respondent as well as the documentation relating to the New Working Arrangements that the allowance was consistently and repeatedly described as being (e.g. the final document made in August 2004):

"basic salary plus an allowance to reflect the working pattern, working practice and level of responsibility"

11. The difference in the working pattern between the CPP Biomedical Scientists and those on the middle box was shown in the considerable difference in the size of the Allowance. In 2005/6 CPP staff received an Allowance of £8,803.00 but those on the Middle Box pattern received £2,836.00. The latter group worked one evening per week until 10 pm and either Saturday or Sunday every 5 weeks. The CPP staff worked on a rota basis evenings, all night and weekends. The difference in the amount of the respective Allowances must relate to the unsocial hours element of the CPP working pattern.

12. Although the final document for the New Working Arrangements describes the Allowance (page 99 of the Bundle) as being "to reflect the working pattern, working practice and level of responsibility", the Tribunal does not accept that the absence of

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the words "unsocial hours" must mean that this element was excluded from the Allowance. The Tribunal is satisfied that this element is included in the term "working pattern". Furthermore in the detail given of Working Patterns (page 101) reference is made to "the number of unsocial hours worked".

13. The working practice and level of responsibility related to the need to show more flexibility so as to assist colleagues in other but related disciplines when there was a high volume of work or at night when there was only a limited number of staff to deal with problems or other consequential pressures of work. In addition, the level of responsibility reflected the fact that when working at night the Claimant would be the only person there in his section and he would have to take responsibility for all matters relating to that department since he was the most senior person present.

14. During the evidence there was reference to training which we understood to be training in other related disciplines, so as to permit multi-skilling, but we accept the Claimant's evidence that it was only ever intended that this should apply in a very limited range of circumstances. All the disciplines in blood sciences are highly skilled and require not just lengthy training but also an obligation to keep up to date with new developments. It would not be possible to substitute an employee from one discipline for another. However, what was intended was that, with training and a more flexible work practice, assistance could be given at appropriate times. The Claimant's evidence was that there was only a very limited amount of training given for this purpose, only one week it would appear. The aspiration was then abandoned not least because of the volume of work and the consequential a lack of available time for those staff concerned. However, the Tribunal do not find that training as such would have comprised any part of this Allowance. An employer does not pay an employee additional remuneration to be trained. It is a part of the employee's obligation to undertake training and he continues to receive his salary during that time. Accordingly, the Tribunal reject that assertion. Nevertheless, as mentioned above, it is accepted that a part of the Allowance did relate to the intention that the Claimant should be able to give occasional assistance to a colleague in a related discipline and to recognise that he have to take responsibility as the most senior person present in the late evening and at night.

15. Does the Allowance fall within the provision of paragraph 2.7 or paragraph 2.9?

Paragraph 2.7 applies if the member of staff was on a contract which was a combination of Whitley basic pay with "locally determined unsocial hours provision". The Tribunal is satisfied that the agreement which resulted in the Allowance paid under the New Working Arrangements was locally determined - it was negotiated and decided between the representatives of the Trust and the staff side of the Blood Sciences department of Pathology. Having found, as above, that the Allowance primarily related to unsocial hours working, the Tribunal finds that the wording used in paragraph 2.7 is apt to cover the Claimant's Allowance. The assertion of the Respondent that 2.7 cannot apply unless there is clear evidence that the Allowance was wholly paid for unsocial hours and that any element which relates to some other

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factor means that the Allowance falls outside the scope of paragraph 2.7 and therefore the employee must be dealt with under paragraph 2.9 is not acceptable. Such an argument could lead to the absurd conclusion, as Miss Smith argued, that if 1% of the Allowance related to a factor which was not unsocial hours provision, this would so vitiate the nature of the Allowance that it would take it outside paragraph 2.7 so that the employee would then be deprived of the continuance of that locally negotiated arrangement. The Tribunal agrees. It is clear that the Agenda for Change in this context intended to protect and continue such local arrangements. Furthermore, paragraph 2.9 which sets out the basis of the enhanced payments is intended from its wording to apply only "where there is no provision for unsocial hours payments or equivalent". This could not be said of the Claimant's position.

16. The Respondent's argument about the Claimant being paid twice if paragraph 2.7 was found to be the applicable paragraph is rejected.

The Claimant's Job Evaluation was scored at 415 while a Basic Work colleague who worked 7.25 hours during the core hours of 8 am and 6 pm each weekday and one Saturday morning in five was scored at 404. This difference of 11 points was attributable to only one factor – number 12 Freedom to Act. In the Claimant's Job Evaluation it is described as:

"Follows policies and procedures, asks advice as necessary/works independently, may be lead specialist"

whereas his colleague's Job Evaluation under item 12 states:

"is guided by precedent & occupational policies & procedures, work managed".

From the different wording it would appear this relates to the Claimant's responsibilities when working alone or as the senior person at night. In all other respects the Job Evaluations are identical. Since the score affects the banding for pay scale purposes, the amount attributed to flexibility and level of responsibility is clearly very small. However, the Tribunal accept that having identified these elements as being included in the Claimant's current basic pay, it will be necessary to apportion the Allowance to ascertain the proportion that relates to unsocial hours.

What is the appropriate proportion?

17. Although Miss Smith had made various suggestions for the apportionment of the allowance, the Tribunal had considerable difficulty. We note that in the papers relating to the Review in the appeal it was stated that "at no stage, either during negotiations nor within the New Working Arrangements document itself, were the values assigned to the [Allowance] fragmented into any constituent parts" (page 95 of the bundle – the Claimant's application for Review). The Tribunal seriously considered whether to take account of the difference between the Claimant's score in the Job Evaluation and that of his colleagues who work the basic pattern and use that fraction to establish the parts of the allowance which related to work practice and the

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level of responsibility. This would result in a factor of 2.65% being attributed to those elements now included in the job evaluation so that 97.35% of the Allowance would fall within paragraph 2.7.

18. However, the Tribunal felt it would not be doing justice to either party to conclude matters on that basis without further information. Accordingly, it invites the parties to agree the appropriate proportion (as was suggested by the Respondent's own Appeal Panel in February 2007). In default the Tribunal will resume on 14 May 2007 to determine the appropriate proportion. On that occasion it will need additional documentation and evidence as set out in the accompanying directions.

Amount due to the Claimant under Section 13-27 of the Employment Rights Act 1996

19. The Tribunal accepts that there have been deductions made from the Claimant's pay. Although, because of the terms in Agenda for Change relating to pay protection, the Claimant's gross pay is the same as it was prior to August 2006, the reality is that he has not been paid in accordance with his contractual entitlement as now determined by the Tribunal. Because of the operation of the pay protection rules, whenever he has received increases in his basic salary, these have served merely to reduce the amount of protection which the Respondent pays to him so that in gross (and no doubt net) terms the Claimant's position has not changed. The Tribunal is satisfied that because of this contractual entitlement, the Claimant has suffered unauthorised deductions under Part II of the Employment Rights Act and is entitled to a declaration to that effect. These deductions will relate to the failure to pay the proportionate part of the Allowance and the loss suffered by the Claimant in that he did not receive increments to his basic pay as the result of the operation of the pay protection provisions. Credit will have to be given for payments made which did not constitute his salary.

20. Unfortunately the Tribunal is not able, on the papers before it, to ascertain the exact amount due to the Claimant. It invites the parties to calculate and agree the amount owing using the above principles. In default the Tribunal will determine the amount subject to being provided with the requisite information and documentation as set out in the attached order.

PA Melnyk
Chairman | 3. 4. 07

Date issued: 5 April 2007

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EMPLOYMENT TRIBUNALS

BETWEEN:Mr K Pearce
Claimant

and

Hull & East Yorkshire NHS Trust
Respondent

Directions

1. The documents set out below should be produced to the Tribunal hearing on 14 May 2007.

1.1 Records of payments made to the Claimant from the introduction of the Allowance in August 2000 until August 2006 showing the amounts paid and the amounts of increases.

1.2 Details of all the components of payments made to the Claimant from August 2006 until the next hearing date, including whether such payments form part of the Claimant's pay for pension scheme purposes.

1.3 Pay slips to support items (1) and (2) above for the Claimant.

1.4 Any evidence relied on by either party to establish the appropriate proportion of the Allowance to be covered by paragraph 2.7.

1.5 Details of payments made to the Claimant which need to be taken into account in order to decide and calculate the amount of any unauthorised deductions. This means that since credit will have to be given for payments made, full details of payments made to the Claimant must be produced.

1.6 Calculations in support of the above showing the amounts which it is alleged are due.

1.7 Details of any locally negotiated arrangements for increases in allowances (e.g., are they increased in line with basic pay or the cost of inflation?).

Evidence relating to the composition of the Allowance and its payment should be given by contemporaneous documents. In default, oral evidence may be given to the Tribunal for which witness statements should be drafted and copies sent to the other party no later than 4 May 2007.

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2. Each party to send to the other copies of all documentation to be used no later than 4 May 2007. The Respondent should prepare a joint bundle of documents. Where possible the documents should be in chronological order. The bundle should be paginated and indexed. Four copies should be brought to the Tribunal hearing.

3. If the parties reach agreement on either of the matters for which this case is being adjourned, they should inform the Tribunal office as soon as possible.

PA Moloney

Chairman

Date issued:

15 April 2007

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IMPORTANT INFORMATION ABOUT ORDERS

- (1) Any person who, without reasonable excuse, fails to comply with a requirement imposed under Rule 10(2)(c) or (d) of the Employment Tribunals Rules of Procedure 2004 is liable on summary conviction to a fine of up to £1,000.00 under section 7(4) of the Employment Tribunals Act 1996.
- (2) Failure to comply with an Order may result in the whole or part of a claim or response being struck out at or before the hearing.
- (3) If this Order was made in the absence of a party, that party may apply to the tribunal to vary or set aside the Order but must do so before the period for compliance with the Order has expired.
- (4) An Order granting the right to inspect documents may be complied with by supplying photocopies of the documents in question, provided the party in whose favour the Order was made agrees.