

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

Mr D Calland

Respondent

Lancashire Teaching Hospitals NHS
Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Manchester **ON:** 28 January 2008

EMPLOYMENT JUDGE: Mr M L Creed
(Sitting alone)

REPRESENTATION:

For the claimant: The claimant was represented by Mr Allen of Counsel.

For the respondent: The respondent was represented by Mr Reynolds, a solicitor.

JUDGMENT

1. The written statement of employment given to the claimant by the respondent under section 4 of the Employment Rights 1996, is hereby amended, pursuant to section 12(2)(b) of the 1996 Act by adding the following further particulars: -

"A Recruitment and Retention Premium shall also be paid, at a yearly rate of £2,899.00 from 19 December 2005, at a yearly rate of £2,972.00 from 1 April 2006, at a yearly rate of £3,016.00 from 1 April 2007 and at a yearly rate of £3,046.00 from 1 November 2007."

2. The claimant has suffered an unlawful deduction of wages contrary to the provisions of Part II of the Employment rights Act 1996 in respect of failure to make payments to him of the Recruitment and Retention Premium applicable for a qualified maintenance technician for the period commencing 19 December 2005 up to and including the date of this hearing.

REASONS

Claims

1 The claimant brought a claim before the Employment Tribunal claiming he had suffered an unlawful deduction of wages arising out of the alleged failure by the respondent to pay Retention and Recruitment Premium payments contrary to the provisions of Part II of the Employment Rights Act 1996 (the 1996 Act). He also sought determination of an issue relating to his terms of employment under section 11(2) of the 1996 Act relating to premium non payments.

2 The claimant brought a second Tribunal claim relating to the calculation of overtime payments. This claim was adjourned generally to await the outcome of the first claim.

3 The claims were resisted by the respondent.

4 The claimant was employed within the National Health Service at the material time. His claims involve consideration of Agenda for Change ("AFC"), a national agreement which was applied to the National Health Service, concerning pay.

The Hearing

5 It was resolved at an earlier hearing into the claim that the issues currently before the Tribunal would be heard by an Employment Judge sitting alone.

6 The Tribunal was provided with a trial bundle comprising more than 700 pages. The Tribunal heard oral evidence from the claimant in support of the claim. Mrs Karen Giffard, an Associate HR Director of the respondent trust, gave oral evidence for the respondent.

7 There was little in issue in respect of the factual matrix.

The parties' representatives presented oral submissions to amplify their written submissions.

Factual matrix

8 The Tribunal found that: -

(1) On 1 October 2004 a new pay policy was introduced into the National Health Service known as Agenda for Change (AFC).

(2) AFC was a national collective agreement. It was set out in a Handbook which was before the Tribunal (page 327- 506).

(3) AFC provided for the payment to employees of a Recruitment and Retention Premium (known as "RRP"). The RRP provided for the payment of sums where market pressures would otherwise prevent the employer from being able to recruit or retain staff in sufficient numbers at the normal salary for the job. Extracts from the AFC are attached to this judgment.

- (4) In the autumn of 2005 the claimant responded to an advert by the respondent for a post as a maintenance technician. The advert referred to the AFC but did not refer to the RRP (page 71). A summary statement about the job published by the respondent on 24 October 2005 referred not only to the AFC but also a banding scale made under the AFC, an hours or work regime applicable to the AFC system and the payment of an RRP (page 73).
- (5) The claimant was interviewed for the post. The RRP was never mentioned at the interview.
- (6) The claimant was employed by the respondent as a qualified maintenance technician (QMT) from 19 December 2005 based at Chorley Hospital.
- (7) The claimant's terms and condition made no mention of the RRP (see page 114). The claimant's contract stated that his terms and conditions were set out in his contract and in "respective national collective agreements". The AFC was one such national collective agreement.
- (8) The claimant's specified hours of work – 37½ hours – was referable to the AFC system too (pages 74 – 80).
- (9) Under the AFC a new pay banding structure was introduced and each post within the respondent's undertaking was matched to a national profile to determine the applicable pay band. This was known as "assimilation". Assimilation commenced on 1 October 2004 but employees were assimilated on subsequent dates as the matching process was resolved for the posts that they held.
- (10) On 10 January 2006 the claimant was awarded pay Band 5 which was referable to the AFC banding structure (Page 120A).
- (11) All QMT's and qualified maintenance craftspeople (QMC) who were employed by the respondent at the date of assimilation into the AFC (on whatever date it occurred in each individual case) were paid the RRP.
- (12) The claimant never received an RRP and the respondent refused to pay him the RRP. The respondent stoutly maintained that it was not required to pay the claimant the RRP as he commenced employment after assimilation.
- (13) Other hospital trusts such as those for Blackpool and Morecambe Bay paid the RRP to all their QMT's. There was no qualification for entitlement. Those trusts were also under the auspices of the same Strategic Health Authority at the respondent.
- (14) Mr Stringfellow, the only other QMT employed at Chorley Hospital by the respondent at the material time, received an RRP. He was employed at the date of "assimilation" to the AFC.
- (15) The RRP was also paid to Ms J McCarthy, another technician.

(16) Mr Jolly, a maintenance technician [plumber] who was employed by the respondent and retired in 2006 was paid an RRP until his retirement. After his retirement he returned to work for the respondent trust on a part-time temporary contract and he again received the RRP.

(17) The claimant challenged the respondent over its decision not to pay him the RRP. He raised a grievance under the respondent's grievance procedure but he failed to succeed in his complaint.

(18) The RRP scheme was operative from 1 April 2005. The rates changed from time to time. The rates were: -

- (a) £2,899 per annum from 1 April 2005,
- (b) £2,972 from 1 April 2006,
- (c) £3,016 from 1 April 2007, and,
- (d) £3,046 from 1 November 2007.

Agenda for Change

9 The terms of the RRP were set out in Part 2, section 5 of the AFC Handbook (350 – 352). This handbook contained a number of annexes:-

- (a) Annex J dealt with local RRP criteria.
- (b) Annex R was entitled "Guidance on the application of the National Recruitment and Retention Premia" (492 – 495).
- (c) There are a set of "Implementation Annexes" – they were Annex Q to Annex V inclusive.
- (d) The transition arrangements upon assimilation were set out in Part 7, section 46 (page 444 – 456)

The relevant documents are appended to this judgment.

The issue

10 The respondent paid the RRP to all relevant employees who were assimilated under the AFC. The narrow issue for the Tribunal to resolve was: -

Whether the claimant, as a new employee who commenced work after 1 October 2004, was entitled to the RRP?

11 The respondent did not seek to argue that AFC was incapable of incorporation, wholly or in part, into the claimant's contract of employment.

Conclusions

12 The Tribunal was satisfied that the AFC was a collective agreement as defined in section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992.

13 The Tribunal accepted that there was a presumption that since the AFC was a collective agreement, it was not intended by the parties to be a legally enforceable contract unless

- (a) the agreement was in writing, and,
- (b) the agreement contained a provision which stated that the parties intended that the agreement should be a legally enforceable contract.

The AFC agreement was in writing. There was no express statement concerning the parties' intention that the AFC was to be legally enforceable. However, the provisions of the AFC could be legally enforced by amendment to the employees' contract of employment.

14 The Tribunal found that parts of the AFC were incorporated into the claimant's contract of employment for the following reasons: -

- (1) Paragraph 9 of the claimant's employment contract (page 115) provided for the inclusion of respective national collective agreements to be terms and conditions of employment for him. The AFC was such a collective agreement;
- (2) The claimant's hours of work, namely 37½ hours, were the hours set out in the AFC;
- (3) One job advert for the post the claimant attained specifically referred to the job being subject to the provisions of the AFC (page 70);
- (4) The reference to the pay banding in one job advert used a term – Band 5 – which was a reference to the AFC pay structure (page 73);
- (5) The claimant received a letter dated 29 December 2005 informing him that his post was subject to a major review of pay and conditions as a result of the AFC and that he would transfer to the new structure in due course (page 112);
- (6) The claimant was advised on 10 January 2006 that his job was now re-graded to Band 5 which was a reference to the AFC (page 114);
- (7) Internal emails within the respondent trust in October 2005 indicated that the new post-holder, for the post to which the claimant was appointed, would be paid the RRP under the AFC (page 88).

12 The Tribunal was satisfied that the claimant's contract of employment did incorporate all the elements of the AFC relating to the RRP for the following reasons:

- (1) The Tribunal found that the RRP provisions were applied to all other QMT's and the RRP was paid to all of them (except the claimant);

- (2) The RRP provisions related to the employees' pay and were contained in a respective collective national agreement;
- (3) The RRP related to the most fundamental feature of the employment relationship, namely "pay for work performed".

13 The Tribunal found that the AFC provided that the RRP was payable in order to meet market needs. The AFC provided that the posts of QMC's and QMT's were special case / exception by section 5.3 and Annex R of the AFC agreement.

14 Annex R set out further criteria which applied to QMT's, namely: -

- (1) Paragraph 3 stated that the RRP premium was pre-agreed by national agreement;
- (2) Paragraph 6 stated that the post of QMT was a post where a premium was necessary;
- (3) Paragraph 7 stated that the RRP should be set to ensure there was no loss;
- (4) Paragraph 13 stated that the RRP was set at a single level of premium nationally.
- (5) The rate increased from time to time as set out above in paragraph 8(18) of these Reasons.

15 The Tribunal was satisfied that the RRP was a payment for recruitment and retention. There was no provision in the AFC, the claimant's contract of employment or any collective agreement which excluded the claimant's entitlement to the RRP or excluded employees who were recruited after the assimilation commenced in October 2004.

16 The Tribunal was satisfied that the RRP was to be paid to prevent a disadvantage in the labour market during "the transitional period". The transitional period was the period commencing on 1 October 2004 following the date upon which the AFC became operative. The transitional period took account of the assimilation of employees into the new pay structure on dates after 1 October 2004 (see paragraph 5 and 7 of Annex R). The premium rates of the RRP changed from time to time during the transitional period. Premium rates were set for specified periods from 1 April 2005 onwards. The last premium rate was set for the period from 1 November 2007.

The Tribunal concluded, on any view, that the transitional period plainly existed from 1 April 2005 since a premium rate was set at that time. The transitional period still existed on 28 January 2008 when the hearing took place since there was relevant premium rate in force which had been set to commence on 1 November 2007. The Tribunal concluded the transitional period had not ended by January 2008.

17 The Tribunal concluded that Annex J was a "general" protocol to be adopted for the application and payment of the RRP. However, Annex J was overridden by Annex R which was specifically drawn for the application of the RRP to QMT's and

QMC's (amongst other groups). Annex R provided a mandatory requirement for employers to pay RRP to specified groups including QMT's. The Tribunal rejected the respondent's contention that Annex R was for guidance only. The Tribunal rejected the respondent's contention that Annex R did not apply to new employees or that it was restricted by Annex J in relation to new employees. There was no support for that contention in the wording of either Annex J or Annex R. Annex J did not place any restriction on Annex R in relation to the rights of QMT's.

18 The Tribunal concluded that since the claimant was employed in the transitional period as a QMT he was therefore entitled to be paid the applicable RRP.

19 The Tribunal could find no reference in Annex R restricting the "no loss guarantee" in that Annex or the applicability of the RRP to QMT's. There was no restriction on the applicability of the RRP to assimilated QMT's only in paragraph 13 of Annex R (copy attached to this judgment). This was plain from the wording of the paragraph itself. The Tribunal therefore rejected that contention by the respondent. The Tribunal was satisfied that the RRP scheme applied to all QMT's employed by the respondent trust.

20 The Tribunal was satisfied that the claimant was entitled to be paid the RRP from 19 December 2005 when he was employed by the respondent trust. The Tribunal was satisfied that the written statement of employment given to the claimant by the respondent under section 4 of the Employment Rights 1996, should be amended pursuant to section 12(2)(b) of the 1996 Act and accordingly did so. The Tribunal therefore adding the following further particulars to the claimant's contract: -

"A Recruitment and Retention Premium shall also be paid, at a yearly rate of £2,899.00 from 19 December 2005, at a yearly rate of £2,972.00 from 1 April 2006, at a yearly rate of £3,016.00 from 1 April 2007 and at a yearly rate of £3,046.00 from 1 November 2007."

21 The Tribunal was satisfied that the claimant suffered an unlawful deduction of wages contrary to the provisions of Part II of the Employment rights Act 1996 in respect of failure to make payments to him of the Recruitment and Retention Premium applicable for a qualified maintenance technician for the period commencing 19 December 2005 up to and including the date of this hearing and ordered the respondent to make all such payments to him for this period at the applicable rate.



Mr M L Creed
Employment Judge
28th February 2008

JUDGMENT SENT TO THE PARTIES ON
..... 28th FEBRUARY 2008
AND ENTERED IN THE REGISTER
.....
FOR THE SECRETARY OF THE TRIBUNALS
.....

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Agenda for Change NHS Terms and Conditions of Service Handbook

Part 2, section 5

SECTION 5

RECRUITMENT AND RETENTION PREMIA

- 5.1 A recruitment and retention premium is an addition to the pay of an individual post or specific group of posts where market pressures would otherwise prevent the employer from being able to recruit staff to and retain staff in sufficient numbers for the posts concerned at the normal salary for a job of that weight.
- 5.2 Subject to the provisions below, NHS employers may apply a recruitment and retention premium to posts of a specific class or type. They may also be applied to individual posts where the post is unique within the organisation concerned (such as the head of a department or service).
- 5.3 Recruitment and retention premia may also be awarded on a national basis to particular groups of staff on the recommendation of the Pay Review Body for Nursing and Other Health Professions and/or the Pay Negotiating Council where there are national recruitment and retention pressures. The Review Body and the Pay Negotiating Council must seek evidence or advice from NHS employers, staff organisations and other stakeholders in considering the case for any such payments. Where it is agreed that a recruitment and retention payment is necessary for a particular group the level of payment should be specified or, where the underlying problem is considered to vary across the country, guidance should be given to employers on the appropriate level of payment. Guidance on the application of national recruitment and retention premia is set out in Annex R.
- 5.4 Recruitment and retention premia will be supplementary payments over and above the pay that the post holder receives by virtue of their position on their pay band, any high cost area supplements, or any payments for unsocial hours or on-call cover.
- 5.5 Recruitment and retention premia will apply to posts. Where an employee moves to a different post that does not attract a recruitment and retention premium, either within the same organisation or elsewhere in the NHS, their entitlement to any previous recruitment and retention premium will cease.
- 5.6 NHS employers and staff representatives, in partnership, will follow the procedure set out in Annex J in deciding the award of a recruitment and retention premium.

Long-Term and Short-Term Recruitment and Retention Premia

- 5.7 The body responsible for awarding a recruitment and retention premium shall determine whether to award a long-term or short-term premium.
- 5.8 Short-term recruitment and retention premia will apply where the labour market conditions giving rise to recruitment and retention problems are expected to be short-term and where the need for the premium is expected to disappear or reduce in the foreseeable future.
- 5.9 Long-term recruitment and retention premia will apply where the relevant labour market conditions are more deep-rooted and the need for the premium is not expected to vary significantly in the foreseeable future.
- 5.10 Short-term recruitment and retention premia:
- may be awarded on a one-off basis or for a fixed-term;
 - will be regularly reviewed;
 - may be withdrawn or have the value adjusted subject to a notice period of six months; and
 - will not be pensionable, or count for purposes of overtime, unsocial hours payments or any other payments linked to basic pay.
- 5.11 Long-term recruitment and retention premia:
- will be awarded on a long-term basis;
 - will have their values regularly reviewed;
 - may be awarded to new staff at a different value to that which applies to existing staff; and
 - will be pensionable, and will count for the purposes of overtime, unsocial hours payments and any other payments linked to basic pay.
- 5.12 Both long-term and short-term recruitment and retention premia will be expressed as cash sums and will be separately identifiable from basic pay, any high cost area supplement and any other component of pay.
- 5.13 The combined value of any nationally awarded and any locally awarded recruitment and retention premium for a given post shall not normally exceed 30% of basic salary. It will be the responsibility of
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employers to ensure that any premia awarded locally do not normally result in payments in excess of this amount, taking into account any national awards for the posts in question. See also the provisions concerning earned autonomy in Annex K.

Transitional Arrangements

- 5.14 Further information on assimilation and protection arrangements during the transition to the new system is set out in Part 7, including information on those jobs where it is agreed that there is prima facie evidence that a premium is necessary to ensure the position of the NHS is maintained in relation to the relevant external labour market during the transitional period (see Table 19 in Annex R).

Agenda for Change NHS Terms and Conditions of Service Handbook

Part 7, section 46

SECTION 46

ASSIMILATION AND PROTECTION

Assimilation to New Pay Structure

- 46.1 Staff on national contracts and other contracts which incorporate, or permit employers to incorporate, national agreements on pay and conditions of service will assimilate to the new pay system on the effective date determined below.
- 46.2 Staff on local contracts not incorporating national agreements on pay and conditions of service will be offered the opportunity to assimilate to the new pay system with the same effective date, subject to them giving their employer reasonable notice of their decision. If these staff do not exercise this right within the initial notice period, they may:
- do so later and the effective date of assimilation will be the start of the next pay period after they have notified the employer of their decision;
 - or
 - defer their decision on moving to the new pay system until the outcome of the review of unsocial hours payments is known and providing they have given their employer reasonable notice their effective date of assimilation will be the effective date of the new arrangements.
- 46.3 Staff on local contracts may move on to the new pay system after this when their effective date will be the start of the next pay period after they have notified the employer of their decision.
- 46.4 Where organisations have normally adopted Senior Manager Pay contracts, these should be regarded as "national agreements" for the purposes of this provision.
- 46.5 Newly appointed or promoted staff should be appointed or promoted on the new terms. However if, during the implementation phase, employees are recruited after 1 October 2004 on pre-Agenda for Change terms and conditions pending assimilation of their posts to the new pay system, then the protection arrangements set out in this agreement will apply.

Effective Dates and Operational Dates

- 46.6 The operational date for national roll out will be 1 December 2004, with an effective date for any changes in pay and conditions of 1 October

2004, except for hours of the working week where staff will retain their existing hours until 30 November 2004 after which the new hours will apply subject to the transitional arrangements set out in paragraphs 46.30 to 46.32 below.

- 46.7 For staff returning from secondment to their substantive post on the same contract of employment after the time of assimilation the protection arrangements set out in this section will apply. For example staff currently working less than 37½ hours will have their hours protected for a phased protection period as set out in Table 9.
- 46.8 To support the smooth transfer of staff onto new contracts employers may agree locally, through their joint negotiating machinery, a series of operational dates for staff to move in practice to the new system. These operational dates may vary for different categories of staff. Where this provision is used locally, the aim should be to have matched most staff to their new pay bands by 31 March 2005 and to have completed the assimilation of staff no later than the end of September 2005. Any member of staff whose assimilation to the new system is deferred for operational reasons under this provision will have any pay increase and any other improvement in terms and conditions back-dated to the effective date, subject to the qualification in relation to the retention of existing hours until 30 November 2004 set out in paragraph 46.6 above.

Assimilation to New Pay Spines and Bands

- 46.9 An employee's current pay for the purpose of assimilation to the new pay spines and bands, referred to below as "basic pay before assimilation", is their annual full-time equivalent basic pay on the effective assimilation date plus the annual value of any job evaluation related allowances (see Annex Q) plus the average value of any bonus payments under schemes which are discontinued (see paragraph 46.42 below).
- 46.10 Where the employee's basic pay is already subject to protection at the point of assimilation the protected level of basic pay should be used in this calculation.
- 46.11 For staff returning from career breaks, maternity leave, or other special leave, current pay shall be calculated as in paragraph 46.9 above but by reference to the current values of the pay and allowances received in the post they held prior to the break.
- 46.12 The rules for assimilating staff to the new pay bands are as follows:
- where basic pay before assimilation is between the new minimum and maximum of the new pay band, staff will assimilate to the next equal or higher pay point in the new pay band;

- in pay band 1, where basic pay before assimilation is below the new minimum, staff in pay band 1 will all move straight onto the minimum. Most staff in other pay bands will assimilate either at the new minimum or, if they are significantly below the minimum, on to special transitional points. Staff will then progress automatically through the special transitional points in annual steps until they reach the minimum of their new pay band, when the normal rules on pay progression will apply, subject to the special provision in Section 6, paragraph 22. Special arrangements are however set out below for staff approaching retirement;
- in a minority of cases, basic pay before assimilation will be above the maximum of the new pay band. In some instances, this situation has been addressed by agreeing that it is appropriate to pay a recruitment and retention premium (see Section 5 and Annex R) from the outset. Where a difference remains, pay protection will apply;
- in the case of staff with an incremental date of 1 October 2004 under their pre-Agenda for Change pay arrangements, their basic pay for the purpose of any assimilation calculation will include the incremental increase payable on that date.

46.13 The special transitional points referred to above are set out in Annex B and Annex C. These special transitional points can only be used during assimilation and will be removed once assimilation is complete.

46.14 Subject to paragraph 46.15 below, special transitional points will be available for use as follows:-

- for staff in early implementer sites the minimum transitional points available are:-
 - from 1 June 2003 to 31 May 2004 the lowest point;
 - from 1 June 2004 to 31 May 2005 the second lowest point;
 - from 1 June 2005 to 31 May 2006 the highest transitional point.
- for all other NHS staff the dates are as follows:
 - from 1 October 2004 to 30 September 2005 the lowest point;
 - from 1 October 2005 to 30 September 2006 the second lowest point;

- from 1 October 2006 to 30 September 2007 the highest transitional point.

46.15 During any period when the special transitional points are in use in respect of any member of staff in a given unit or equivalent work area, new appointees to the same pay band in that unit or work area, who would normally join at the minimum pay for the job, should be appointed on the lowest special transitional point currently in use.

46.16 Where a special transitional point is in use:

- all new appointees appointed on it during the year will move up a point on the 1 October following appointment and their incremental date will be 1 October regardless of when in the year they were appointed;
- where existing staff assimilate to a special transitional point, they will progress on their normal incremental date to the next point.

Staff Approaching Retirement Age

46.17 During the period of assimilation the following rules will apply for staff approaching retirement age⁸ whose basic pay before assimilation is below their new minimum:

- assimilation for staff two years or less from their normal retirement age on the effective date of assimilation should be no lower than the normal minimum;
- for staff three years or less from their normal retirement age on the effective date, assimilation should be to a point no lower than the highest special transitional point;
- for staff four years or less from their normal retirement age on the effective date, assimilation should be to a point no lower than the second highest special transitional point;
- for staff five years or less from their normal retirement age on the effective date, assimilation should be to a point no lower than the lowest special transitional point.

⁸ In accordance with the relevant NHS pension provisions, including those relating to any special classes. (In Scotland information about pensions is in Superannuation (Health Services) Circular No 1995/4).

Pay Protection

Calculating Pay Before and After Assimilation

- 46.18 In the case of the minority of individual staff whose regular pay might otherwise be lower under the new system the following arrangements will apply to ensure that any such staff will be no worse off on assimilation.
- 46.19 The level of pay before and after assimilation should be calculated taking account of the payments set out in Table 7 below, subject to the qualifications set out in paragraph 46.20.

Table 7

Payment Before Assimilation	Payment After Assimilation
<p>Basic pay, including any contractual overtime: plus</p> <p>Leads and allowances measured in the Job Evaluation Scheme, or taken into account in any recruitment and retention premia (see Annex Q): plus</p> <p>London weighting, fringe allowances and cost of living supplements: plus</p> <p>Shift allowances and other payments related to unsocial hours (see Annex Q): plus</p> <p>On-call payments (unless special transitional arrangements are in force – see paragraph 2.28) (That is where it is agreed locally to retain existing on-call arrangements for a transitional period of up to four years from the effective date of assimilation. In such cases, on-call payments should be excluded from the calculation): plus</p> <p>Bonus payments from schemes discontinued following implementation of the new pay system: plus</p> <p>Other leads and allowances paid as part of regular pay which will cease on assimilation (see paragraph 46.40 below)</p>	<p>Basic pay, including any contractual overtime: plus</p> <p>Recruitment and retention premia: plus</p> <p>High cost area supplements: plus</p> <p>Shift allowances and other payments related to working outside normal hours (see Section 2 and Annex Q): plus</p> <p>On-call payments (unless special transitional arrangements are in force – see paragraph 2.28): plus</p> <p>Any new bonus schemes authorised under the new system.</p>
Total	Total

46.20 The level of pay before assimilation for the purpose of this calculation will be the average level of the payments in the left-hand column of Table 7 above over a reference period of twelve weeks or three months ending at the assimilation date except:

- where this period includes the annual pay award due in April 2005 or an annual increment, the protected amount should be adjusted as if that award or increment had applied throughout the reference period;
- where the shift allowances or payments for working outside normal hours vary over a rota which is longer than three months, the average over the full rota should be used;

- where bonuses are paid less frequently than monthly an average over the last twelve months should be used.

Accelerated Progression for Staff in High Cost Areas

46.21 In the case of staff in high cost areas as defined in Section 4 where the combined value of the payments before assimilation is greater than the combined value of payments after assimilation, the latter should be recalculated using the first or second available higher pay point within the pay band to that indicated in paragraph 46.12 if that will obviate the need for protection. In such cases the employee's next incremental increase will be payable on 1 October 2005 and 1 October will be the employee's incremental date.

Pay Protection Arrangements

46.22 Where the combined value of the payments before assimilation remains greater than the combined value of the payments after assimilation, the former level of pay will be protected. These protection arrangements apply to the combined value of payments before and after assimilation, not to individual pay components, excepting the provisions relating to retention of existing on-call arrangements (see Table 7 above and paragraph 28 in Section 2).

46.23 The level of protected pay will be re-calculated for staff assimilating after April 2004 taking into account the 3.225% uplift in April 2005 in respect of all payments to which it applies.

46.24 If standard hours change during the period of protection, other than under the rules for assimilation to new standard hours below (for example where a member of staff changes from full-time to part-time employment), or if a staff member reduces their hours of work or level of unsocial hours working, the protected level of pay will be re-calculated.

46.25 The period of protection will end when the total level of payments under the new system exceeds the level of protected pay, or when the protected person changes job voluntarily, or at the latest on 30 September 2009 for staff in early implementer sites and 31 March 2011 for staff in national roll-out. For protection arrangements in NHS Scotland please refer to the pay protection section of the pay and modernisation website:
www.show.scot.nhs.uk/sehd/paymodernisation/afc.htm

46.26 As soon as possible during the period of protection, the skills, knowledge and role of staff subject to protection will be reviewed to establish whether they could be re-assigned to a higher weighted job or offered development and training to fit them for a higher weighted job.

46.27 Staff with pay protection arising from changes unrelated to this agreement who are also eligible for protection under this agreement may, at the time of assimilation, elect either to continue with their existing protection agreement or to move to this protection agreement. When the agreement concerned expires they will move onto the normal terms and conditions under this agreement.

Incremental Dates

46.28 Subject to the special provisions set out in Section 6, paragraph 32 relating to temporary movement into a higher pay band, paragraph 46.16 for staff on special transitional points and paragraph 46.21 in relation to accelerated progression for staff in high cost areas, incremental dates will be determined as follows:

- for existing staff on spot salaries (i.e. in posts with a single salary rate and no increments) or staff who are on or above the maximum of their current pay scale the incremental date will be the anniversary of the effective date of assimilation;
- for newly appointed or promoted staff the incremental date will be the date they take up their post.

46.29 All other staff will retain their current incremental date.

Assimilation to New Conditioned Hours

46.30 For staff who currently work more than 37½ hours, excluding meal breaks, there is a two year transitional period during which the new contracted hours will be phased in, as set out in Table 8 below, and during which staff may be required to work up to their old contracted hours with overtime payable for any hours in excess of their standard hours. Pro-rata arrangements will apply to part-time staff.

Table 8
Assimilation of Working Hours for Those Currently Working
More than 37½ hours

Current Standard Hours	New Standard Hours
Up to 39	37½ from 1 December 2004
More than 39, up to 41	39 from 1 December 2004 37½ from 1 December 2005
More than 41	40½ from 1 December 2004 39 from 1 December 2005 37½ from 1 December 2006

46.31 Staff currently working less than 37½ hours, excluding meal breaks, will have their hours protected for a phased protection period as set out in Table 9 below. These protection arrangements will continue to apply where staff move to a post with the same hours under the old pay system during the protection period.

46.32 Part-time staff whose hours of work change under Agenda for Change may opt to either retain the same number of hours they currently work or have their part-time hours altered to represent the same percentage of full time hours as is currently the case.

Table 9
Assimilation of Working Hours for those Currently Working
Less than 37½ hours

Current Full-Time Standard Hours	New Standard Hours (Years from 1 December 2004)
37 hours	<ul style="list-style-type: none"> • Three years on 37 hours
36½ hours	<ul style="list-style-type: none"> • Three years on 36½ hours • One year on 37 hours
36 hours	<ul style="list-style-type: none"> • Three years on 36 hours • Two years on 37 hours
35 hours	<ul style="list-style-type: none"> • Four years on 35 hours • Two years on 36 hours • One year on 37 hours
33 hours	<ul style="list-style-type: none"> • Four years on 33 hours • Two years on 35 hours • One year on 37 hours

Assimilation to New Annual Leave or General Public Holiday Arrangements

46.33 Any additional leave and general public holiday entitlements set out in Section 13 will begin to accrue from the effective date of assimilation.

This will be 1 October 2004 for national roll-out sites. If the staff member remains in post for the remainder of the leave year, the additional leave available in that year will be calculated pro-rata to the proportion of the leave year falling after the date of assimilation.

- 46.34 Any member of staff whose leave entitlement is reduced under Agenda for Change will have their existing entitlement protected for five years from the date of assimilation onto the new system. During this period staff may continue to claim existing entitlements.
- 46.35 Length of service for the purposes of calculating the additional leave entitlements set out in Section 13 includes service prior to the effective date of assimilation (see Section 12 for provisions governing reckonable service).

Leads and Allowances

- 46.36 Within the new pay structure all leads and allowances will be replaced by higher basic pay for the majority of staff. This supports simplification of the pay system and is consistent with the principle of equal pay for work of equal value. Employers may use their discretion, subject to partnership arrangements, to reward staff undertaking statutory, regulatory duties performed outside of those required by the job description and/or measured by the NHS Job Evaluation Scheme. Current examples of such statutory, regulatory duties include midwifery supervision.
- 46.37 The current value of national leads and allowances or other special payments, which compensate staff for elements of their work which are valued within the NHS Job Evaluation Scheme, have been taken into account in setting levels of basic pay in the new system. The allowances it is agreed fall in this category are listed at Annex Q.
- 46.38 The current value of national leads and allowances and other special payments which reflect continuing special recruitment and retention needs such as London allowances, the chaplains' accommodation allowance, the special hospital lead and the regional secure unit allowance, have been taken into account in either new payments in high cost areas or in new recruitment and retention payments (see Section 4 and Annex Q).
- 46.39 Local allowances and other special local payments intended to enable NHS employers to respond to high market wages for staff in particular occupations or with particular skills will be reviewed under the rules for recruitment and retention premia in Agenda for Change. Where they continue to be justified, the resources concerned will be taken into account in new recruitment and retention premia under the new system. See Section 5 and Annex Q.

46.40 All other leads and allowances paid when staff are assimilated onto the new system, whether agreed nationally or locally, will cease. The value of any such payments made as part of regular pay before assimilation will, however, be taken into account in assimilation and in the calculation of any pay protection for the minority of individual staff whose regular pay may otherwise be lower under the new system. See the Pay Protection provisions above.

Trainees

46.41 The arrangements for the pay and banding of trainees are set out in Annex U.

Bonus Payments

46.42 Agenda for Change does not preclude bonus schemes, provided they are related to genuinely measurable targets (and not part of regular pay) and provide fair and equal opportunities for all staff in the organisation or unit or work area concerned to participate. However, it is agreed that most existing bonus schemes/performance agreements are unlikely to be compatible with these principles. All existing schemes, excepting any local schemes that do meet these requirements will, therefore, cease at the date of assimilation. If they cease then the value of the bonus payments should be included in the calculation of regular pay for assimilation purposes or, if agreement can be reached locally, the resources reinvested in a properly constituted scheme offering fair access to all staff.

High Cost Area Supplements

46.43 Current payments for London weighting, Fringe allowances and Cost of Living Supplements will be discontinued once the new arrangements are in force.

46.44 For existing staff, where the new level of supplement falls short of the combined entitlement to these former payments the former level of payment will be included in the calculation of any protected level of pay (see the Pay Protection provisions above), provided they remain in a job in which they would have received the former payment.

46.45 Current entitlements for Cost of Living Supplements in areas outside London and Fringe will continue but will be re-expressed as long-term recruitment and retention premia.

Nationally Agreed Recruitment and Retention Premia

46.46 The use of job evaluation to ensure fair pay between NHS jobs has revealed a number of jobs with relatively high levels of pay in relation to job weight which appear to reflect past responses to external labour

market pressures. In some cases these market pressures require continuing special measures.

- 46.47 Table 10 below lists a number of jobs for which there is prima facie evidence from both the work on the job evaluation scheme and consultation with management and staff representatives that a premium is necessary to ensure the position of the NHS is maintained during the transitional period.

Table 10
Jobs Subject to Nationally Agreed Recruitment Premia

Job
Chaplains
Clinical Coding Officers
Cytology Screeners
Dental Nurses, Technicians, Therapists and Hygienists
Estates Officers/Works Officers
Financial Accountants
Invoice Clerks
Biomedical Scientists
Payroll Team Leaders
Pharmacists
Qualified Maintenance Craftspersons
Qualified Maintenance Technicians
Qualified Medical Technical Officers
Qualified Midwives (new entrant)
Qualified Perfusionists

- 46.48 Initial guidance to employers in setting appropriate levels of premia in these cases and the arrangements for their review is included at Annex R. It requires the level of premium payable to be set locally on assimilation in cash terms at a level at least sufficient to ensure that at assimilation an existing member of staff will be no worse off than now, and that these premia should be uprated by 3.225% in April 2005. The guidance may be revised by the NHS Staff Council and any uprating of these premia beyond 2005 will be by agreement at national or local level.

Career and Pay Progression

- 46.49 The gateway system set out in Section 6 will only become fully operational when an employer has put in place reasonable arrangements to ensure that staff have access to development reviews, personal development plans and appropriate support for training and development to meet the applied knowledge and skills required at the gateway concerned. This must be done for all posts covered by this agreement no later than October 2006.

46.50 Existing staff with at least twelve months' experience in post will be assumed to have met the criteria for passing through the foundation gateway. Where the gateway system is operational, they will, however, be subject to the normal operation of the new system at the second gateway.

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Annex J

ANNEX J**LOCAL RECRUITMENT AND RETENTION PREMIUM CRITERIA**

1. To ensure consistency in the application and payment of recruitment and retention premia, local employers should adhere to the following protocol.

Recruitment

2. All new vacancies should be advertised in relevant local, regional, national and/or professional media.
3. Where adverts have produced no suitable applicants HR personnel service/department managers and staff representatives should consider the reasons for this. Account should be taken of the number of applicants, relevant national vacancy data and local labour market information, the media used and any non-pay improvements which could be made to the employment package (e.g. training opportunities, childcare, relocation), or any expected increase in the supply of staff suitable for the post.
4. If it could be reasonably assumed that vacancies could be filled through, for example, advertising in different media or by waiting for an expected increase in supply (for example from new trainees) then vacant posts should be re-advertised.
5. However, if on the basis of paragraphs 2 and 3 above, it is decided that the vacancy problem can be addressed most effectively only through payment of a recruitment and retention premium, the employer should decide in partnership with local staff representatives whether the problem is likely to be resolved in the foreseeable future (in which case any premium should be short-term) or whether it is likely to continue indefinitely (in which case any premium should be long-term (see Section 5)).
6. The employer should then consult with neighbouring employers, the Strategic Health Authority, Workforce Development Confederations, staff organisations and other stakeholders, before implementing any premium.

Retention

7. Before consideration is given to paying recruitment and retention premia to increase retention of staff, HR personnel, service/department heads and relevant staff representatives should ensure non-pay benefits (e.g. childcare support, training and development) are sufficiently developed. Where possible local turnover rates should be

compared with national rates. Employers are also advised to undertake regular exit surveys to assess how far pay is a factor in employees' decisions to leave the organisation.

8. However, if it is decided that a retention problem can be addressed most effectively only through payment of a recruitment and retention premium, the employer should decide whether the problem is likely to be resolved in the foreseeable future (in which case any premium should be short-term) or whether it is likely to continue indefinitely (in which case any premium should be long-term (see Section 5).
9. The employer should then consult with neighbouring employers, the Strategic Health Authority, Workforce Development Confederations, relevant staff organisations and other stakeholders.

Review

10. Once recruitment and retention premia are awarded they should be reviewed annually. This review should be done by HR personnel, relevant service/department heads and staff representatives.
11. The review should consider amongst other factors:
 - how far the recruitment and retention premia have allowed the NHS organisation to reduce its vacancy rates and turnover;
 - the likely impact on vacancies of removing or reducing a recruitment and retention premium;
 - any changes in labour market circumstances.
12. The principle consistent with equal pay for work of equal value should be that where the need for a recruitment and retention premium is reduced or has ended, short-term premia should be reduced or withdrawn as soon as possible consistent with the protection period in Section 5. Long-term premia should be adjusted or withdrawn for anyone offered a qualifying post after the decision to withdraw or reduce the premium has been made.

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Annex R

ANNEX R**GUIDANCE ON THE APPLICATION OF NATIONALLY AGREED RECRUITMENT AND RETENTION PREMIA**

- 1 This note provides initial guidance on setting the levels of long-term recruitment and retention premia which have been agreed in principle at national level under the new NHS pay system.

Background

- 2 Recruitment and retention premia are additions to the pay of a post or group of similar posts where market pressures would otherwise prevent the employer from being able to recruit or retain staff in sufficient numbers at the normal salary for jobs of that weight. The new system provides for them to be awarded on either a national or local basis. But where it is agreed nationally that a recruitment and retention payment is necessary for a particular group the level of the payment should be specified or, where the underlying problem is considered to vary across the country, guidance should be given to employers on the appropriate level of payment.
- 3 This guidance therefore covers the award of long-term recruitment and retention premia for staff in the limited number of posts for which the payment of a premium has been pre-agreed. This does not mean that other premia cannot be agreed locally, provided the correct procedure for determining a premium is followed as set out in Annex J, including consultation with staff representatives and other local NHS employers.

Posts to Which This Guidance Applies

- 4 The use of job evaluation to ensure fair pay between NHS jobs has revealed a number of jobs with relatively high levels of pay in relation to job weight which appear to reflect past responses to external labour market pressures. In some cases employers have used higher grades than would appear appropriate on the basis of a strict interpretation of grading definitions in order to recruit or retain staff. In other cases there have been national agreements to improve the pay of particular grades or groups because of concerns about recruitment and retention.
- 5 Under normal circumstances, when the new pay system is fully operational, evidence would be sought that it is not possible to recruit or retain staff at the normal job-evaluated pay level before agreeing a recruitment and retention premium. However this process cannot be safely applied to the transitional period in which the new system is being implemented, because data on recruitment at the new pay levels cannot be sought until the new pay rates are in force. That could result in the withdrawal of all past local and national measures aimed at

dealing with recruitment problems for a period of several months and possibly longer, while data on recruitment at the new pay levels was gathered, which could severely disadvantage the NHS in the labour market.

6. The negotiators of Agenda for Change have therefore agreed a list of jobs for which there is prima facie evidence from both the work on the job evaluation scheme and consultation with management and staff representatives that a premium is necessary to ensure the position of the NHS is maintained during the transitional period. The jobs concerned are listed in Table 19 below:

Table 19

Type of Post
Chaplains
Clinical Coding Officers
Cytology Screeners
Dental Nurses, Technicians, Therapists and Hygienists
Estates Officers/Works Officers
Financial Accountants
Invoice Clerks
Biomedical Scientists
Payroll Team Leaders
Pharmacists
Qualified Maintenance Craftspersons
Qualified Maintenance Technicians
Qualified Medical Technical Officers
Qualified Midwives (new entrant)
Qualified Perfusionists

7. Under these circumstances however it is difficult, and in most cases would be inappropriate, to determine a national rate for the premium. The agreement therefore provides in these cases only that the premium must be sufficient to ensure no loss (in line with the principle that the NHS should not be disadvantaged in the labour market during the transitional period) while requiring employers working in partnership with staff representatives to review the evidence available locally. The exception dealt with below is that of staff who require full electrical, plumbing or mechanical crafts qualifications, where there is a high degree of consistency in NHS rates and readily available published market rates, on the basis of which an initial rate for the premium has been set.
8. The following paragraphs provide guidance on how the no loss guarantee should be interpreted, the constraints within the new system on the maximum level of premium which may be paid and specific guidance on some of the groups concerned where additional

considerations apply, including the agreed rate in the case of staff who require full electrical, plumbing or mechanical crafts qualifications.

Minimum Level of Premium

9. The level of premium payable should be set locally on assimilation in cash terms at a level at least sufficient to ensure that at assimilation an existing member of staff will be no worse off. The level of premium agreed locally should therefore be at least sufficient to ensure that the staff in these posts do not require protection under the separate protection arrangements.
10. As set out in paragraph 2 of Section 5, employers may establish different premia for different classes or types of post provided there is evidence that the recruitment and retention position is different, for example because they have significantly different job descriptions and are in different pay bands under the new system.

Maximum Level of Premium

11. Unless necessary to ensure no loss as described above, no premium may exceed 30% except as set out below.
12. Premia in excess of 30% may be paid where justified under the criteria in Annex J.

Further Guidance on Specific Cases

Qualified Maintenance Craftspersons and Qualified Maintenance Technicians

13. Given the high degree of consistency in NHS rates and the existence of published market rates, it is appropriate to specify a single level of premium for staff who require full electrical, plumbing or mechanical crafts qualifications of £2,808 a year. Premia should only exceed this rate, or the equivalent rate as uplifted under the provisions below, where that is necessary to ensure no loss under the rules in paragraphs 4 to 7 above.
14. Premia may also be agreed locally for building crafts, subject to the guidance above on minimum and maximum rates.

Chaplains

15. The agreement instituting the new pay system includes agreement that the chaplains' accommodation allowance should be replaced by a recruitment and retention premium. In the case of chaplains therefore any premium agreed, in addition to meeting the normal rules on the

minimum level of allowance set out above, must not be less than the level of any accommodation allowance already in payment.

Qualified Midwife (New Entrant)

16. Premia should be set at the level necessary to ensure that newly qualified midwives in post on assimilation to pay band 5 suffer no loss under the rules in paragraph 9 above. Trusts should then apply the same premium to other newly qualified midwives in pay band 5 appointed after the effective date for assimilation. No premium should be paid to midwives in more senior jobs at pay band 6 and above on the basis of this guidance. Employers are however free (as with all other jobs) to agree local recruitment and retention premia for other midwives locally under the new system, where the criteria are met.

Uprating of Nationally Agreed Premia

17. The agreement instituting the new pay system includes a provision that any premia agreed should be uprated by 3.225% in April 2005. Any premia paid prior to these dates should be uplifted at that date by this amount. Any uprating of premia thereafter will be by either national or local agreement.

Review of this Guidance

18. This initial guidance on the level of nationally agreed recruitment and retention premia has been drafted to allow flexibility for the service during assimilation to the new system, taking account of the fact that the current grading of posts varies widely. Future reviews of the guidance should seek to introduce greater consistency in rates of premium for newly appointed staff, unless variation is justified by the evidence.