THE INDUSTRIAL TRIBUNALS

CASE REFS: 32223/23
31998/23

CLAIMANTS: **Dr Edward O'Neill**
Dr John Durkan

RESPONDENT: **Belfast Health & Social Care Trust**

JUDGMENT

The unanimous judgment of the tribunal is that:-

1. the claimants were at all material times workers for the purposes of the Employment Rights (Northern Ireland) Order 1996 and the Working Time Regulations (Northern Ireland) 2016;

2. the 2018 contract is void for uncertainty;

3. the claims under the Working Time Regulations (Northern Ireland) 2016 are upheld. Remedy will be determined separately.

CONSTITUTION OF TRIBUNAL

Employment Judge: **Employment Judge Kelly**

Members: **Ms U Short**
Mr D Walls

APPEARANCES:

The claimants were represented by Ms Seymour, Barrister-at-Law and Ms Grace, Barrister-at-Law, instructed by Capital Law Limited.

The respondent was represented by Mr Potter, Barrister-at-Law, instructed by the Business Services Organisation.

BACKGROUND

1. The claimants are General Medical Practitioners ("GPs"). The respondent is the NHS Trust for the Belfast area.

2. The respondent provides an out-of-hours GP service ("OOH service") which is staffed by both salaried OOH GPs and by "*as and when*" (sessional) OOH GPs. Salaried OOH GPs work fixed regular shifts with the same monthly pattern. Sessional OOH GPs work irregular shifts with no guaranteed work.

3. Doctor O'Neill has worked as a sessional OOH GP for the respondent from 10 August 2018.

4. Doctor Durkan has worked as a sessional OOH GP for the respondent, or its predecessors, since 2005.

5. Up to 1 April 2018, sessional OOH GPs were treated as self-employed and did not receive employee benefits, including holiday pay. They were engaged as self-employed individuals under a different form of contract than salaried OOH GPs. The last version of that self-employed and sessional OOH GP contract was issued in 2015.

6. At all times both before and after 1 April 2018, salaried OOH GPs have been treated as employees with employee benefits, including holiday pay.

7. There was a differential of 20% between the hourly rate paid to sessional OOH GPs and that paid to salaried OOH GPs; the sessional OOH GPs were paid at the higher rate. The tribunal heard a great deal of heated argument about whether this differential was an enhancement of the sessional OOH GP rate or a deduction from the salaried OOH GP rate. More of this later, but for this stage of the judgment, which is setting out the background, it is sufficient to note that there was such a differential in the hourly rate.

8. In 2017, HMRC ruled that sessional OOH GPs engaged by or on behalf of Trusts, including the respondent Trust, were employees for the purposes of income tax and NIC, and that they should be paid as such through the respondent's payroll.

9. The Trust introduced a new contract for sessional OOH GPs which took effect from 1 April 2018. The new contract applied to both claimants.

10. The differential in the hourly rate between sessional OOH GPs and salaried OOH GPs remained in place and no additional or separate payments have been made by the respondent Trust to sessional OOH GPs in respect of holiday pay.

11. The respondent Trust argues that the 2018 contract, properly construed, provides for holiday pay which is incorporated into the hourly rate paid to sessional OOH GPs. The amount of the hourly rate paid to sessional OOH GPs and to salaried OOH GPs did not change in 2018 [and has remained unchanged since that date].

12. The claimants argue that the 2018 contract, properly construed, provides for the payment to sessional OOH GPs of holiday pay at a rate of 12.5% over and above the pre-existing hourly rate. If the claimants are correct in their contention, that would result in sessional OOH GPs being paid an hourly rate which is already 20% higher than the rate paid to salaried OOH GPs, together with an additional 12.5% supplement in respect of holiday pay. The claimants further argue that the

respondent has been in breach of the Working Time Regulations (Northern Ireland) 2016 as a result of a failure to pay the claimants holiday pay in accordance with the regulations for their OOH GP sessional work.

13. The claims before this tribunal are that the claimants have not been paid holiday pay by the respondent. In statutory terms, the claims are:-

    (a) claims under Article 45 of The Employment Rights (NI) Order 1996 (the 1996 Order); and

    (b) claims under Regulations 15, 16 and 20 of the Working Time Regulations (NI) 2016 (WTR).

14. In addition to the dispute between the parties about the correct interpretation of the 2018 contract, the claimants argue that, at all relevant times, they were workers for the purposes of both the 1996 Order and the WTR. The respondent argues that they were not workers for the purposes of either legislation, and that they were self-employed.

RELEVANT LAW

15. Article 3 of the 1996 Order provides:

> *"3 – (1) In this Order, "employee" means an individual who has entered into or works under - a contract of employment.*
>
> *(2) In this Order, "contract of employment" means a contract of service - whether express or implied and (if it is express) whether oral or in writing.*
>
> *(3) In this Order, "worker" means an individual who has entered into, or works under –*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract whether express or implied and (if it is express) whether oral or in writing whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of an individual or customer of any profession or business undertaking carried on by the individual".*

<u>Unauthorised Deduction from Wages</u>

16. Article 45 provides, so far as is relevant to this claim as follows:-

> ***"45. – 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 Article "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.

(4) Paragraph (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of the Article a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this Article an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This Article does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

Working Time Regulations

17. Regulation 2 provides:-

> *"Worker" means an individual who has entered into or works under -*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of a profession or business undertaking carried on by the individual and any reference to a worker's contract shall be construed accordingly."*

18. Regulations 15 and 16 provide that a worker is entitled to 5.6 weeks leave in a given leave year. That comprises 4 weeks leave derived from EU law and an additional 1.6 weeks leave derived from domestic law.

19. Regulation 20 provides that a worker should be paid a week's pay in respect of each week of leave.

20. Regulations 17 to 20 provide for the calculation of a week's pay.

Rolled Up Holiday Pay

21. The respondent argues that the 2018 contract in the present cases incorporates the entitlement to holiday pay into the hourly rate payable to sessional OOH GPs for various types of shift. That rate remained unchanged when the new contract was introduced in 2018. The 2018 contract was prepared and implemented by the respondent. The tribunal has been referred to no contemporaneous negotiations with the BMA or any other representative body in relation to the preparation of the contract and has been referred to no input by, or on behalf of, the claimants into the terms of the contract. In ***Gridquest Limited v Blackburn [2002] ICR 1206*** the Court of Appeal (GB) stated:-

> *"7. Only if it is agreed between employer and employee that the weekly payment includes an amount for something else, such as holiday pay, can it be held to do so. An employer cannot unilaterally decide that the week's pay is a payment not only for the hours worked during the week but includes an element of holiday pay. The claim that holiday pay was "in fact" paid amounts to an assertion that the employer can decide unilaterally what is included in the weekly payment.*
>
> *8. In my judgment, Regulation 16(5) does not confer that right upon an employer. Indeed, it expressly refers to "contractual" renumeration paid in respect of a period of leave. If the worker has not agreed that the sum paid includes a sum in respect of a period of leave, it is no part of the contract that the sum includes an element of holiday pay. The renumeration under the contract is for the week's work". (Tribunal's emphasis)*

22. In ***Robinson-Steele v RD Retail Services Limited [2006] ICR 932,*** the ECJ considered, inter alia, whether Article 7 of Directive 93/104 precluded part of the renumeration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, a payment additional to that for work done; in other words, whether *"rolled-up"* holiday pay was permissible. Directive 93/104 was replaced by the 2003 Directive which is, in material part, in similar terms.

23. The ECJ confirmed that Article 7(1) of the Directive precluded the practice of rolled up holiday pay. The court emphasised at paragraph 49 that the purpose of the relevant provisions was *"to enable the worker actually to take the leave to which he is entitled"*. It stated at paragraph 50,

> "*The term "paid annual leave" in that provision means that, for the duration of annual leave within the meaning of the Directive, renumeration must be maintained. In other words, workers must receive their normal renumeration for that period of rest".*

24. The ECJ further stated:-

> *"51 In those circumstances, it must be held that an agreement under which the amount payable to the worker, as both renumeration for work done and part payment for a minimum annual leave, would be identical to the amount payable, prior to the entry into force of that agreement, as a renumeration solely for work done, effectively negates by means of a reduction in the amount of that renumeration, the workers' entitlement to paid annual leave under Article 7 of the Directive. Such a result would run counter to what is required by Article 18(3) of the Directive.*
>
> *52 Consequently, the answer to the second question referred in case C-257/04 must be that Article 7(1) of the Directive precludes part of the renumeration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, in payment additional to that for work done. There can be no derogation from that entitlement by contractual arrangement.*

25. The ECJ stated in relation to set-off:-

> "65 *The question is therefore whether payments in respect of minimum annual leave, within the meaning of that provision, already made within the framework of such a regime contrary to the Directive, may be set off against the entitlement to payment <u>for a specific period during which the worker actually takes leave</u>. (Tribunal's emphasis)*
>
> *66. <u>In that situation</u>, Article 7 of the Directive does not preclude, as a rule, sums additional to renumeration available for work done which had been paid, <u>transparently</u> and <u>comprehensively</u>, as holiday pay, from being set off against the payment for specific leave." (Tribunal's emphasis)*

26. The practice of rolled up holiday pay is unlawful and there can be no sensible argument to the contrary. However, in limited circumstances, it is possible that there might be a right of *"set off",* as a question of remedy. Properly, that would fall to a separate remedy hearing in this matter. However, any right of set off can only be exercised where the arrangements are *"transparent and comprehensible"*.

27. The decision of the ECJ in Robinson Steele and the interpretation in that decision of the WTR was clearly retained case law for the purposes of the European Union (Withdrawal) Act 2018, up to 31 December 2023 and assimilated case law thereafter for the purposes of the Retained EU Law (Revocation and Reform) Act 2023.

28. In ***Lyddon v Englefield Brickwork Limited [2008] IRLR 198***, the EAT stated in considering an arrangement where the worker had received rolled up holiday pay and where the tribunal had determined that the respondent employer had been entitled to set off the amounts paid as part of rolled up holiday pay against annual leave entitlement, that;

> *"30. - The fundamental question is whether there is a consensual agreement identifying a specific sum properly attributable to periods of holiday". (Tribunal's emphasis)*

In that particular case, the claimant had agreed to the practice of rolled-up holiday pay before commencing employment and the amount attributable to holiday pay had been clearly and specifically set out in his payslips.

The EAT referred to the earlier decision of ***Smyth v AJ Morrisroes and Sons Limited [2005] IRLR 72*** which set out guidelines;

> *"There must be mutual agreement for genuine payment for holidays representing a true addition to the contractual rate of pay for the time worked. The best way of evidencing this is for:*
>
> *(a) the provision for rolled up holiday pay to be clearly incorporated into the contract of employment;*
>
> *(b) the percentage or amount allocated to holiday pay (or particulars sufficient to enable it to be calculated) to be identified in a contract and preferably also in the payslip;*
>
> (c) *records to be kept of holidays taken (or of absences from work when holidays can be taken) and for reasonably practicable steps to be taken to ensure that workers take their holidays before the end of the relevant holiday year".* (Tribunal's emphasis)

29. Any remedy hearing which considers whether the present employer is entitled to set off the amount paid by way of holiday pay will have to consider:-

(a) whether set off is possible in the absence of any real agreement to the practice of rolled-up holiday pay?;

(b) whether set off is possible where no records of annual leave actually taken have been kept by the respondent and where no effort has been made by the respondent to ensure that the sessional OOH GPs took any annual leave, both in compliance with statutory requirements and as a health and safety measure?;

(c) whether set off is possible where the payslips were inadequate, at least for a substantial period?;

(d) whether it is appropriate for a public sector body to adopt an unlawful practice such as rolled-up holiday pay in 2018 when it must have known it was unlawful and then, some years later, to seek set off.

30. It is clear that the statutory provision of holiday pay, both originally in Directives and subsequently in domestic legislation such as the WTR, is primarily a health and safety measure to encourage workers to take specified periods of rest and to be paid for doing so. The Supreme Court in ***Chief Constable of the Police Service for Northern Ireland v Agnew [2023] UKSC 33*** stated at paragraph 10 of the judgment that:-

> *"The first Working Time Directive was Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time:-. It was adopted using the power in the EC Treaty for the Council to take measures "to ensure a better level of protection for the safety and health of workers". The recitals included the statement that the improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations."* (Tribunal's Emphasis)

Construction of a Contract

31. The legal principles relevant to contractual construction apply to a contract of employment as in the case of contracts generally. Judge Richardson in ***Weatherilt v Cathay Pacific Airways Limited (EAT) [2017] ICR*** stated as follows (at Paragraph 50):-

> *"50 The principles which should be applied in interpreting the 2008 conditions of service are found in a line of cases most recently summarised by the Supreme Court in **Rainey Sky SA v Kookmin Bank [2011] I WLR 2900**, paras 14-30 (per Lord Clarke of Stone-cum-Ebony JSC) and **Arnold v Britton [2015] AC 1619, paras 14-23**. These passages always repay study in full; but it is sufficient for the purposes of this judgment to set out para 15 of the judgment of Lord Neuberger of Abbotsbury PSC in **Arnold v Britton**.*
>
> > *"When interpreting a written contract, the court is concerned to identify 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 contract to mean', to quote Lord Hoffman in **Charterbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14**. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural*

and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions …"."

32. In ***Arnold v Britton and others [2015] UKSC 36*** (I) Lord Neuberger further held that:-

> *"The interpretation of a contractual provision, including one as to service charges, involved identifying what the parties had meant through the eyes of a reasonable reader, and, save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision; that, although the less clear the relevant words were, the more the court could properly depart from their natural meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate a departure from the natural meaning; that commercial common sense was relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date on which the contract had been made; and that, moreover, since the purpose of contractual interpretation was to identify what the parties had agreed, not what the court thought that they should have agreed, it was not the function of a court to relieve a party from the consequences of imprudence or poor advice."* (Tribunal's emphasis)

33. In ***Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR896, 912***, Lord Hoffmann identified five principles applicable to construing contractual terms:-

> *"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> *(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*
>
> *(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see* ***Mannai Investments Co. Ltd. V. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 794****.*

(5) *The "rule" that words should be given their "natural and ordinary meaning" reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in* ***Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201****:-*

"11. if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

34. Chitty on Contracts 34th Edition Volume 1, Part 5 (2023) provides the following commentary:-

"***A summary of the applicable principles***

The principles applied by the courts to the construction or interpretation of commercial documents were helpfully summarised by Popplewell J in ***Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The "Ocean Neptune") [2018 EWHC 163]*** *in the following terms:-*

"The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary

exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each." This summary can be broken into a number of components, namely (i) the objective nature of the assessment; (ii) the "factual matrix" or "available background"; (iii) the meaning of the language used by the parties; (iv) the need to have regard to the contract as a whole; (v) the significance of the nature, formality and quality of the drafting of the contract; (vi) what is to be done when there are two possible meanings of the disputed clause; (vii) the unitary and iterative nature of the process , and (viii) striking the balance between the various, potentially conflicting, principles.""

35. In ***Capgemini UK PLC v Dassault Systemes UK Limited [2024] EWHC 2728*** the Court stated:-

"The Law on Construction and Implied Terms

39. There was nothing between the parties in this regard C provided the following summary which I find useful:-

39.1 The Court's task is to ascertain the objective meeting of the language which the parties have chosen to express their agreement: ***Wood v Capita Insurance Services Limited [2017] AC 1173*** *at [10] and* ***National Commercial Bank Jamaica Limited v NCB Staff Association [2024] UKPC 2*** at [32].

39.2 Statements of the parties' subjective intent are, for this purpose, irrelevant: ***Arnold v Britton [2015] UKSC 36*** *at [15]. It is the meaning which the document would convey to a reasonable person that is determinative, not what the parties subjectively understood a contract to mean.*

39.3 When seeking to interpret the contract, a Court is entitled to take into account the background knowledge which would reasonably have been available to both parties in a situation in which they were at the time of entry into the contract (the so called matrix of fact); ***National Commercial Bank Jamaica Limited v NCB Staff Association*** *at [32].*

39.4 Although the matrix of fact is broad, it does not encompass:-

*39.4.1 Pre-contractual negotiations (**Chartbrook Limited v Persimmon Homes Limited [2009] UKHL 38)** or*

*39.4.2 Conduct subsequent to the making of the contract (**Schuler AG v Wickman Machine Tool Sales Limited [1974] AC 235**).*

*39.5 The meaning of the contract is assessed in light of (i) the natural and ordinary meaning of the clause (ii) any other relevant provisions of the contract or document, (iii) the overall purpose of the clause and the contract or document, (iv) the facts and circumstances known or assumed by the parties at the time that the contract or document was executed, and (v) commercial common sense: **Arnold v Britton** at [15] the Court must therefore interpret the clause in dispute and the context of the contract as a whole rather than examining the disputed clause in isolation from the contract of which it is apart.*

*39.6 The starting point in construing a contract is that words are to be given their ordinary and natural meaning especially where the parties have access to legal advice and can be expected to choose their words carefully: **Arnold v Britton*** at [17-18]. Prima facie, words mean what they say: ***Fomento Construcciones Y Contratas SA v Black Diamond Off-Shore Limited [2016] EWCA Civ 1141***, [12]. Thus, in a case where the contract has been drawn up with the benefit of professional assistance, the terms of the contract are to be interpreted *"principally by textual analysis"*: ***Wood v Capita Insurance Services Limited*** [13] (tribunal emphasis).

*39.7 In the case where the language is used by the parties is unambiguous, it is the duty of the Court to apply that meaning, even in a case where the result is thought to be improbable: **Rany Sky SA v Kookmin Bank [2011] 1WLR2900** at [23]."*

36. The following principles relating to the interpretation of the contract are set out in Lewison's *"interpretation of contracts"* Eighth Edition:-

(a) The interpretation of a written contract involves the ascertainment of the words used by the parties and the determination subject to any rule of law of the legal effect of those words (27).

(b) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract (13).

(c) Both the text and the context are tools in the process of interpretation. The text must be assessed in the light of (i) that natural and ordinary meaning of the words, (ii) any other relevant provisions of the contract, and (iii) the overall purpose of the clause and the contract (15).

(d) The meaning of the contract must be ascertained from the language the parties have used, considered in the light of the surrounding circumstances and the overall purpose of the contract insofar as that has been agreed or approved (51).

(e) The admissible background includes anything which a reasonable person would have regarded it as relevant and which would have affected the way in which they would have understood the language of the document and would reasonably have been available to the parties (15).

(f) The process of interpretation is a unitary and iterative one by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. The weight to be given to each will depend on a number of facts, including the formality of the agreement and the quality of the drafting (20).

(g) If the language of the contract is unambiguous, the Court must apply it. But if there are two possible interpretations, the Court is entitled to prefer the interpretation which is consistent with business common sense as at the date of the contract and to reject the other. However, the commercial consequences of one interpretation as against another does not detract from the importance of the words (22). (Tribunal's emphasis)

(h) Where a clause in a contract is taken from a published precedent known to both parties, the precedent may be relied on as an aid to interpretation (119).

(i) The Court may take into account published explanatory notes in interpreting the contract that they are intended to explain (121).

(j) In construing any written agreement, the Court is entitled to look at the evidence of the objective factual background known to the parties or reasonably available to them at or before the contract. This principle applies even if the contract appears to be unambiguous. There is no conceptual limit to background. It can include any relevance which would have affected the way in which the document would have been understood by a reasonable person. However, this does not entitle the Court to look at evidence of the parties' subjective intentions; nor to ascribe to the words of the contract a meaning which they cannot legitimately bear (118).

(k) The reasonableness of the result of any particular interpretation is a relevant consideration in choosing between rival interpretations (524). (Tribunal's emphasis)

(l) A patent ambiguity may arise because the contract is self-contradictory or because it expresses alternative intentions without choosing between them or because it lacks essential definition. In none of these cases is direct evidence of the intention of the parties admissible to resolve the ambiguity and the Court must do the best it can. In reaching a conclusion, the Court may have however regard to such extrinsic evidence as is admissible to construe any contract. In the last resort the clause in question (or the contract as a whole) will be declared void for uncertainty (537) (tribunal's emphasis).

Contra Proferentum Principle

37. The maxim indicates that a contract will normally be construed against the party who prepared that contract and where the contract is ambiguous. The maxim operates most comfortably in standard form contracts, where one side puts forward the contract on a take-it-or-leave-it basis. If for example, an insurance policy contains a clause excluding damage caused by *"floods"* and the damage is caused by a burst domestic water pipe, a court could say that the insurance company, which had the opportunity to do so, should have worded the exemption more clearly to exclude *"floods"* caused by a burst pipe. In the present case, the 2018 contract was prepared exclusively by the OOH employers, including the respondent, and presented to sessional OOH GPs on a take-it-or-leave-it basis.

Worker Status

38. To qualify as *"workers"* for the purpose of the 1996 Order and the WTR, the claimants would have to have been under an obligation personally to do work. Secondly that obligation must have been owed to the respondent. Thirdly, the respondent must not have been a client or a customer of a business being run by the claimants.

39. In ***Uber v Aslam [2021] UK SC5***, the Supreme Court decided:-

    (a) the question of whether a person is an employee, self-employed or a worker is determined by assessing whether that person falls within the relevant statutory provisions irrespective of what has been contractually agreed. In short, the primary question is one of statutory interpretation, not contractual interpretation;

    (b) the starting point is not the contract agreed between the parties because that in reality gives the employers a free hand to determine for themselves whether the persons they engage are employees, workers or in self-employment;

    (c) the purpose of legislation governing employment rights is the protection of employees and workers, and it would be inconsistent with the purpose of that legislation to treat the terms of a written contract as a starting point for determining worker status given the employer's ability to dictate those terms;

    (d) this analysis is supported and given force by the statutory restrictions limiting contracting out from the rights afforded by the relevant legislation which renders provisions of agreements void insofar as they purport to exclude or limit the operation of those provisions.

40. In paragraph 60 the Supreme Court stated:-

> *"In the Supreme Court the sole decision was given by Lord Clarke of Stone-Cum-Ebony*, with whom the other justices agreed. In his discussion of the legal principles, Lord Clarke drew a distinction between certain principles *"which apply to ordinary contracts and, in particular to commercial contracts"*, and *"body of case law in the context of employment contracts in which a different approach has been taken"* – it can be seen from a passage quoted

by Lord Clarke – from the judgment of Aikens LJ in the Court of Appeal ***[2010] IRLR 70***, paragraphs 87-89, that the principles applicable to ordinary contracts to which he was here referring were:-

> *"(i) The "parol evidence rule", whereby a contractual document is treated, at least presumptively, as containing the whole of the parties' agreement;*
> *(ii) The signature rule, whereby a person who signs a contractual document is treated in law as bound by its terms irrespective of whether he or she has in fact read or understood them; and*
>
> *(iii) The principle that, generally, the only way in which a party to a written contract can argue than its terms do not accurately reflect the true agreement of the parties is by alleging that a mistake was made in drawing up the contract which the Court can correct by ordering rectification."*

41. ***Uber*** held that what the ***Autoclenz*** decision decided is that, for the purposes of applying a statutory classification, a court or a tribunal may disregard terms of a written agreement if it is shown that the terms in question do not represent the *"true agreement"* or what was *"actually agreed"* between the parties as ascertained by considering all the circumstances of the case, including how the parties conducted themselves in practice. If, however there is no inconsistency between the terms of the written agreement and how the relationship operated in reality, there is no basis for departing from the written agreement.

42. The Supreme Court held that that definition gave too much weight to the written contract which in reality had been determined by the employer in any event. It held at paragraph 87:-

> *"In determining whether an individual is a "worker", there can, as Baroness Hale said in the Bates Van Winkelhof case at paragraph 39 "be no substitute for applying the words of the statue to the facts of the individual case".*

43. At the same time, in applying the statutory language, it is necessary both to view the facts realistically and keep in the mind the purpose of the legislation. As noted earlier, the vulnerabilities of workers which create the need for statutory protection are subordination to and the dependence upon another person in relation to the work done. The degree of control exercised by the putative employer over the work or services performed by the claimant is crucial. The greater the extent of such control, the stronger the case for classifying the individual as a *"worker"* who is employed under a *"worker's contract"*. Equally the balance of power and understanding between the parties is crucial. The Supreme Court in ***Uber***, at paragraph 77; made it plain that this factor was being taken into account in disregarding, in that case, the terms of the written contract; *"It is unlikely that many drivers ever read those terms, or even if they did, understood their intended legal significance."* That statement could apply in many employment situations. Many individuals signing a contract of this nature do not read it or do not understand it. However, that is not universally the case. In the present case, the claimants were

experienced GPs and members of the BMA. They were familiar with how the system of OOH GP provision operated in practice. In such circumstances, and to the extent that the contract is clear, the written terms of the 2018 contract should be given more weight than the written terms were given in ***Uber*** or ***Autoclenz*** in determining whether the claimants have the status of workers.

44. The contract is therefore not necessarily determinative in every case. However, it cannot be completely ignored and forms part of the factual matrix which must be considered by the tribunal in assessing the facts of each individual case. Much depends on the actual degree of subordination which is present in each case, the knowledge and understanding of the parties when agreeing that contract and whether the terms of the contract provide for a consistent and coherent meaning in relation to the employment status of the claimants.

45. Baroness Hale *identified three types of employment relationship in* ***Bates Van Winkelhof***:-

> *"As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class.*

Baroness Hale said of the distinction between the two types of self-employed people:-

> *"Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contract with clients or customers to provide work or services for them. The arbitrators in* ***Hashwani v Jivraj (London Court of International Arbitration Intervening) [2011] UKSC40*** *– were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in* ***Hospital Medical Group Limited v Westwood [2012] EWCA Civ 1005*** *– who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of Section 230(3)(b) of the 1996 Act"*

46. In these particular claims, it is not in dispute that there was a written agreement between the claimants and the respondent. Obviously, the effect and the meaning of that agreement is in dispute. While the tribunal has to focus on the statutory test, various issues have been raised in the case law; three of these issues seem to me of particular relevance to the present cases:-

(a) the purposive approach;

(b) the dominant purpose of the agreement or contract between the parties;

(c) the degree of integration of the claimants in the respondent organisation.

Purposive Approach

47. The Supreme Court in ***Uber*** (above) held at paragraph 70 of the judgment:-

> *"The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. In* ***UBS AG v Revenue and Customs Commissioners [2016] UKSC13*** *– Lord Reed (with whom the other* justices of the Supreme Court agreed) explained how this approach requires the facts to be analysed in the light of the statutory provision being applied, so that if, for example, a fact is of no relevance to the application of the statute construed in light of its purpose, it can be disregarded. Lord Reed cited the pithy statement of Ribeiro PJ in ***Collector of Stamp Revenue v Arrowtown Assets Limited (2003) 6ITLR454***, paragraph 35:-
>
> > *"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically." (Tribunal's emphasis).*

48. The general purpose of the employment legislation relied on by the claimants in the ***Autoclenz*** *case,* was clear. It was to protect vulnerable workers from being paid too little for the work they do, being required to work excessive hours or being subject to other forms of unfair treatment (such as being victimised for whistleblowing). The paradigm case of a worker whom that legislation is designed to protect is an employee, as defined as an individual who works under contract of service or a contract of employment. In addition, the statutory definition of a *"worker"* includes in limb (b) a further category of individuals who are not employees for the purpose of including such individuals in the scope of the legislation. This was clearly elucidated by Mr Recorder Underhill QC giving the judgment of the Employment Appeal Tribunal in ***Byrne Brothers (Form Work) Limited v Baird [2002] ICR667***:-

> *"It seems to us that the best guidance is to be found by considering the policy behind the inclusion of limb (b). That can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu – workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours. The reason why employees are thought to need such protection is that they are in a subordinate and dependant position vis – a – vis their employers: the purpose of the regulations is to extend protection to workers who are, substantively and economically in the same position. Thus, the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects"* (Tribunal's emphasis)

Dominant Purpose

49. The Court of Appeal in the case of ***Mirror Group Newspapers Limited v Gunning [1986] ICR145*** considered a claim of sex discrimination brought by the daughter of an individual who had a contract with the appellant for the local distribution of their products. That individual retired and the newspapers refused to contract with his daughter. The issue to be determined was solely, as in the present hearing, one of jurisdiction. It was accepted, again as in the present case, that the claimant was not an employee and the only argument was whether or not she was, to use that shorthand, a *"limb (b) worker"* under the statutory definition. The Industrial Tribunal had approached this issue simply on the basis that where a contract existed and where that contract provided an obligation to perform the work personally that was sufficient to bring it within the scope of the Act. The Employment Appeal Tribunal approached the matter somewhat differently. They stated:-

> *"On balance, however, for my part, I am persuaded that the more natural and logical meaning is that contended for by Mr Irvine and expressed by Mr Scott in the appeal tribunal. In my judgment, what is contemplated by the legislation in this extended definition is a contract, the dominant purpose of which is the execution of personal work or labour, and I would allow the appeal on this ground, for quite clearly here the dominant purpose was simply the regular and efficient distribution of newspapers* (Tribunal's emphasis).
>
> *In my judgment, one has to look at the agreement as a whole, and provided that there is some obligation by one contracting party personally to execute any work or labour, one then has to decide whether that is the dominant purpose of the contract, or whether the contract is properly to be regarded in essence as a contract for the personal execution of work or labour which seems to be the same thing in other words*".

Integration

50. In ***Halawi v WDFG UK Ltd [2014] EWCA 1387***, the Court of Appeal (GB) stated:-

> *"43. In determining whether the employment relationship exists, the Court has to accept all the facts but an important factor is the measure of integration into the putative employer's business."*

51. In ***Hospital Medical Group Ltd v Westwood [2013] 1015*** the Court of Appeal (GB) stated:-

> *"19. I do not consider that there is a single key with which to unlock the words of the statute in every case. On the other hand, I agree with Langstaff J that his integration test will often be appropriate as it is here."*

Procedure

52. The two claims were consolidated and heard together.

53. Both claims have been case managed and detailed directions had been given in relation to the interlocutory procedure, the witness statement procedure and the exchange and lodgement of skeleton arguments.

54. Doctor O'Neill gave evidence on his own behalf. He swore/affirmed and then adopted his witness statement as his evidence-in-chief. He was then cross-examined. There was no re-examination.

55. Doctor Durkan did the same. However, he first gave additional oral evidence-in-chief to explain that paragraph 18 of Ms Wilkinson's statement was inaccurate where she had stated that he had been removed from his role in 2005. That clarification was not challenged or rebutted by the respondent in the course of the hearing.

56. Mr Greg Greer of the respondent's Payroll Service Centre had exchanged and lodged a witness statement on behalf of the respondent. By agreement, his statement was simply entered into evidence. He was not cross-examined or re-examined.

57. Ms Clare Wilkinson gave evidence on behalf of the respondent. She swore/affirmed and then adopted her witness statement as her evidence-in-chief. She was then cross-examined. There was no re-examination.

58. However, Ms Wilkinson was clear from the start of her cross-examination that she had no direct knowledge of, or involvement in, the matters under consideration by the tribunal. She had simply examined documentation and had spoken to others. She spoke, for example, of a *"local understanding"* of the status of the two claimants when referring to their status as workers or a self-employed.

59. The tribunal was clear that it could read documents itself and that indirect evidence was not of any great assistance; neither was unsupported evidence of a "local understanding"; particularly in a matter where a hearing had already been postponed to arrange the availability of an appropriate witness for the respondent.

60. This was a matter which, to a significant extent, concerned incidents in and around 2018. That was only some seven years ago. Witnesses with direct involvement and direct knowledge could and should have been available.

61. The respondent was offered the opportunity to apply to call additional witnesses, subject to the consideration of any objection on behalf of the claimants. The respondent did not take up this offer from the tribunal.

62. The tribunal will record that, in a matter of this importance, involving a significant sum of public money, it is simply not credible that a witness or witnesses with direct and relevant knowledge could not have made themselves available for a few hours to assist the tribunal in the determination of this matter. It is also regrettable that the respondent chose to put Ms Wilkinson in the difficult position of trying to give evidence in relation to an important matter in which she had not been directly involved.

63. The evidence was heard over two days on 8 and 9 April 2025. Oral submissions were made by both parties on 10 April 2025.

64. The parties were each then given the opportunity to exchange and lodge final written submissions by 9 May 2025 to further deal with any of the issues raised by these claims and, in particular, to address whether or not the claimants were *"workers or employees"* at any stage for the purpose of the legislation. The parties were invited to consider whether this issue of employment status was a matter which could be agreed between the parties. However, it became apparent that the respondent intended to argue that neither claimant had at any time satisfied the definition of *"employee or worker".*

65. The parties agreed that the present hearing should deal solely with the issue of liability and that, if a remedy hearing were to be required, that could be arranged later.

66. A panel meeting was held on 15 May to consider the evidence and the submissions and to reach a judgment on liability. This document is that judgment.

67. The claims before the tribunal are in respect of the lack of a separate and identifiable payment in respect of holiday pay accrued by the claimants. As indicated above the statutory claims are:-

    (a) claims of unauthorised deduction from wages contrary to Article 45 of the Employment Rights (Northern Ireland) Order 1996 (1996 Order);

    (b) claims of a failure to pay sums under Regulations 15, 16 and 20 of the Working Time Regulations (Northern Ireland) 2016 (WTR).

RELEVANT FINDINGS OF FACT

68. The tribunal was presented with a blizzard of evidence and documentation, including a detailed history of the wider working careers of the two claimants beyond their specific roles as sessional OOH GPs, details of the arrangements put in place in relation to holiday pay by entirely separate employers such as Dalriada Care, details of the position in Great Britain following recent changes to their legislation for rolled up holiday pay and details of the financial position and structure of the respondent Trust. Much of the evidence before the tribunal was therefore irrelevant to the two specific statutory claims which were before this statutory tribunal for determination.

69. The claims concern two particular claimants and one particular respondent. The contractual arrangements between different employees and different employers are not relevant. Furthermore, the claims concern the law in Northern Ireland only. It is no part of the function of the tribunal to comment on the law in relation to rolled-up holiday pay in any other legal jurisdiction. Furthermore, the present hearing is to determine liability in respect of the claims of unauthorised deductions from wages and breaches of the WTR. It therefore concerns the relevant liability of the respondent under the 1996 Order and the WTR. The financial circumstances and the administrative structure of the respondent Trust are not relevant to the proper construction of the 2018 contract or to the interpretation of the WTR. Finally, the present hearing is not a therapy session to explore and to analyse the simmering

grievance between sessional OOH GPs in general and employers in general about wider contractual issues including the level of pay.

70. The following matters are the findings of fact which are necessary for the determination of the issue of liability only in respect of the claims of unauthorised deduction from wages contrary to the 1996 Order and the claims of breaches of the WTR.

Relevant Career Histories

71. Doctor O'Neill has worked as a sessional OOH GP since 10 August 2018.

72. Doctor O'Neill signed a contract with the respondent on 10 August 2018. This was the new form of contract (the 2018 contract) which followed the HMRC ruling that sessional OOH GPs were, for tax purposes, employees. The contract had been prepared and put in place by the respondent. There was no evidence of any negotiation or consultation with the claimants or with any representative of the claimants in relation to the terms of the new contract before that contract was put in place. The evidence put before the tribunal related solely to discussions between the various employers, including the present respondent, following the HMRC ruling.

73. Doctor Durkan's relevant career history started earlier. Since 2005, he has worked as a sessional OOH GP for the respondent and its predecessors.

74. Doctor Durkan was originally engaged in this work by the Eastern Health and Social Services Board which sponsored an organisation known as the *"Belfast OOH Service"*. He then signed a contract in February 2015 with the respondent. The 2015 contract provided that sessional OOH GPs were self-employed. Following the HMRC ruling, and the respondent's decision to treat sessional OOH GPs as employees for tax and NIC purposes, he signed the 2018 contract.

75. The periods of employment by the two claimants in other roles, such as a salaried GP, or in an advisory role to the health service, are not relevant to the present hearing.

76. The extent to which claims can be backdated, the precise dates on which annual leave accrued in respect of Doctor O'Neill and Dr Durkan and the precise sums which would have compensated for that annual leave can be determined at any remedy hearing which proves necessary.

77. The respondent Trust is a statutory corporation formed in 2009 following the Review of Public Administration. It replaced a Health and Social Services Board.

78. OOH GPs services have been provided by the respondent Trust and its predecessors since at least 2005. Those services have been provided by both salaried OOH GPs and by sessional OOH GPs. The tribunal accepts the unrebutted evidence of Doctor O'Neill that originally all OOH GPs were sessional and that, originally, there were no salaried OOH GPs. When the salaried OOH GPs were introduced, their hourly rate was fixed at reduction of 20% from the hourly rate

for sessional OOH GPs. That 20% reduction was to reflect the increased costs to the respondent, ie, 7% employer's superannuation contribution and 12.8% employer's NIC contribution.

79. Salaried OOH GPs have always been considered as employees of the respondent. Sessional OOH GPs were, until 1 April 2018, considered to be self-employed; thereafter they have been considered to be employees for tax and NIC purposes. That change followed a HMRC ruling in 2017.

80. There remains a differential of 20% between the hourly rates paid to salaried OOH GPs and the hourly rates paid to sessional OOH GPs. The salaried OOH GPs are paid the lower hourly rate.

81. The hourly rates paid to salaried or sessional OOH GPs vary according to the nature of the shift worked. For example, a week day evening shift attracts an hourly rate of £51.14 for sessional OOH GPs and a hourly rate of £41.40 for salaried OOH GPs.

82. Salaried OOH GPs work fixed regular shifts with the same monthly pattern. They know when they are going to work, where they are going to work, and for how long they are going to work.

83. Sessional OOH GPs work irregular shifts with no guaranteed level of work (apart from a minimal amount designed to ensure sufficient training and certification). They are effectively employed on *"a zero hours"* arrangement.

84. The sessional OOH GPs were, until their position changed in 2018, engaged as self-employed individuals for all purposes. They were responsible for the payment of their income tax and NIC contributions. They were responsible for arranging their medical indemnity cover in full. Their arrangements did not attract holidays, sick leave/pay, maternity leave/pay, special leave, study leave, etc. They had no pension entitlement.

85. The sessional OOH GPs, engaged by the Trust, including the two claimants, signed the 2018 contract which had been prepared and put in place by the Trust to implement the HMRC ruling for tax and NIC purposes. It was common case that this contract was extremely badly worded; particularly in paragraph 6. Each party argued that paragraph 6, although presenting on its face entirely inconsistent and contradictory propositions, should be interpreted in a way that supported their case.

86. Post-2018, the respondent argues that, because of the HMRC ruling, sessional OOH GPs were treated as employees for tax and NIC purposes only but that they were not workers for the purposes of the 1996 Order and the WTR.

87. The claimants argue that they were, when working as sessional OOH GPs, workers for the purposes of the 1996 Order and the WTR.

88. Paragraph 3 of the 2018 contract says:-

> *"3* ***Renumeration***
>
> *Payment will be made for actual hours worked and will be paid within an agreed payment cycle as set out within the GP Out-of-Hours Service. The current rates of pay for the different types of bank shift are available from the Head of GP Out-of-Hours service."*

89. Paragraph 6 of the contract states:-

> *"6.* ***Annual Leave/Holidays***
>
> *6.1 You will be entitled to annual leave calculated pro-rata to hours worked on the Bank. You will have your annual leave allowance calculated and paid on the basis of 12.5% incorporated into each of the hourly rates of pay referred to in paragraph 3 above. This equates to one hour of annual leave for every eight hours worked.*
>
> *Time off in lieu of public holiday working is not applicable.*
>
> *6.2 Due to the variation in the rate of pay applicable to the type of bank shift worked, the enhancement payable for the annual leave allowance payable in any working week will be 12.5% of the average hourly rate of pay paid to you over the reference period, which is the last twelve weeks that you actually worked bank shifts. For the purposes of this clause, a week is from a Sunday to Saturday. This will automatically be paid to you by payroll upon receipt of information from the GP Out-of-Hours service.*
>
> *6.3 Therefore, you are not entitled to claim further payment when annual leave is taken."*

90. Paragraph 6 of the contract clearly contains several inconsistencies and anomalies:-

(a) the first sentence of 6.1 provides for an entitlement to annual leave (not specifically an entitlement to annual leave pay). The respondent accepted in cross-examination that there was no specified or contractual annual leave allowance and that there was no mechanism to ensure that annual leave, of any particular amount, was ever taken by sessional OOH GPs. That in itself is disturbing given the health and safety basis for this entire legislative construct. On the respondent's interpretation of the current arrangements, there is nothing to prevent or discourage sessional OOH GPs from working excessive hours on a regular basis to the detriment of their health and that of their patients;

(b) the second sentence of 6.1 states clearly that annual leave pay should be incorporated into each of the hourly rates paid under paragraph 3. Firstly, that puts in place *"rolled up"* holiday pay which is in itself unlawful. Secondly, it is inconsistent with 6.2;

(c) 6.2 can only be read as a contractual entitlement to an annual leave payment calculated at 12.5% over a reference period of 12 weeks, necessarily paid in arrears. 6.2 specifically requires that the respondent should pay that allowance upon receipt of information from the OOH service; not that the payment will already have been made in every case as part of the hourly rate. That sub-paragraph states that this mechanism was put in place because of the variations in the hourly rate applicable for different types of shifts. There was no evidence of the necessary information ever being collated by the respondent in relation to either claimant and no evidence of any calculations ever being made by the respondent;

(d) paragraph 6.3 can only be consistent with the proposition that a further payment is made if leave is not taken but that it is not paid if leave is taken. That seems to be inconsistent with both 6.1 and 6.2. It is inconsistent with 6.1 because 6.1, on its face, provides for rolled up holiday pay as put of the hourly rate and therefore the question of any additional payment could never arise. It is inconsistent with 6.2, because if a payment in arrears had been calculated over a 12-week reference period, there could have been no question of any additional payment.

Sessional OOH GP Arrangements

91. Dr Durkan has been engaged as a sessional OOH GP since 2005. In the period immediately before the 2018 contract came into being the relevant arrangements were set out in a document entitled *"terms of engagement for sessional (self-employed) General Medical Practitioners"* which was issued in February 2015. There is no evidence that the arrangements for sessional OOH GPs between 2005 and 2015 had altered in any material sense.

92. The arrangements before 2018 specifically provided that sessional OOH GPs were engaged on a self-employed basis:-

> *"8. For the avoidance of doubt, since you are engaged on a self-employed sessional basis, you are not entitled to paid holidays, sick pay or any other form of leave paid or otherwise, in respect of your engagement under these terms of engagement."*

93. Under the 2015 arrangements, sessional OOH GPs were offered out of hours sessions and also participated in an out-of-hours rota where they indicated in advance their availability to cover sessions. Their duties were described as:-

> *"9. Your main duties and responsibilities are as follows:*
>
> - *To provide emergency primary care medical services in the out of hours (OOH) period.*
> - *To work closely with all other support services in the provision of equality OOH service.*
> - *To support the development of modern primary care services OOH.*

94. The arrangements set out the different hourly rates payable for specific types of shifts and summarised the duties in more detail.

95. There was no evidence or argument that the duties of salaried OOH GPs (who were always treated as employees) were materially different from those of sessional OOH GPs. Both salaried and sessional OOH GPs provided primary medical care in the out-of-hours period. In fact, it is clear that some salaried OOH GPs, when their fixed hours have concluded, could then on occasion continue work as sessional OOH GPs. This could involve the OOH GP moving seamlessly from being a salaried OOH GP to being a sessional OOH GP, perhaps dealing with the same patient, simply because the salaried OOH GP shift had ended.

96. Given the evidence in relation to the duties of OOH GPs, the tribunal concludes that there was no material difference in the duties performed by salaried and sessional OOH GPs.

97. It is also clear that the arrangements for undertaking particular shifts and for participating in the rota involved a high degree of integration between the claimants and the respondent organisation. There was not, in any sense, a situation where either claimant had been operating a business and the respondent Trust had simply been in receipt of services as a customer or client of that business. It is clear that the claimants, when working as sessional OOH GPs had been integrated into the respondent organisation.

98. Since 2018, both claimants have been subject to the 2018 contract; Dr Durkan from the 1 April 2018 and Dr O'Neill from 10 August 2018.

99. While the 2015 contract was explicit in clarifying the employment status of the sessional OOH GPs as self-employed, the 2018 contract is not so explicit. It does not address directly the issue of employment status at all. It provides for clinical duties which, on the evidence before the tribunal, do not appear to be any different from the clinical duties undertaken by salaried OOH GPs. It provides that the sessional OOH GPs are engaged on an *"as and when required"* basis but does not explicitly state whether the sessional OOH GPs are employees, workers or self-employed.

100. Nevertheless the 2018 contract in paragraph 5 accepts that the respondent is obliged under Regulation 4(1) of the WTR to ensure that the number of hours worked on average each week is limited to 48 hours, as calculated over the reference period of 26 weeks, without an opt out form being completed. It also acknowledges that the Trust may limit the number of bank shifts being offered to a sessional OOH GP if there appears to be any adverse impact on that individual's health. There was however no evidence that that had ever occurred, and no evidence that there has even been any system in place for monitoring hours and specifically in relation to this case for monitoring the amount of annual leave taken or not taken and the amount of any annual leave allowance.

The WTR does not apply to the self-employed.

101. Furthermore, the 2018 contract at paragraph 8 indicates that in relation to matters of conduct or clinical performance, the matter could be dealt with under either the *"Maintaining High Professional Standard Framework (MHPSF)"* or the Trust's Disciplinary Procedure.

102. In paragraph 10 of the 2018 contract, the respondent accepts that sessional OOH GPs may be entitled to statutory sick pay and statutory maternity pay.

103. At paragraph 12 of the 2018 contract, the respondent accepts that the appointments are superannuable and that, without an opt out, deductions from pay will be made automatically to the HSC Pension Scheme.

104. Paragraph 13 of the 2018 contract refers to the retirement age for *"all staff/workers".* It goes on to state that *"the Trust reserves the right to require an individual worker to retire at a particular age where this is subjected to be justified at a particular circumstances of the case."*

105. Paragraph 16 of the 2018 contract refers to data protection and to the responsibilities of *"all employees and workers of the Belfast Health and Social Care Trust"*.

106. Paragraph 21 of the 2018 contract refers to the use of the respondent's grievance procedure.

107. The HMRC issued a ruling in relation to the status of sessional OOH GPs in early 2017. There does not appear to be any evidence as to the exact date upon which this ruling was issued. However, it seems clear from the notes of a teleconference meeting between OOH employers on 18 May 2017 that the HMRCs determination had been:-

    (a) that there were no differences in the type of work carried out by salaried OOH GPs and by sessional OOH GPs;

    (b) that there were no differences in the level of control that OOH providers (including the present respondent) had over sessional or salaried OOH GPs;

    (c) that the sessional OOH GPs were employees as far as HMRC were concerned ie for tax and NIC purposes.

    The teleconference meeting on 18 May 2017 was between all the OOH employers including the respondent. The purpose of the meeting was to discuss the HMRC ruling and the Chair Dr Orr indicated that he was hoping to adopt a regional *"joined up"* approach. The notes of that meeting indicate that various OOH employers felt that there was a risk of GPs walking away from the service when the necessary changes were implemented to their terms of engagement. The chair indicated during the course of that meeting that it would be preferable if all the providers had a *"regionally agreed contract"*. It was agreed at that meeting that all OOH employers would work towards adopting a joint regional approach to this issue.

108. On 3 July 2017, Dr Orr of the Health and Social Care Board wrote to all OOH employers. He indicated that HMRC required that the process of transferring sessional OOH GPs on to the payroll should commence at the earliest possible

date. He indicated that there was no additional funding to cover any other cost associated with moving sessional (OOH) GPs on to the payroll other than for the additional employer NIC costs and stressed:-

> *"There should be no undue delay in the process of transferring sessional (OOH) GPs on to the payroll".*

109. The lack of additional funding available to the respondent was a matter which was the subject of repeated comment by the respondent. However, it is absolutely clear from the case law referred to above that the need to provide both annual leave and holiday pay to workers is a matter of health and safety and the lack of financial resources is not a valid excuse for a failure to provide that leave and pay. See the ***Agnew*** judgment above.

Procedure leading up to the 2018 Contract

110. It is difficult to extract a coherent and comprehensive picture of the process leading up to the 2018 contract on the basis of the various draft position papers and emails disclosed to the tribunal. That difficulty has been made significantly worse by the failure of the respondent to produce any witness with direct and relevant involvement in that process. However, the contemporaneous emails disclose that the factors concerning the respondent most were the limitation on financial resources, the need to maintain the OOH service and a fear that sessional OOH GPs would cease to provide their services under new arrangements. The health and safety basis for the provision of annual leave and the provision of holiday pay does not appear to have featured at any stage in the discussions between the OOH employers. Furthermore, it is clear, and accepted by the respondent, that there was no negotiation as such with the claimants or their representatives. The negotiations such as they were, took place between the OOH employers. The OOH GPs, at the end of that procedure, were presented with a fait accompli. It was also clear that throughout the process leading up to the 2018 contract, there was a degree of confusion, if not outright panic, on the part of the OOH employers. They were concerned about, on the one hand, the potential for fines being imposed by HMRC on the OOH employers and, on the other hand, the OOH service collapsing.

111. On 18 May 2017 the OOH employers attended a teleconference to discuss the HMRC ruling. The Chair of that teleconference was Doctor Orr of the Health and Social Care Board. Under the legislative arrangements then in place, that Board was responsible for commissioning health services including the OOH service. The minutes recorded that he stated that:-

> *"The HSBC would be seeking to adopt a regional joined up approach to the HMRC determination in order to ensure a smooth transition from sessional to salaried GP status."*

112. The notes record:-

> *"Richard (Orr) again highlighted the importance of adopting a regional co-ordinated approach (across all five OOH providers) to this issue and ask SHSCT not to move forward independently."*

113. The notes record concern amongst the participants of a risk to service delivery. There was concern of *"GPs walking away from the service"* and *"there is a risk that GPs will suffer financially."* There was also a concern that simply offering sessional OOH GPs a salaried rate was not workable as it was effectively a pay cut.

114. At that stage the SHSCT had moved forward independently and had developed a *"as and when"* OOH contract which offered 90% of the current OOH sessional rate for "*as and when*" workers.

115. On 3 July 2017, Doctor Orr wrote to the OOH employers. He warned that the HMRC ruling *"could have significant financial and operational implications for all five OOH providers"* and stated that the employers needed to work together *"in order to ensure continued service delivery"*. He stated *"there was no additional funding to cover any other cost associated with moving sessional GPs on to the payroll other than for the additional NIC costs."*

116. As a result of the discussions between the OOH employers which followed that correspondence, sessional OOH GPs would have two options which were summarised in an FAQ document which was provided to the OOH GPs on 16 March 2018. The first option was engagement on an as and when required basis which would operate in a similar manner to that for self-employed sessional OOH GPs. The second option was to move to employment as a salaried OOH GP.

117. As indicated above, the process adopted by the OOH employers and the sequence of events is unclear. However, it would appear that the OOH employers had considered two options for the hourly rate for sessional OOH GPs. The first option would have been equivalent to the hourly rate for salaried OOH GPs with a 12.5% holiday pay enhancement. The second option was to keep the existing hourly rate for sessional OOH GPs but to alter the words in the contract to *"ensure that this rate included the 12.5% holiday enhancement."* It was emphasised in these discussions that there was no additional funding to the OOH employers to cover any other cost involved in moving self-employed sessional OOH GPs on to the payroll other than the additional NIC employer costs.

118. There was no mention of the health and safety basis for holiday pay and no attempt to negotiate an agreement with the OOH GPs.

119. It would appear from an email dated 5 December 2017 from the SHSCT and the meeting notes from the Financial Allocation Meeting on 16 January 2018 that the OOH employers decided that the appropriate option was to maintain the existing OOH GP sessional rate but to alter the words in the contract to "*ensure that this rate included the 12.5% holiday entitlement."*

120. In the earlier email Ms Reid stated in reference to the other option that:-

> *"The as and when rate proposed was not acceptable and Doctor Richard Orr and Doctor Ciara McLoughlin both expressed that they are not able to support this rate as they feel it is a 10% pay cut and cannot "dress it up" to sell it to GPs."*

121. The minutes of the Financial Allocation Meeting state:-

> *"Providers were of the view that the new as and when contract rate as "existing salaried rate plus 12.5% was no longer viable."*

122. The minutes refer to:-

> *"The danger of sessional GPs walking away if they perceive a pay cut."*

123. Without going into the fine detail of the ongoing discussions, which are in any event difficult to decipher, the respondent eventually adopted the position that it would pay the existing hourly rate for sessional OOH GPs but that it would in some way incorporate 12.5% for annual leave entitlement.

124. In an email of 15 February 2018, Doctor Orr wrote to the SEHSCT and shared that email with the other OOH employers. He stated:-

> *"Key is a positive message outlining the benefits of moving to the payroll and I think we are in a position to do so. The main benefit being a reduction in their personal Medical Defence Costs. It is <u>all about</u> how the message is given and perceived by GPs* (tribunal emphasis)*."*

The need to comply with well-known statutory requirements in relation to annual leave and holiday pay took second place to this PR exercise.

125. Doctor Orr further stated in an email of 22 February 2018:-

> *"GPs will benefit directly and indirectly from the combination of the additional costs scheme and the Trust/DOH indemnity cover for costs and claims. As a result, they should be able to reduce their overall Medical Defence bills. It is important that you make GPs aware of this, even if they don't see it in their pay packet."*

126. A letter was sent to all the relevant GPs on 16 February 2018 advising them that:-

> *"You may be aware that HMRC has been reviewing the status of sessional GPs."*
>
> *"A final determination has now been reached in respect of this matter."*
>
> *"In order to understand what this determination means for you as one of current sessional GPs, we are holding an information session at -".*

That letter presented the HMRC ruling as a recent issue. However, by this stage the final determination of HMRC was almost a year old.

127. There appears to be no element of negotiation or real discussion in this matter. It was again a contract drawn up by the OOH employers and simply imposed on the sessional OOH GPs in a take-it-or-leave it manner.

128. The power point which was used in the relevant information sessions, including the session held by the respondent Trust on 6 March 2018, stated that the hourly rate would be the same as the hourly rate paid under the pre-existing sessional OOH GP terms. The power point slides stated that as a result of the HMRC ruling sessional OOH GPS would transfer to the Trust payroll with income tax and NIC deducted at source. It stated that the Trust was required to abide by the ruling of the HMRC or face significant financial penalties. It stated that the transfer to payroll would take effect on 1 April 2018. It stated that one of the benefits of the new status would be "*statutory entitlement to sick pay, maternity, paternity, adoption pay."* It stated that the rates payable for shifts would be the same as those paid under the old sessional terms. It was silent on the issue of holiday pay and annual leave entitlement even though it specifically mentioned matters such as maternity pay.

The information session took place three weeks before the new arrangements took effect.

129. In a later document issued on 1 April 2018 which was headed *"frequently asked questions"*. Under the question:-

> *"9. What are the proposed payment rates for shifts worked under as and when required terms?"*

130. The document stated:-

> *"To ensure you suffer no financial detriment, there are no plans to reduce the sessional rate currently received. The Trust will be legally required to demonstrate how this rate is calculated, to include payment for annual leave."*

131. It is clear that reference to annual leave was not originally included in the payslips for the claimants or other sessional OOH GPs employed by the Trust and that that omission was not corrected until after Dr O'Neill's grievance

132. As part of this exercise, sessional OOH GPs were given a form to complete to indicate which option they accepted for their future engagement with the respondent. In that form, they had to confirm whether they accepted the new sessional OOH GP position, whether they wanted to discuss the possibility of a salaried OOH GP position or whether they wished to increase the hours they worked if they were already working as a salaried OOH GP.

133. Doctor Durkan was at that stage working both as a salaried OOH GP and as a sessional OOH GP outside his salaried hours. When completing the form on 23 January 2018, he confirmed that he would accept the new sessional OOH GP position and that he would maintain his existing salaried OOH GP position.

134. In that form, he did not query the stated position in relation to annual leave with the new sessional OOH GP position.

135. Doctor Durkan did lodge a grievance in connection with the failure to pay holiday pay on 19 March 2021.

136. Doctor O'Neill became a sessional OOH GP and signed the 2018 contract on 4 February 2019. When signing that contract, he queried the arrangements concerning annual leave and holiday pay and was told specifically that the hourly rate payable included a payment in respect of holiday pay.

137. Doctor O'Neill continued to query that position in writing and received confirmation from the respondent on 28 February 2019 and later on 20 March 2019 confirming their position that holiday pay was included in the hourly rate paid to sessional OOH GPs.

138. Doctor O'Neill raised a grievance in relation to this matter on 16 October 2020. On 6 September 2021, some eleven months later, Doctor O'Neill received a written response from the respondent to his grievance. There was no grievance hearing and no right of appeal was given to Doctor O'Neill.

139. That response to Doctor O'Neill's grievance on 6 September 2021 stated that it had been agreed recently that the higher hourly rate previously payable to sessional OOH GPs would be maintained because it would then include an annual leave allowance in line with the Working Time Regulations, equating to 12.5% of the hourly rate. While the response was less than clear, it appeared to suggest that the remaining 7.5% of the 20% differential was *"maintained to support training and to attract and retain sessional GPs under these revised arrangements."*

Decision

Status of the Claimants

140. The respondent included in the "agreed" list of issues for determination by this tribunal:-

> *"Whether the claimants are workers for the purposes of the below legislation?" (The 1996 Order and the WTR).*

141. That *"agreed"* issue was qualified by a foot note to state that this issue had been inserted by the respondent and had not been agreed by either claimant.

142. The status of the claimants had, at least on paper, altered on 1 April 2018 when the new contract came into force. Doctor Durkan was directly affected at that time and Doctor O'Neill was affected shortly thereafter when he took up his role as a sessional OOH GP. The claimants argue that, in reality, the status of sessional OOH GPs had been the same throughout, ie, before and after 1 April 2018. The respondent maintains that sessional OOH GPs were in reality self-employed before 1 April 2018 and that thereafter they were simply regarded as "employees" for tax and NIC purposes, but that they remained throughout, in reality, self-employed.

143. The claimants have worked as sessional OOH GPs for the respondent Trust. Having heard the evidence from the claimants and the respondents, the tribunal is satisfied that they were clearly integrated into the OOH service operated by the respondent Trust. They worked in specified OOH premises, owned and maintained by the respondent Trust. They worked during times pre-arranged with the respondent using the respondent's booking system. They used the equipment, the auxiliary staff and the services of the respondent Trust in their duties. They did not

operate in any way as a separate business undertaking with the respondent Trust as their customer. They did not operate in any way which was different from that of the employees of the Trust, such as salaried OOH GPs. The tribunal notes in particular that the teleconference notes of 18 May 2017 record that HMRC had concluded there were no differences in the work carried out by salaried and sessional OOH GPs and that they were no differences in the level of management control. The tribunal further notes that the respondent, following advice, did not appeal or challenge that ruling and that it moved quickly to implement it.

144. Doctor Durkan works both as a sessional OOH GP and as a part-time salaried OOH GP for the Trust and he operates as a completely integrated part of the OOH service in either role.

145. In any event, the 2018 contract, which was prepared by the Trust and other OOH employers, and not by the claimants or their representatives, makes it absolutely plain that sessional OOH GPs were *"workers"* within the meaning of the WTR and the 1996 Order.

146. For example, paragraph 3 states:-

> *"In order that the Trust can monitor compliance with Working Time legislation, you will be asked to declare any other work commitments outside of the Trust - "*
>
> *"In undertaking additional hours, you understand that unless you agree otherwise, Regulation 4(1) of the Working Time Regulations (Northern Ireland) 1998 (WTR) limits the average number of hours you work each week to 48 hours, as calculated over a reference period of 26 weeks - ".*

147. The 2018 contract also makes it plain that the Trust's disciplinary procedure could apply to sessional OOH GPs and, while they are not eligible to contractual sick pay, that they may be entitled to statutory sick pay.

148. The sessional OOH GPs were also superannuable and the contract provided for membership of the HSC pension scheme.

149. Further, the 2018 contract referred to:-

> *"(i) the retirement age for "workers".*
>
> *(ii) the obligations placed on "all employees and workers" of the respondent under Data Protection legislation".*
>
> *(iii) A grievance procedure.*

It is clear that the dominant purpose of the contract was to create the relationship of employer and worker.

150. After 1 April 2018, the tribunal is satisfied that it is absolutely plain that the two claimants were workers, for the purposes of the 1996 Order and the WTR.

151. Turning to the position before the new contract came into force on 1 April 2018, the evidence before the tribunal was absolutely clear. The sessional OOH GPs during this period provided the same clinical services as they provided after that date. Their duties and the manner in which they performed those duties remained unchanged. They operated in the same Trust premises, using the same equipment, auxiliary staff and services as they did after that date and they were subject to the same line management.

152. The only administrative difference which started on 1 April 2018 is that they were no longer treated as self-employed for tax and NIC purposes and that their position in relation to medical indemnities changed.

153. In 2017 the HMRC ruled, for tax and NIC purposes, that the sessional OOH GPs were *"employees"* and that they had to be treated as such through the Payroll Department operated by the Trust. The Trust has the benefit of in-house lawyers and access to outside counsel. They also have several experienced Human Resources Managers. They did not seek to challenge that ruling and did not seek to take the matter further. They immediately acceded to that ruling and took steps to put that ruling into operation. It can be safely assumed that the respondent had considered this matter carefully and that it took appropriate legal and Human Resources advice before doing so. It seems odd to this tribunal that the respondent Trust is using public resources at this stage to argue against a proposition which is obviously correct; that the sessional OOH GPs were always workers of the respondent Trust.

154. From the facts set out above, the tribunal is clear that the claimants were at all times; ie, before and after 1 April 2018, workers or employees for the purpose of the relevant legislation. This seems to be an issue beyond any rational argument and the tribunal is puzzled to why the respondent has chosen to argue this point.

Construction of the Contract

155. The 2018 contract is an absolute mess and the respondent Trust should have been embarrassed to put this document forward as the considered result of a process lasting approximately one year from early 2017 to 1 April 2018 involving the combined legal and administrative resources of several OOH employers. This document defies any logical or coherent construction.

156. In various parts of the contract, apparently without being noticed by the respondent Trust, the contract openly refers to sessional OOH GPs as *"workers"* although the Trust maintains that they are self-employed. The references to the retirement age, the disciplinary procedure, the grievance procedure and the application of the WTR are absolutely plain. The sessional OOH GPs are workers for the purposes of the legislation. In the *"agreed"* issues and in the hearing the respondent argued, with some force, that they were not. It is entirely unclear how, throughout the lengthy process of preparing this *"contract",* the respondent did not notice the clear contractual provisions that contradicted their stated position on the status of the claimants.

157. The respondent argues, in terms, that paragraph 6(2) was "*anomalous and inserted in error".* That is not an argument which is convincing. Several parts of the contract are "*anomalous"* when compared to the respondent's interpretation. It is not just

paragraph 6(2). The multiple references in the contract, set out above, which are consistent with the claimant's status as workers are clear. What the respondent wants the tribunal to do is to radically alter the terms of the contract while preserving paragraph 6.1.

158. Crucially, paragraph 6 contains some absolutely contradictory and nonsensical provisions:-

> *"(i) 6.1 provides that "you will have your annual leave allowance calculated and paid on the basis of 12.5% incorporated into each of the hourly rates of pay - "*

No "annual leave allowance" was ever identified, checked or calculated for any sessional OOH GP. This sub-paragraph was never seriously put into operation by the respondent Trust. Nevertheless, the respondent Trust in the course of this hearing argued that this sub-paragraph was "absolutely clear". The fact that rolled-up holiday pay has been unlawful for some considerable time, did not seem to trouble the respondent Trust unduly.

(ii) Paragraph 6.2 reads:-

> *"Due to the variation in the rate of pay applicable to the type of bank shift worked, the enhancement payable for the annual leave allowance payable (sic) in any working week will be 12.5% of the average rate of pay paid to you over the reference period, which is the last 12 weeks that you actually worked bank shifts."*

No reference period was ever calculated or used by the respondent Trust when paying the salaries of sessional OOH GPs. This sub-paragraph necessarily refers to a payment in respect of annual leave which is made <u>in arrears</u> after a 12-week reference period has expired and has been calculated and no such payment was ever made in arrears by the respondent Trust.

To state the blindingly obvious, you can either have rolled-up holiday pay (however unlawful) or you can have a payment in arrears after a reference period. You cannot have both.

(iii) 6.3 states:-

> *"Therefore, you are not entitled to claim a further payment when annual leave is taken."*

This sub-paragraph does not sit easily with sub-paragraphs 6.1 or 6.2 and suggests that the necessary link between the taking of annual leave and the payment of holiday pay is broken. That undermines the purpose of the legislative protection of annual leave.

In short, this "contract" defies any proper or rational construction. It is no surprise that no one from the Trust or from other OOH providers who had actually been involved in its production had been willing to give evidence before this tribunal.

Differential in Pay

159. To give an example of how absolutely inarguable the Trust's position was throughout the course of this hearing, the tribunal will turn to the issue of the differential in pay between sessional OOH GPs and salaried OOH GPs which was in place under the old arrangements before 1 April 2018 and which continued unchanged thereafter.

160. The respondent argued that the OOH GP sessional rate which was 20% higher than the hourly rate paid to salaried OOH GPs was in reality an enhancement of the hourly rate paid to those salaried OOH GPs. They argued that it was simply not correct to argue that the hourly rate paid to salaried OOH GPs was a reduction from the hourly rate paid to sessional OOH GPs. However, sessional OOH GPs were in existence for some considerable time before salaried OOH GPs were created. It would have been difficult to put in place an enhancement of the rate paid to salaried OOH GPs at a time when salaried OOH GPs did not exist and when only seasonal OOH GPs existed.

161. Ms Wilkinson, on behalf of the Trust, admitted in cross-examination that the salaried hourly rate was properly a reduction from the sessional hourly rate. However, it is also obvious as a matter of simple mathematics that the proposition put forward by the respondent Trust was untenable.

162. A 20% reduction from the sessional hourly rate, if that hourly rate was, eg, £100.00 would leave £80.00. That is, pro-rata what happens. If the Trust's proposition was correct and if the differential was as a result of a 20% enhancement of the OOH salaried hourly rate, that would give on the basis of the figures just given, £96.00 per hour. That is not what happens.

163. The claimants' argument was that the reduction in the hourly rate applicable to an OOH sessional GP when salaried OOH GPs had been created, had been to take account of the need to pay employers NIC contributions and the need, at that time, to pay HSC employers pension contributions. Those additional costs amounted to almost 20%. That, the tribunal concludes, is obviously correct.

164. The Trust's argument was that the 20% differential was an enhancement of the OOH salaried rate (which did not exist when the differential was introduced) to take account of 12.5% holiday pay and (plucked out of the air) a 7.5% recruitment and retention allowance.

165. That argument is obviously untenable. There is no evidence that there was any discussion at any stage about a *"recruitment or retention allowance"* which magically amounted to 7.5%. Furthermore, holiday pay was not even an issue when the differential was first put in place. Finally, the original position was that all OOH GP posts were sessional and it was at a later date that salaried OOH GP posts were created.

166. It is not clear to this tribunal why the Trust chose to maintain such an untenable argument in this regard. However, that seems to be the manner in which they approached this litigation throughout. It would have been better if the Trust had recognised that it had made a complete mess of the matter, that its contract was a nonsense, and if it had then proceeded to negotiate a fair and reasonable solution.

Determination of the Claims

167. The 2018 contract was never negotiated with, or in real sense, agreed, or accepted by, the claimants. It was the product of a year long process which had been conducted exclusively between the OOH employers. It had then been imposed upon the claimants as a fait accompli.

168. This is not a case where the 2018 contract has two alternative and viable meanings and where paragraph 6 could bear one of two arguable interpretations. This contract is self-contradictory and, as indicated above, defies any logical or coherent construction.

169. The respondent says that paragraph 6(2) was inserted by mistake. The respondent argues that all will be well if 6(2) is simply deleted in some way. That argument cannot be correct. The contract contains several other references which are, on their face, at odds with the respondent's interpretation. Paragraphs 5, 8, 10, 12 and 13 are examples. It cannot be right that the respondent wants the tribunal in some way to delete or modify multiple parts of the contract to achieve what is now their desired object.

170. The Trust took a year to draft this contract and used the combined legal and HR resources of the OOH employers to do so. The contra proferentum maxim is more easily applied where there are competing viable interpretations of a contractual provision. It is less easy to apply where the respondent, having drafted the 2018 contract with no input from the OOH GPs, now seeks to delete or rewrite multiple parts of that contract to avoid the proper application of the statutory provisions in relation to holiday pay and to, in 2025, change the status of the claimants to that of self-employed contractors.

171. Nevertheless, the maxim must have some effect. It was a contract prepared and imposed by the respondent. It has to bear the consequences of its own actions in wording the contract in the way that it did.

172. This is not a case where the matter can be easily resolved by a simple exercise in contractual interpretation. It is not a case where both parties to the 2018 contract had an identifiable *"intention"* in agreeing that contract. In the first place the contract was not agreed in negotiations. The claimants had that contract foisted upon them in a take-it-or-leave-it basis. They had no part in the formation of that contract and therefore *"no intention"* which can be of assistance. The respondent had as its *"intention"*, insofar as it can properly be ascertained, the need to avoid additional expenditure, the need to avoid HMRC fines and the need to preserve the *status quo* in the OOH service insofar as was possible. No where in their *"intention"* was any "intention" to promptly comply with the law in relation to holiday pay.

173. There is no coherent and objective *"meaning"* on the basis of the contract as currently worded and construed as a whole. There is no "*reasonable meaning"* or *"natural and ordinary meaning"* which can be extracted from this contract, again if read as a whole.

174. The *"background"* is obscure other than that the claimants were left out of the process during which the contract had been formed, and that the respondent was concerned primarily with financial considerations and with the preservation of the OOH system.

175. There is no realistic way in which the 2018 contract can be construed to yield to *"business commonsense"*. If the respondent's argument were to be accepted, that will involve not just deleting paragraph 6(2) but deleting or modifying multiple other provisions in the contract.

176. Above all, the interpretation urged upon the tribunal by the respondent would involve the tribunal copper fastening an unlawful provision, ie, the establishment of a system of rolled-up holiday pay in the public sector some years after the ***Robinson-Steele*** decision.

177. The case law referred to above suggests that ultimately the tribunal may have to *"do the best it can"*. However, that cannot reasonably mean that a tribunal should underwrite an unlawful practice such as rolled-up holiday pay. Particularly, where again if the respondent's arguments were to be accepted, the 2018 contract would be effectively butchered by the tribunal to achieve what the respondent now wishes it had achieved in 2018 and had reduced to writing in 2018.

178. This is not a case where the tribunal can rectify the situation by interpreting a few words in the contract, leaving the wording of the contract unchanged.

179. The course of action advocated by the respondent would involve a substantial rewriting of the 2018 contract and would go far beyond any normal exercise in contractual interpretation.

180. The course of action advocated by the claimants would involve less drastic but still substantial changes to the working of the contract; by deleting much of paragraph 6.1

181. It is not the function of the tribunal to step in and to substantially rewrite (not interpret) a contract which had been carefully prepared by the Trust some seven years ago.

182. After careful consideration, the tribunal can only conclude that the 2018 contract is void for uncertainty.

183. On that basis, the claim of unauthorised deductions from wages, in the absence of any written contract, would be difficult to determine.

184. The claimants were workers at the relevant times for the purposes of the WTR and were entitled to holiday pay and annual leave under these regulations.

185. It is therefore not necessary to determine the claims under the 1996 Order. The claims under the WTR are upheld.

186. The tribunal will arrange a Remedy Hearing in due course for the determination of this matter. If there is to be an appeal in this matter to the Court of Appeal, the parties should notify the tribunal as soon as possible so that any Remedy Hearing can be stayed.

Further Correspondence from the Respondent

187. After the judgment had been agreed by the tribunal panel but before the judgment was signed, the respondent asked the tribunal to take into account the contents of a RQIA report.

188. The tribunal reconvened on 21 May 2025 to consider this request and to consider the objections of the claimants to the admission of this document.

189. The tribunal considered the report and in particular the two pages to which the respondent referred.

190. The tribunal considered that this document added nothing relevant to the determination of these claims. Even if admitted at this late stage, it is irrelevant.

Employment Judge:

Date and place of hearing: 8-10 April 2025, Belfast.

This judgment was issued to the parties on: 29 May 2025

This judgment will be entered in the register within 14 days.