EMPLOYMENT TRIBUNALS

Claimant: Mr F Jones

Respondent: Epsom & St Helier University Hospitals NHS Trust

Heard at: **London South Employment Tribunal** **On: 30 September 2019**

Before: **Employment Judge Ferguson (sitting alone)**

Representation
Claimant: Mr M Gullick (counsel)
Respondent: Ms B Criddle (counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant was employed by the Respondent pursuant to an overarching contract of employment from January 2013 until 31 May 2018.

2. The Claimant was entitled to a High Cost Area Supplement, as provided for in Agenda for Change, throughout that period of employment.

3. The remedy to which the Claimant is entitled will be determined at a one-day hearing, notice of which will be sent to the parties in due course.

REASONS

INTRODUCTION

1. The Claimant has worked as a hospital porter at St Helier Hospital since February 2011. The portering service was contracted out to Mitie in June 2018 and the Claimant is currently employed by Mitie. This claim concerns the period from February 2011 until May 2018 when the Claimant was a “bank worker” at the hospital.

2. By a claim form presented on 19 September 2018, following a period of early conciliation from 24 July to 20 August 2018, the Claimant brought complaints against the Respondent and Pulse Healthcare Limited ("Pulse"). He claimed that he was either an agency worker employed by Pulse and supplied to the Respondent, or he was an employee of the Respondent. In either case he claimed he was entitled to the same pay as permanent hospital porters employed by the Respondent, which included a High Cost Area Supplement, also referred to as Outer London Weighting ("the Supplement") pursuant to Agenda for Change. This was said to amount to approximately £300 a month.

3. Both the Respondent and Pulse defended the claim. The Respondent initially asserted that the Claimant was a worker supplied by Pulse, but later accepted that he was employed by the Trust during assignments. It denied that the Claimant was employed between assignments or that there was mutuality of obligation. Its Amended Grounds of Resistance also state:

> "It is denied that the Claimant was entitled to receive 'Outer London Weighting payment' – referred to as High Cost Area Supplement' in Agenda for Change – by virtue of his alleged status as an employee of the First Respondent. The NHS Agenda for Change is a collective agreement included in all contracts of employment for NHS employees. The First Respondent avers that as the Claimant is a bank worker, his contract does not set out any entitlement to receive any 'Outer London Weighting payment', and he was not an NHS employee, Agenda for Change is not applicable to him and as such he is not entitled to receive the additional Outer London Weighting payment."

4. By late March 2019, the Respondent had agreed "in principle" that if the Tribunal decided the Claimant was an employee of the Trust he would have been entitled to the Supplement. On 3 April 2019 the Respondent agreed in correspondence with the Claimant that "at all times the relationship was between [the Claimant] and the Trust", and that Pulse could be released from the proceedings. In the same email the Respondent made the following concession:

> "In the event that the Tribunal considers your client to be an employee, we agree that he would be and would have been entitled to receive the London Weighting Allowance".

5. On 10 April 2019 the Claimant withdrew his claim against Pulse. The Tribunal issued a judgment dismissing the proceedings against Pulse, which was sent to the parties on 18 May 2019. The final hearing, which had been due to take place on 16 & 17 May 2019, had by then been postponed due to the unavailability of the Respondent's witness. The parties having agreed that the sole remaining issue in dispute was whether the Claimant was an employee of the Respondent, a final hearing was relisted for one day on 30 September 2019.

6. By early July 2019, the parties had agreed a Statement of Agreed Facts for the purposes of the final hearing. The final paragraph was as follows:

> "It is agreed that if the Claimant was an employee rather than a worker, he would be entitled to a High Cost Area Supplement. The sums which he would have received in this respect are set out in a schedule annexed to this document."

7. The sums were never in fact agreed.

8. On 29 August 2019 the Respondent's solicitors wrote to the Claimant's solicitors in the following terms:

> "I write to let you know that [JB] has now left Capsticks so I will be taking over the conduct of this matter…
>
> I attach a revised statement of facts, with the changes shown as tracked changes. I trust that this can be agreed but do let me know if there are any parts that you dispute.
>
> I have asked my client for a breakdown of the amount your client would have received by way of HCA supplements had he been employed pursuant to an employment contract which incorporated AfC. It is not accepted that he will be entitled to any HCA supplements if he is found to be an employee since AfC is not incorporated into his contract. I have therefore deleted the final paragraph of the statement of agreed facts."

9. The Claimant's solicitors strongly objected to the Statement of Agreed Facts being amended and said that the Respondent would need to apply to the Tribunal to withdraw its admission.

10. At the start of the hearing Ms Criddle confirmed the Respondent's position. It was accepted that the Claimant was an employee when he was working, but the Respondent did not accept there was an "umbrella" contract of employment. Even if there was an umbrella contract, Agenda for Change was not incorporated into it, so the Claimant was not entitled to the Supplement. Mr Gullick argued that the Respondent should not be permitted to amend its response or withdraw the concession made in correspondence. It was agreed, however, that the hearing could proceed and this issue would be addressed in closing submissions. On the substantive point, the Claimant argued that Agenda for Change did apply to the Claimant if he was a permanent employee.

11. It was agreed that the hearing should be limited to liability. The issues to be determined were:

    11.1. Was there a global or overarching contract of employment between the Claimant and the Respondent?

    11.2. Should the Respondent be permitted to withdraw its concession and/or amend its response in order to argue that even if there were a global contract, the Claimant was not entitled to the Supplement?

    11.3. If so, was the Claimant entitled to the Supplement, i.e. was Agenda for Change incorporated into the contract of employment?

12. I heard evidence from the Claimant and from Sue Winter, who was at all relevant times Director of Workforce for the Respondent.

THE FACTS

13. Agenda for Change is a national collective agreement between the Department of Health, NHS Employers and the unions. The agreement is reflected in the NHS Terms and Conditions of Service Handbook. The introduction to the Handbook states:

> "The terms and conditions of service set out in this handbook apply in full to all staff directly employed by NHS organisations, except very senior managers and staff within the remit of the Doctors' and Dentists' Review Body"

14. The pay rates in the Handbook provide for a "high cost area supplement", which for Outer London amounts to 15% of basic salary.

15. Ms Winter's evidence was that it is a matter for individual Trusts whether or not to incorporate Agenda for Change into the contracts of its employees. She said the Respondent does not use Agenda for Change for all of its substantive employees. There were, for example, "VSM" (very senior manager) contracts which had separate terms and conditions. The employees are paid an inclusive salary and no Supplement. Another example was the "spot salary contract", where the Trust offers a set inclusive salary, separate to Agenda for Change terms and conditions, and no contractual entitlement to the Supplement arises. This evidence was disputed by the Claimant and it was put to Ms Winter that she had not produced any evidence to contradict the statement in the Handbook that it applies to all staff employed by the Respondent, except for very senior managers, doctors and dentists.

16. The Respondent is a Healthcare Trust. Among other things, it runs St Helier Hospital and Epsom Hospital. It operates what it refers to as an internal bank of workers. At all material times Pulse, trading as "Staffbank", was contracted by the Respondent to administer offers of work and payment of bank workers. In late 2010 the Claimant applied to Staffbank for the position of porter at St Helier Hospital. The advertisement stated that bank work is flexible, and "the more hours you are available the higher chance you have of working on the bank".

17. The Claimant signed bank worker terms and conditions on 15 November 2010. The Respondent accepts that this document wrongly identifies Pulse as a party to the agreement. The Respondent says the agreement was in fact between the Claimant and the Respondent. The agreement states, among other things, that Pulse are not obliged to offer the Claimant work and the Claimant is not obliged to accept any assignment offered to him. It also states, "No contract shall exist between the parties between Assignments", and "For the avoidance of doubt these terms shall not give rise to a contract of employment between the parties". There is no reference in the agreement to Agenda for Change or the Supplement.

18. There is a dispute about whether the Claimant received what the Respondent says is a standard letter on appointment as a bank worker. The Claimant's evidence is that he did not receive any such letter. The Respondent has produced no evidence to contradict that. It has not produced a copy of such a letter addressed to the Claimant. It relies on a letter sent to another worker in June 2010 and Ms Winter's evidence that it would be "highly unusual" for such a letter not to have been sent to the Claimant. Given that the Respondent evidently has records of such letters going back to June 2010, and has not been able to produce an equivalent letter addressed to the Claimant, and in the absence of any direct evidence to contradict what the Claimant says, I find that he did not receive the letter.

19. The Claimant worked ongoing and regular shifts, with an average of 24 hours per week from February 2011 until January 2013, and an average of 43.5 hours per week from January 2013 until May 2018. The Claimant has been assigned to the Endoscopy department since June 2011.

20. The Respondent says that new terms and conditions for bank workers were sent out in September 2011. The Claimant disputes receiving this document. Again, the Respondent has produced no evidence of the document having been sent to the Claimant and relies on Ms Winter's evidence that it would be "very unusual" for him not to have received it. In fact nothing turns on this because neither party suggests that the new terms and conditions altered the position on mutuality of obligation, but I will proceed on the basis that the document was not sent to the Claimant.

21. Towards the end of 2012 the Claimant asked Joy Stillman, Matron for Endoscopy Services, about being put onto a permanent employment contract. She said she would need to speak to someone called Charles Mantillis about it. After some time she came back to the Claimant and said it would not be possible, but that the Trust would like him to work full-time. This is what happened from January 2013.

22. The Claimant was never offered a permanent contract of employment with the Respondent and he never applied for a substantive post.

23. The Claimant's duties as a porter were the same as those carried out by porters employed on permanent contracts of employment with the Respondent. There were, however, differences in the arrangements between bank workers and the Respondent as compared to permanent employees and the Respondent. For example:

    23.1. The Claimant's written agreement was referred to as a bank contract and the Respondent's Bank Worker Policy was applied to him.

    23.2. From September 2011 onwards the Claimant was paid weekly. A timesheet was submitted by the Respondent on a weekly basis in relation to the Claimant's work. The Claimant was not involved in the production of timesheets. Staff working pursuant to employment contracts were paid monthly and not required to submit timesheets.

23.3. The Claimant received "rolled up" holiday pay, whereas permanent employees were paid holiday pay when they took holiday.

23.4. The Claimant was not entitled to occupational sick pay, whereas permanent employees were.

23.5. The Claimant was not paid the Supplement. According to the original Statement of Agreed Facts, "staff working pursuant to employment contracts were paid this supplement pursuant to Agenda for Change". The Respondent now says: "staff working pursuant to permanent contracts which expressly incorporate the national Agenda for Change collective agreement which makes provision for this supplement are paid it".

23.6. If the Claimant had any queries about his pay, his first port of call would be Staffbank.

24. The Respondent had a Bank Workers Protocol, which was replaced in around April 2013 by a Bank Worker Policy. The Protocol states that the aim of the bank is to provide workers who are available to work on a casual basis to provide temporary cover. It states that bank workers are "not intended to cover long periods of absence". Bank workers may work for longer periods "under exceptional circumstances however this must be reviewed on a monthly basis by the relevant service area". The later Policy similarly states that the bank is designed to supply workers to cover temporary vacancies. It states,

> "Bank workers should not be used on a regular weekly basis as an alternative to recruiting a substantive member of staff. Bank workers may work for longer periods under exceptional circumstances, however, this must be reviewed on a monthly basis by the relevant service area and the bank worker provided with clear dates for the start and end of the assignment."

25. The Policy also states that there is no obligation on the Trust to offer bank workers work "in terms of number of hours, frequency, type or place of assignment", and no obligation for bank workers to accept offers of work.

26. Ms Winter said in cross-examination that the Claimant's circumstances were exceptional because it would have cost a considerable amount to address the disparity in pay between bank workers and permanent staff (see below).

27. The Claimant accepted that the nature of bank work, in general, is that work may be offered and you can choose whether or not to accept it, but said that was not the situation in his case. He said it was simply understood from January 2013 onwards that he would work 10am to 6pm Mondays and Thursdays, and from 8am to 6pm Tuesdays, Wednesdays and Fridays. If there was any variation he would liaise with Filomena Santos, the team leader employed by the Trust. He did not work on bank holidays. He could only recall six days during the whole period working for the Respondent when he did not work and these were all because of family occasions. On those occasions he would notify Ms Santos a couple of weeks or so in advance and it was never a problem. The Claimant gave evidence that he wore an NHS uniform and tie and was at all times "very much part of the team".

28. Ms Winter's evidence was that the roster for porters is completed electronically. The system first populates the roster by distributing shifts equally amongst the substantive (i.e. permanently employed) porters. At all material times there was a high "vacancy factor" in the portering service, so there was always a need for bank porters to fill the roster. Ms Winter said that 40% of all shifts were filled by bank workers. This could either be done by the local manager "self-booking" the shift by agreement with a particular bank worker with whom they have developed a relationship, or the vacant shifts would be sent to bank workers via an app and they would respond on a first come, first served basis.

29. The Respondent produced records of all of the Claimant's shifts, which include a column for the method of booking. Many of the shifts show "self-booked", which accords with the Claimant's evidence that the shifts were agreed directly with Ms Santos. A large number of the shifts show "Day" under this column. It was put to the Claimant in cross-examination that this reflects a booking via the main bank office. The Claimant disputed that any of his shifts were booked in this way. The Respondent did not adduce any evidence as to the meaning of "Day" or to counter what the Claimant said. Ms Winter accepted in cross-examination that the Respondent could have called the Claimant's managers or people who deal with his roster. I find that from January 2013 there was an understanding between the Claimant and Ms Santos that he would work, and continue to do so, according the agreed pattern, excluding bank holidays. Any other variation was agreed with Ms Santos in advance.

30. In September 2015 the Claimant's MP, Gavin Barwell, wrote to Daniel Elkeles, the Respondent's Chief Executive, asking for the Claimant to be considered for a permanent role. The letter notes that the Claimant's terms and conditions stated that the position was temporary, but he had been working a regular 43-hour week for the past two years, which contradicted that. Mr Elkeles replied on 29 September 2015 in the following terms:

> "I was very sorry that Mr Jones felt it necessary to approach you regarding his employment status, as I am informed by Ms Joanne Adamu, Facilities Manager responsible for cleaning and portering services at St Helier Hospital, that Mr Jones is a valued member of her team, currently working as a Porter within the Endoscopy Department with guaranteed shifts and very steady work patterns.
>
> In response to the issue raised by Mr Jones, you may be interested to learn that, due to cost pressures within the Trust's Facilities Department, no permanent recruitment to portering positions has taken place for many years, as there has been a significant saving to the Trust due to the difference in labour costs between permanent and temporary staff. However, should circumstances change whereby this financial constraint is overcome, affording the Facilities Department the opportunity to look again at its recruitment process, then I am assured that Mr Jones' employment status will be reviewed."

31. The correspondence continued and in April 2016 Mr Elkeles wrote to Mr Barwell saying that the Trust had secured a limited amount of funding to move some

bank workers onto permanent contracts. This did not materialise, and ultimately the Trust instead contracted out the service to Mitie.

32. Ms Winter's evidence as to the decision to contract out to Mitie was as follows:

> "At the St Helier site where Mr Jones worked, cleaning and portering services were provided both by bank workers and by permanent staff. However, since the cost of employing permanent staff was higher than the cost of using bank staff, less than 50% of the workforce was permanently employed by the Trust and some bank workers had been working in the same role for a number of years.
>
> As a result, there was a discrepancy in pay between bank workers and permanent staff who were carrying out the same functions. The Trust recognised that this was an issue and had received complaints about the situation from other staff and unions, as well as the complaints raised by and on behalf of Mr Jones as described above.
>
> The Trust undertook a review into the situation, but found that the cost of addressing the pay disparity was approximately £482,000. The Trust did not have the funding to meet that cost at that time. It therefore discussed with [Mitie] whether Mitie could put forward a cost effective proposal for the provision of cleaning and portering services at the Trust and Mitie was able to do so."

33. As to Mr Elkele's letter referring to "guaranteed shifts", she said this was because of the 40% vacancy factor. There was always going to be work available for a reliable worker such as the Claimant.

34. It is not in dispute that when the portering service at St Helier Hospital was contracted out to Mitie, the porters who were permanent employees transferred under TUPE.

35. A consultation document produced for the purposes of the transfer states that there were 16.4 permanent porters and 22 bank workers. Under the heading "Non-substantive staff", the document states:

> "There are currently 88 WTE staff working for Staff Bank who will not automatically benefit from the TUPE rights to transfer to Mitie. The Trust have however as part of the agreement to extend the service agreed that Mitie will offer each of the non-substantive staff a role within the proposed service structure and where ever possible in a similar if not the same position. These staff will benefit from all of the benefits as listed above but also benefit from security a permanent role that offers annual leave, sick pay as well as other assumed leave e.g. paternity. This will address the concerns raised in regards to staff remaining on bank shifts for many years."

36. The Claimant was offered and accepted a permanent contract with Mitie, which commenced on 1 June 2018.

37. There is a dispute about whether the Claimant could have applied for permanent posts that became available and were advertised during the period he worked for the Respondent. It is unnecessary to make any findings in relation to this because it is not relevant to the Claimant's employment status.

38. The Respondent produced what it said was a standard contract for a permanently employed porter. Under "Pay and conditions of Service" it states:

> "Your salary and Terms and Conditions of Service will be in accordance with those determined by the Department of Health in the Agenda for Change Agreement and subsequently varied from time to time by the NHS Negotiating Council. In the event that there is a conflict between these terms and conditions and Agenda for Change terms and conditions, these terms and conditions will take precedence.
>
> The Trust reserves the right to alter or amend your terms and conditions from time to time within the framework of Agenda for Change Terms and Conditions…"

THE LAW

39. It is well established that an essential feature of a contract of employment is mutuality of obligation. This usually consists of an obligation on the employer to provide work and an obligation on the worker to perform the work.

40. In Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99 Elias LJ reviewed the law governing "global" contracts, where a worker works intermittently for the employer. He noted there was no reason why the worker should not be employed under a contract of employment for each separate engagement, even if of short duration. If the worker wishes to show that the contract remains in force between engagements, however,

> "it is necessary to show that there is at least what has been termed 'an irreducible minimum of obligation', either express or implied, which continues during the breaks in work engagements." (paragraph 12)

This principle had been confirmed and applied in Nethermere (St Neots) v Gardiner [1984] IRLR 240 and in Carmichael v National Power plc [200] IRLR 43.

41. In St Ives Plymouth Ltd v Haggerty (2008) UKEAT/0107/08/MAA, Elias P dismissed an appeal against a finding by an employment tribunal that a global employment contract existed in the case of a casual worker who worked regularly for the same employer but with fluctuating hours. One of the issues in that case was whether it mattered that there was no duty on the claimant to work any particular shift. Elias P said that the issue was not "whether there may be circumstances when the employer can choose not to offer work, or the employee refuse to do it", but rather "whether there is an obligation to offer some work and some corresponding obligation to do it" (paragraph 16). The EAT held that a course of dealing, even in circumstances where the "casual" is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided. The issue

for the tribunal, it noted, was "when a practice, initially based on convenience and mutual cooperation…can take on a legally binding nature" (paragraph 26). As to the test to be applied:

> "[T]he test is not whether it is necessary to imply an umbrella contract, or whether business efficacy leads to that conclusion. It is simply whether there is a sufficient factual substratum to support a finding that such a legal obligation has arisen. It is a question of fact, not law." (paragraph 28)

The EAT, by a majority, held that the tribunal had been entitled to find that there was an overarching contract of employment. Relevant factors included the lengthy period of employment, the fact that the work was important to the employers, and that the work was regular even if the hours varied.

42. In Pulse Healthcare Ltd v Carewatch Care Services Ltd and others (2012) UKEAT/0123/12/BA the EAT considered an appeal against a finding that workers who were ostensibly employed on zero hours contracts were employed under contracts of employment which were global in nature. The EAT found that the Employment Judge had been "entirely justified" in saying that the written contracts did not reflect the true agreement between the parties. The EAT referred to the judgment of the Supreme Court in Autoclenz v Belcher [2011] ICR 1157, which had approved the following passage of Elias J's judgment in Consistent Group Ltd v Kalwak [2007] IRLR 560:

> "57. The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship. Peter Gibson LJ was alive to the problem. He said this (p.697):
>
> > 'Of course, it is important that the industrial tribunal should be alert in this area of the law to look at the reality of any obligations. If the obligation is a sham, it will want to say so.'
>
> 58. In other words, if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless."

CONCLUSIONS

43. It is first necessary to resolve the issue about whether the Respondent should be permitted to argue that, even if there were a global contract, the Claimant was not entitled to the Supplement because Agenda for Change was not incorporated into it. I address this first because the question of the Claimant's employment status cannot be decided in a vacuum. It only arose because of the position the Respondent took: that the Claimant was not entitled to the

Supplement *because* he was not a permanent employee. The Respondent accepted that he was employed during each individual "assignment" (shift), but asserted that Agenda for Change did not apply to bank workers. It was clear from the Amended Grounds of Resistance and the correspondence between the parties that, according to the Respondent, the deciding factor in whether the Claimant was entitled to the Supplement was whether there was a global or overarching contract of employment. That was the basis on which the Claimant proceeded from March 2019 at the latest and on which he prepared for the hearing.

44. What the Respondent now says changes the context of the dispute entirely. As Ms Criddle put it, the issue for the Tribunal was not what the Claimant *would be* entitled to if he were a permanent employee, but what he was *in fact* entitled to. This arguably makes the issue of the Claimant's employment status irrelevant, or at least the secondary issue. The primary issue would be: whatever the contractual arrangement between the Claimant and the Respondent, was Agenda for Change and/or the Supplement incorporated into it?

45. Ms Criddle said that the statement in the Amended Grounds of Resistance that Agenda for Change is "included in all contracts of employment for NHS employees" was simply wrong. She did not expressly accept that it was necessary to obtain the Tribunal's permission to withdraw the concession and/or amend the response, but said that if it were necessary, she applied to do so. During closing submissions, at around 3.30pm, she orally sought to amend the relevant paragraph of the Amended Grounds of Resistance as follows:

> "It is denied that the Claimant was entitled to receive 'Outer London Weighting payment' – referred to as High Cost Area Supplement' in Agenda for Change – by virtue of his alleged status as an employee of the First Respondent. The NHS Agenda for Change ~~is a collective agreement included in all contracts of employment for NHS employees~~. is a collective agreement, which can be incorporated into contracts of employment for some NHS employees, but it is a matter for the Respondent whether to do so. The First Respondent avers that as the Claimant is a bank worker, his contract does not set out any entitlement to receive any 'Outer London Weighting payment,' ~~and he was not an NHS employee, Agenda for Change is not applicable to him~~ and as such he is not entitled to receive the additional Outer London Weighting payment. Further or alternatively, in the absence of agreement between the Claimant and the Respondent that Agenda for Change is incorporated into his contract, the Claimant is not entitled to the High Cost Area Supplement."

46. II am satisfied that it is necessary for the Respondent to apply to amend its response. The clear meaning of the original paragraph was that Agenda for Change, as a matter of fact, applies to all NHS staff employed under contracts of employment, and that it did not apply to the Claimant "as" he was a bank worker and not an "NHS employee". The Respondent cannot put forward an argument that directly contradicts both of those propositions without amending its response.

47. Ms Criddle could not explain why this concession had been made, but said that it was clearly wrong and her instructions were that there was nothing on the file "to indicate that instructions were sought" on the issue prior to the change of solicitor with conduct of the case in August 2019.

48. There are conflicting EAT decisions as to the correct approach to adopt in deciding whether to allow a respondent to withdraw a concession. In Centrica Storage Ltd and another v Tennison (2008) UKEAT/0336/08 the EAT treated an application to withdraw a concession as a standard application to amend the response, applying the principles outlined in Selkent Bus Co Ltd v Moore 1996 ICR 836. It was held in Selkent that employment tribunals must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment, the applicability of time limits and the timing and manner of the application.

49. In Nowicka-Price v Chief Constable of Gwent Constabulary (2009) UEAT/0268/09, however, the EAT noted that the Employment Tribunal Rules (the 2004 Rules then in force) were silent on the question of withdrawing admissions, and decided it was appropriate to apply Part 14 of the Civil Procedure Rules. It made no reference to the Selkent principles and it applied the following guidance from the civil courts:

    - The court will consider all the circumstances of the case and seek to give effect to the overriding objective

    - Among the matters to be considered will be: (a) the reasons and justification for the application, which must be made in good faith; (b) the balance of prejudice to the parties; (c) whether any party is the author of any prejudice they may suffer; (d) the prospects of success of any issue arising from withdrawal; (e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.

    - The nearer any application is to a final hearing the less chance it will have of succeeding, even if the party making the application can establish clear prejudice.

50. Ms Criddle noted that the editors of the IDS Handbook had queried the correctness of Nowicka-Price and suggested that the ordinary (and broader) Selkent principles apply. She argued that in either case it was essentially an exercise of balancing prejudice. She put forward a strong argument that the prejudice to the Respondent in refusing the amendment was greater because it could potentially liable on the basis of a position that is "clearly wrong". She also referred to there being broader implications because there are apparently around 80 people in similar circumstances to the Claimant. She argued that the Claimant was not prejudiced because the matter had been raised in correspondence on 29 August and the Claimant had not requested any further documents or information, or suggested that he would have wanted to call evidence and has not been able to.

51. Mr Gullick accepted that the Respondent raised the matter on 29 August, but he noted that no application to amend had been made prior to the hearing. He had prepared written submissions for the hearing which addressed the employment status argument and only referenced the Respondent's recent attempt to change its position as a footnote, arguing that the Respondent must be held to its admission. When the matter was raised at the start of the hearing, Mr Gullick agreed that it would be a better use of the Tribunal's time to proceed with the case and hear submissions on the issue at the end, rather than deal with the application to amend as a preliminary matter at the start of the hearing. He was content to deal with it in the evidence because he said Ms Winter's witness statement was contrary to the express terms of Agenda for Change and the Respondent had not produced any other evidence to support its position.

52. I have concluded that on the particular facts of this case, even applying the more liberal principles in Selkent, the application to amend should be refused. First, the application has been made at the eleventh hour, or arguably at the thirteenth hour, coming as it did in closing submissions after the evidence had been heard, but even if it had been dealt with at the outset of the hearing, the consequence of allowing the amendment would be to move the goalposts entirely on the day of the hearing. It is true that Mr Gullick did not suggest that an adjournment would be necessary if the amendment were granted, but it is also clear that the Claimant had prepared for the hearing on the basis that the sole issue was employment status. As noted above, the context for that dispute was the concession itself. Allowing the amendment would have the effect of shifting the emphasis onto the precise terms of the contract, as opposed to the existence of such a contract. The Claimant is obviously prejudiced to some extent by having to meet such arguments on the day of the hearing. There is no reason why the application to amend could not have been made as soon as the Respondent decided, on 29 August, to change its position. It should have been obvious to the Respondent that an amendment was required for the reasons given above.

53. Secondly, while it is of course correct that the issue for the Tribunal is not what the Claimant *would have* been entitled to if he had been a permanent employee, but what he was *in fact* entitled to, it does not necessary follow that the concession was "clearly wrong". It was an admission of fact that Agenda for Change is "included in all contracts of employment for NHS employees", and that it did not apply to the Claimant "as" he was a bank worker and not an NHS employee. In correspondence between the parties it was expressly admitted that if the Tribunal found the Claimant was a permanent employee, he would be entitled to the Supplement. Ms Criddle pointed out that Agenda for Change is a collective agreement that could only form part of the Claimant's contract if it were incorporated by a term of his individual contract. That is obviously right, but a collective agreement may be incorporated by either an express or an implied term. Her arguments were premised on the Claimant having to identify an express incorporation term, similar to the one that was included in the permanent porter's contract. It is perfectly possible, however, that such a term would be implied into a permanent contract of employment between the Claimant and the Respondent, if one existed.

54. There is at least some evidence of a custom and practice that would support such a term being implied. There is the wording of the NHS Terms and Conditions of Service Handbook itself, stating that it applied to "all staff directly employed by NHS organisations". There is also the letter from Mr Elkeles to the Claimant, and Ms Winter's evidence about the cost of moving the Claimant onto a permanent contract. The clear implication is that it would cost more to engage the Claimant on a permanent contract because Agenda for Change *would* apply. If, as Ms Winter suggests, it is a matter of choice for the Trust, then he could have been lawfully employed on a permanent contract without paying him the Supplement. There is also the admission itself, the source of which has not been explained by the Respondent. The Respondent has not provided any evidence to support Ms Winter's assertion that Agenda for Change is not incorporated into the contracts of some employees.

55. I do not therefore accept that the concession was necessarily and obviously wrong.

56. As for the claimed wider implications, the Respondent would not be bound by a concession made in this case when seeking to defend any other case. The point may be argued in any other case where it has been properly pleaded.

57. Overall I conclude that the prejudice to the Respondent in refusing the amendment is outweighed by the prejudice to the Claimant in having to meet an entirely new argument on the day of the hearing. The application to amend is refused.

58. If follows that the only issue is whether the Claimant was employed pursuant to an overarching contract of employment.

59. The Respondent accepts that the Claimant was an employee during each individual assignment (each shift). The only dispute is whether there was mutuality of obligation on a global or overarching basis.

60. This case differs on its facts from the cases referred to above concerning global contracts because the Claimant was not employed "intermittently", and nor were there fluctuations in his work. He worked continuously, initially part-time, 24 hours a week according to a set weekly pattern, and then from January 2013 until May 2018, 43.5 hours a week according to a set weekly pattern. The issue is whether the Claimant did so according to the terms and conditions for bank workers, both parties understanding that there was no mutuality of obligation to offer and accept work or whether, in reality, such mutual obligations did exist.

61. It is reasonably clear that when the Claimant started working for the Respondent it was pursuant to ordinary bank work arrangements. The advertisement made it clear that the work was flexible and the Claimant signed the terms and conditions for bank workers on 15 November 2010. Although the bank worker contract, on the Respondent's own case, named the wrong parties and therefore cannot have been enforceable as between the Claimant and the Respondent, I accept that it is good evidence of the parties' intentions as to the nature of the relationship. The position changed, however, at the end of 2012. The Claimant's unchallenged evidence is that Joy Stillman, Matron for Endoscopy Services, told the Claimant the Trust would like him to work full-

time in that department. He was expressly told he would not be offered a permanent contract, but it is now clear that the principal reason for that was the additional cost to the Respondent as a result of the benefits set out in Agenda for Change. In order to maintain the Claimant's perceived "bank status" the Respondent had to keep paying him according to the arrangements for bank workers. Although the Bank Worker Policy in theory applied to the Claimant, the nature of his work was expressly contrary to the policy and neither the Respondent nor the Claimant demonstrated any intention to comply with it. I do not accept that the "exceptional circumstances" referred to in the policy existed, and even if they did the Respondent has not produced any evidence that it complied with the obligation to hold regular reviews and set a clear end date.

62. From January 2013 onwards there was, as I have found above, an understanding between the parties that the Claimant would work, and continue to do so, according to the agreed pattern. Any variation was agreed with Ms Santos in advance.

63. The Claimant did not work on six days in that period, which the Respondent says demonstrates he was not obliged to accept the offers of work. In fact, however, this aspect of the factual background points the other way. The Claimant's uncontested evidence is that he let his manager know about these absences a couple of weeks in advance, and she said it was "not a problem". That is inconsistent with a casual employment relationship and suggests he was expected to attend unless it was agreed otherwise. I note that in Pulse v Carewatch, the EAT said at paragraph 38 that "the fact that an employee can object to rostered hours if there is a problem does not mean there is no mutuality of employment (sic)".

64. The Respondent says that the explanation for the regularity of the Claimant's working pattern was that there was always a need, due to the high "vacancy factor" for bank porters. That does not, however, indicate that there was no obligation to offer or accept work. The Claimant was never "offered" shifts in the way that other bank workers would have been. He was added to the roster automatically pursuant to the understanding that had been reached. He was expected to work the shifts that he was rostered and did so consistently for more than five years. I consider it is wholly unrealistic to suggest that there was no mutuality of obligation. The Respondent relied on the Claimant being able to continue with the agreed arrangement.

65. I accept that the true position was as in Mr Elkeles's letter of September 2015. The Claimant was a "valued member" of the team, with "guaranteed" shifts and "steady work patterns". The Respondent suggests that the Claimant's efforts to be transferred onto a permanent contract show that he was well aware that there was no global contract. I do not accept that. The Claimant knew that he was not a permanent employee, in the sense that he did not receive the same pay as his colleagues who were, but there is nothing in the correspondence that amounts to a concession, or evidence of the Claimant's belief, that there was no mutuality of obligation. On the contrary, the letter from Mr Barwell on the Claimant's behalf complained that the Claimant's terms and conditions stated the position was temporary, which was not the reality. The clear implication from Mr Elkeles's response is that he accepted the Claimant was,

in truth, a full-time permanent employee, but he could not afford to pay him in accordance with Agenda for Change terms and conditions.

66. Ms Criddle relied on the judgment of the Court of Appeal in Stevedoring & Haulage Service Ltd v Fuller and others [2001] IRLR 627, in which it was held that where the terms upon which casual work is offered and accepted expressly negative mutuality of obligations, there can be no global or overarching contract of employment. In that case, however, the tribunal had accepted that the terms upon which work was offered and accepted were contained in documents that expressly negatived mutuality of obligation. Here, by contrast, the document the Claimant signed in November 2010 cannot have been enforceable at any stage, given that it named the wrong parties, and in any event I have found that the agreement between the parties from January 2013 to May 2018 was not governed by that document or by the Bank Worker Policy. The Claimant continued to be paid as a bank worker and notionally was treated as such, but this was a situation such as that envisaged in Kalwak, where no-one seriously expected that the Respondent would stop offering the Claimant work or that he would refuse to accept it.

67. I therefore conclude that the Claimant was employed by the Respondent pursuant to an overarching contract of employment from January 2013 until 31 May 2018. In light of the Respondent's concession in its response to the claim, he was therefore entitled to the Supplement for the whole of that period.

68. I note that there was an issue canvassed in correspondence with the Tribunal as to whether the claim was brought as a series of unauthorised deductions from wages and/or breach of contract. As far as I can see that issue was not clarified in correspondence. Nor was it addressed at the hearing. I therefore limit the judgment to these findings of fact and hope that the parties can now agree the consequences. A further one-day hearing will be listed in case the parties cannot reach agreement, but they should write to the Tribunal as soon as possible if it is not required.

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Employment Judge Ferguson

Date: 18 October 2019