



Easter Term
[2013] UKSC 20
On appeal from: [2011] EWCA Civ 1129

JUDGMENT

Barts and the London NHS Trust (Respondent) v Verma (Appellant)

before

**Lord Hope, Deputy President
Lord Walker
Lady Hale
Lord Sumption
Lord Carnwath**

JUDGMENT GIVEN ON

24 April 2013

Heard on 27 February 2013

Appellant

Karon Monaghan QC
Edward Kemp
(Instructed by Darbys
Solicitors LLP)

Respondent

David Welch
Stephen Page
(Instructed by Alexander
Chambers)

Intervener

Frederic Reynold QC
Nadia Motraghi
(Instructed by Bevan
Brittan LLP)

LORD CARNWATH (with whom Lord Hope, Lord Walker, Lady Hale and Lord Sumption agree)

1. Dr Verma is a doctor specialising in oral and maxillo-facial surgery. She trained as a dentist in India but later qualified as a doctor. She has been working in the United Kingdom since 1996. She worked in training grade posts from March 1998 until August 2002. From September 2002 to September 2006 she held a series of locum positions in career grade posts, two of them at Specialist Registrar level. In November 2006 she took a six-month appointment with the Luton and Dunstable Hospital NHS Foundation Trust. That appointment was described in the appointment letter as “Trust grade doctor in oral surgery (Hospital Practitioner equivalent) for two sessions per week”. She left that post in early 2007. She was then offered a post as a “Foundation Year 1 Pre-Registration House Officer” with the respondent (“the Trust”). This is a training post, typically for newly-qualified doctors, but sometimes for more senior doctors who need further training. For Dr Verma it was a necessary step to her qualifying for an appointment as a consultant, having originally trained as a dentist.

The contractual terms

2. The relevant contractual terms are in the NHS Terms and Conditions of Service for Hospital Medical and Dental Staff and Doctors in Public Health Medicine and the Community Health Service (England and Wales), which came into force in September 2002. They were promulgated by the Secretary of State but represented the outcome of negotiations with representatives of the medical and dental professions. (Revised terms, which included revised pay protection arrangements, came into force on 1st August 2007, but do not apply to Dr Verma’s contract which took effect from 31st July 2007.)

3. Paragraph 1 (a) provides that “practitioners shall be paid at the rates set out in Appendix I”. That in turn refers to the latest “Advance Letter” (otherwise referred to as the “Pay Circular”). A fresh Pay Circular is issued each year. Annex A is headed “Basic rates of pay per annum” effective from 1 April in each year. It consists of a schedule setting out figures for each of fifteen grades, the highest being “Consultant (pre-2003 contract) and the lowest “Hospital practitioners”. For each grade there is a series of levels of pay running from “Min” and then from 1 to 13, though the number of levels varies from grade to grade. It is common ground that these levels correspond to the “incremental points” referred to in the terms and conditions. For all grades other than Hospital Practitioner the figures given are

annual figures for full-time work. For hospital practitioners the figures relate to “sessions”.

4. Paragraph 6 is headed “Hospital Practitioner Grade”. To qualify a medical practitioner should have been fully registered for at least four years; a dental practitioner for five. Posts are limited to “a maximum of five notional half days each week.” A half-day (or “session”) is treated as “the equivalent of a period of 3½ hours flexibly worked” (para 61). A full week notionally consists of eleven sessions. Thus, while Dr Verma’s appointment was for two sessions only per week, it was inherent in the nature of her Hospital Practitioner post that it could not be for more than five sessions. That limitation is also reflected in paragraph 69, which restricts the maximum remuneration for part-time appointments in the Hospital Practitioner grade to “five notional half-days”. It also provides that where a practitioner holds part-time appointments with more than one authority, the maxima shall apply to “the aggregate remuneration from all the authorities concerned”. This latter provision may be contrasted with paragraphs 94 and 105, dealing respectively with part-time medical officers and part-time general dental practitioners, which enable such a practitioner holding appointments with more than one authority to have his remuneration calculated separately for each.

5. Paragraph 132, relating to pay protection, is the provision most directly material for the purposes of this appeal. It is part of a group of sections relating to salaries, which starts at paragraph 121, headed “Starting salaries and incremental dates”; followed by paragraphs 122-125 (“Counting of previous service”) and paragraphs 126-131 (“Increments on first appointment to a grade”). The latter contain detailed rules for increases above the minimum, fixed generally by reference to “incremental points” on the scale in Annex A. Thus, for example, paragraph 131 provides, in the case of a hospital practitioner:

“Authorities shall have discretion to fix the starting salary of a hospital practitioner on first appointment to any of the three next incremental points above the minimum of the scale by reason of age, special experience and qualifications taken as a whole.”

6. At the heart of the present discussion are paragraphs 132 (“Protection”) and 135 (“Interpretation”). The former provides:

“132 Where a practitioner takes an appointment in a lower grade which is recognised by the appropriate authority as being for the purpose of obtaining training (which may include training to enable the practitioner to follow a career in another speciality), the practitioner shall, while in the lower grade, continue to be paid on

the incremental point the practitioner had reached in his or her previous appointment. Such a practitioner shall receive the benefit of any general pay awards. On reappointment to the higher grade or on appointment to another higher grade, the practitioner's starting salary should be assessed as if the period spent in the approved training post had been continuing service in the previous higher grade. Practitioners whose previous appointment was in the Northern Ireland, Isle of Man or Channel Islands hospital service are eligible for protection of salary under the terms of this paragraph.”

7. Paragraph 135, so far as relevant, provides:

“a. the rate of salary for a part-time practitioner shall be taken to be the corresponding point in the salary scale, except for a practitioner employed as a part-time medical or dental officer under paragraphs 94 or 105, for whom it shall be the maximum amount appropriate to nine notional half-days...

c. the rate of salary in the previous post shall be taken to be the present rate of remuneration for such a post, whether or not this rate was in fact paid...”

8. The main elements of paragraph 132 are not in issue. Dr Verma’s position with the Trust was “recognised... as being for the purpose of obtaining approved training”. Her previous appointment was her post with the Luton and Dunstable Trust. Although she had not strictly been eligible for a Hospital Practitioner grade post, because she was not a registered GP, it had been treated as equivalent to such a post, and has been so treated for the purpose of pay protection. It is accepted therefore that account must be taken of her previous entitlement in that post; the question is how.

9. The Employment Tribunal held that her protection was limited to five sessions, which was the maximum period which she could have worked in her previous post (para 86). The Trust had argued that the limit should be two sessions, as the period she in fact worked; but that submission was not adopted by the tribunal, and has not been renewed.

10. In the Employment Appeal Tribunal (presided over by the President, Underhill J) the area of dispute was defined by reference to two possibilities for practitioners in Dr Verma’s position (para 17):

“(i) that they should enjoy pay protection only in respect of the number of hours that they worked in the previous appointment (so that – for example – a Consultant who had previously worked half-time would be paid as a Consultant for half of his or her training-post work as, say, a Registrar, but as a Registrar for the balance); or (ii) that he or she would be paid as a Consultant for the full time worked as a Registrar. The difference could be expressed as being between (i) protecting the *amount* received in the previous post and (ii) protecting the *rate*.”

11. The EAT preferred the latter interpretation. Particular reliance was placed on paragraph 135(a): the words “the corresponding point in the salary scale” could only mean the full-time rate shown on the scale for that post. That construction was supported by the words of exception:

“Paras 94 and 105, which are the subject of the exception, provide for the pay applicable to certain ‘appointments held only by part-time practitioners’ – e.g. in convalescent homes or GP maternity hospitals. We were not shown the detailed provisions covering their terms, but it is clear from para. 94 that the unit of payment is the ‘notional half-day’. The thinking behind the maximum of nine half-days was not explained to us; but its importance for present purposes is that the necessary implication is that the ‘corresponding point’ would otherwise be ten (or eleven) half-days, i.e. the equivalent full-time figure.” (para 20(5))

12. The EAT saw nothing surprising in that position. While the purpose of pay protection might arguably be met if the protection were limited to the number of hours worked in the previous appointment, it was not inconsistent with that purpose for “a more generous approach” to be taken, based on the full-time equivalent of the actual pay received in the previous post:

“The rate reflects not only the actual value of the work done but also the seniority and experience of the person doing it, and those factors are present and apply to the entirety of the hours worked. We have no difficulty in seeing that it would ‘feel fair’ to all concerned that, say, a former Consultant filling a Registrar post, so as to re-train in a way which will benefit the NHS as much as herself, should be paid as a Consultant for the entirety of the hours worked; and indeed that it might feel positively unfair and anomalous for her to receive different rates for different hours within a single job. There is a further factor, in as much as she may have given up other remunerative work – and in any event the opportunity of doing such

work – in the hours that she was not working under the part-time contract, which it is not unreasonable to value at the same rate that she was receiving for her (part-time) NHS work; and although these ‘foregone hours’ are not compensated as such under para 135 there is an equity in recognising their value by paying the protected rate for the entirety of the hours worked. We can see how in those circumstances a form of pay protection which extended only to part of the hours worked might be a real disincentive to a part-time hospital doctor being prepared to step down in order to re-train, with a consequent disbenefit to the NHS.” (para 22)

13. Later, dealing with Dr Verma’s own position, they accepted that it might seem surprising that she should receive this level of protection, given that she herself had worked only two sessions per week, and that the resulting figure was almost three times that of an ordinary hospital practitioner at her level. They commented:

“As to the former point, however, if the principle that pay protection protects *rates* is correct, as we believe it is, there is no principled basis for drawing any distinction between cases where the practitioner's previous part-time work was 80% of full-time and cases where it was only 20%. As to the latter, of course it is in the nature of protected pay that the beneficiary may receive far more than the normal rate for the job. The Appellant was not a young doctor straight out of medical school but an experienced maxillo-facial surgeon. It seems that Hospital Practitioners are well-paid – if annualised, their rates are higher than those paid to any grade save Consultant - and the Appellant was at the top of the incremental scales... It has however to be borne in mind that Hospital Practitioners may be GPs of great experience who may well be earning for the part of their work that they do in general practice amounts which compare favourably with what they receive from their hospital post:...” (para 28)

14. In anticipation of the one difference between the EAT and Elias LJ in the Court of Appeal, it is to be noted that there appears to have been no material dispute at this stage about the method of calculation. The judgment recorded as “common ground” that the sessional rates in Annex A needed to be converted into an appropriate salary figure. The appellant did not accept that it was appropriate simply to multiply the figure for a single 3½ hour session by eleven, since that would produce a figure for a 38½-hour week, rather than the 40 hours for which she worked. They commented:

“Her case is accordingly that the sessional figure has to be reduced to an hourly rate and then multiplied to produce an annual salary entitlement appropriate to a 40-hour week.... Subject to its other points considered below, the Trust does not challenge that method of calculation.” (para 16)

The Court of Appeal

15. In the Court of Appeal, there was a difference of view between Elias LJ, who gave the first judgment, and subject to one point supported the reasoning of the EAT, and the other two members of the court (Rix and Rimer LJ) who broadly accepted the Trust’s case. Since the respective submissions before us largely reflect these two contrasting positions it is helpful to refer to the reasoning in some detail.

16. Elias LJ relied principally on what he regarded as the natural construction of paragraph 132 itself (paras 18-21). In the case of a full time employee undertaking training, the employee would continue to be paid precisely what he or she was paid in the previous job. He saw nothing to suggest that the salary should vary with the hours worked in the previous post. The natural construction was that the employee would continue to receive pay “on the incremental point by which pay is determined for the previous job” and to receive it “for the basic hours required to perform the training job”. In summary:

“... the natural reading of paragraph 132 is that the practitioner, whether full time or part-time, would in the training post have his or her pay determined by reference to the incremental point in the previous scale. Since the training post is full time for everyone, there is then no basis for limiting the payment merely because the practitioner in the previous job was undertaking a part-time post.” (paras 19 and 21)

Although he did not think that paragraph 135(a) provided significant help on the construction of paragraph 132, he considered in detail the submissions relating to its effect and found nothing inconsistent with his preferred view (paras 22-35).

17. The leading judgment for the majority was the third judgment, given by Rix LJ. It is difficult in a short summary to do justice to his carefully reasoned analysis of the relevant paragraphs (paras 63-78). In paragraph 132, the “critical words” in his view were “shall... continue to be paid on the incremental point... reached in his or her previous appointment”. The “incremental point” was a reference to the

amounts set out in Annex A which were not hourly rates, but annual rates and in one case rates per session. He found it “difficult to the point of impossibility” to construe paragraph 132 as referring to hourly rates, in the absence of any reference to hourly rates as such. He thought that the word “continue” at the end of the first sentence, and “the concept of unbroken continuity” embedded in the final sentence, emphasised that “what continues is what has been and will be the relevant salary rate, which in our case is a rate per session” (para 66).

18. That led to the question, at the heart of the appeal:

“What happens if the practitioner who is entitled to protected pay under the provisions of paragraph 132 has been working on a part-time rather than a full-time basis?”

His answer was:

“In such circumstances, just as the annual income of an employee in the grade of hospital practitioner will depend ultimately on the number of sessions he or she will work throughout the year, so the annual income of an employee in any of the other grades will depend on whether he or she works full-time or part-time. Thus it is reasonable to assume that the salary would be adjusted, in the cases where an annual salary is identified, by reference to both the annual salary in question (ie the rate for the job) and the amount of part-time work undertaken, and, in the case of the hospital practitioner, by reference to the number of sessions which are performed in that role, where it is the rate for the session, rather than the rate for the year, which is definitive of the rate for the job.” (para 67)

19. Turning to paragraph 135(a) he thought it –

“highly unlikely that any of the language of paragraph 135 will provide that a person performing work in any of the specified grades in Annex A will, if working only part-time, have his or pay protected as if he or she was working full-time.” (para 70)

Following detailed analysis of paragraphs 135(a) and (b), he concluded:

“79. In sum, there is in my judgment nothing in paragraphs 132 or 135 to supersede or undermine the natural, rational and purposive

interpretation of these provisions relating to protected pay as protecting the practitioner for the pay in a previous role which he or she earned, at the rate to which he or she was entitled to (ie either the rate earned or, where that rate has been improved under current awards, at the current rate), and not as extending their pay to a figure possibly far in excess of any figure previously earned. It is simply counter-intuitive to suppose that the less a part-time practitioner worked in a previous post, the more he or she is "protected" in a training post..."

20. Rimer LJ agreed with Rix LJ's judgment, but added his own comments. Like Rix LJ he found "counter-intuitive" the notion that Dr Verma should be entitled to pay protection "at a salary level which she did not earn and could not have earned in her post as a Trust grade doctor" (para 49). He also placed emphasis on the use of the word "continue" in paragraph 132, and the lack of any reference to hourly rates:

"The word 'continue' in that context is not necessarily conclusive on the point, but it would seem to me that its more natural interpretation in the context is that it is referring to a continuation of that which the practitioner had previously enjoyed. It is therefore pointing against any notion that he will overnight become entitled to an immediate hike in his former pay and receive a level of remuneration that he had not previously earned. That result could only be achieved if condition 132 is interpreted as concealing within it an unspoken scheme by which the required task is to identify the hourly rate at which the practitioner was formerly paid and then to apply that hourly rate to the hours worked in the lower grade. There is, however, nothing in condition 132 or anywhere else in the conditions that says or suggests that this is the scheme. ..." (para 52)

Discussion

21. It is disturbing that a condition designed to confer important rights on employees should be so obscure. The differences of view between such experienced judges, even after the intense analysis to which the condition was subjected in the Court of Appeal, is testament enough that the condition is not well drafted, and requires reconsideration. This would be a matter for real and urgent concern if there were evidence that it has caused or is causing wider problems in practice. That possibility was noted as one of the reasons for the grant of permission to appeal to the Court of Appeal. In the event Mr Welch for the Trust has not pursued this point. He has not suggested that the EAT's interpretation of the condition is likely to cause problems outside the relatively unusual

circumstances in the present case. In retrospect, this may be another case where it would have been better to have left the case where it stood following consideration by the specialist appeal tribunal.

22. This view gains support from written submissions on behalf of the intervener, NHS Employers (“NHSE”), the body which represents employers in the NHS. From them we learn that “the grade of Hospital Practitioner is rare, and is now what is called a closed grade: that is a grade to which no new entrants are permitted.” There are currently only 650 practitioners in this grade, predominantly practising GPs who undertake limited session work in hospitals. The issue of protection in such cases is said to be “extremely rare”, no other case having been recorded by NHSE since its creation in 2004.

23. Both before the tribunals and in the Court of Appeal, there were expressions of regret at the lack of information about the background of the negotiations which led to these terms, and no evidence about “what the parties assumed they were protecting in paragraph 132 with respect to part-timers” (CA para 17 per Elias LJ). Since then the diligence of Mr Kemp, junior counsel for Dr Verma, has led to the unearthing of considerable information about the earlier versions of the terms and conditions, going back to 1949. We must be grateful for these efforts, but it is not suggested by either party that the history throws significant light on what we have to decide.

24. The majority reasoning of the Court of Appeal was strongly influenced by their view as to the improbability of the EAT’s construction on the facts of Dr Verma’s case. By contrast the EAT, and Elias LJ, regarded that result as the possibly surprising, but not unacceptable, result of the application to an unusual case of a rule intended to be of more general application. I see force in both points of view, but for that reason find neither of much assistance in resolving the issue of construction.

25. The majority were also influenced by the lack of any direct basis in paragraph 132 for converting sessional rates into hourly equivalents. This concern also led Elias LJ to differ from the EAT on the calculation of the weekly figure. However, as I have noted, it was recorded as common ground before the EAT that such a conversion had to be made, and that there was no disagreement with the appellant’s use of 40 rather than 38½ hours as a multiplier. Before us Mr Welch challenged the general approach of both the EAT and Elias LJ, but did not, as I understood him, offer any convincing reason for going back on the method of calculation which had been accepted by both sides in the EAT.

26. In these circumstances, the issue has to be approached by applying ordinary principles of construction, the object being to -

“... ascertain the intention of the parties by examining the words they used and giving them their ordinary meaning in their contractual context... Effect is to be given to every word, so far as possible, in the order in which they appear in the clause in question. Words should not be added which are not there, and words which are there should not be changed, taken out or moved from the place in the clause where they have been put by the parties. It may be necessary to do some of these things at a later stage to make sense of the language. But this should not be done until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise.” (per Lord Hope, *Multi-link Leisure Developments Ltd v North Lanarkshire Council* [2010] UKSC 47, 2011 SC (UKSC) 53, para 11).

27. In paragraph 132 the critical words are “the practitioner shall ... continue to be paid on the incremental point the practitioner had reached in ... her previous appointment”. The “incremental point” is clearly a reference to the relevant point in the scale for the practitioner’s grade as shown in Annex A. Since, for Dr Verma’s grade, that point is expressed in terms of sessional rates some means must be found to convert those rates into a form which can be applied to the different terms of her training post, in which her periods of work were measured in hours not sessions. Even if it had not been common ground before the EAT, the most obvious way of doing this was by conversion of the sessional rates to hourly rates. It may be “counter-intuitive” that these rates should not be limited in some way by reference to the number of sessions which were, or could have been, worked in the former post. Mr Welch relied in particular on the surprising consequence that the sessional rate for a hospital practitioner, which in practice was limited to five sessions per week, is notionally converted into an annual salary greater than that of the top grade, that of a consultant.

28. However, there is nothing in the wording of paragraph 132 which can be relied on to support the limitation which he asserts. One might have expected to find such a limitation in the interpretation provision, but there is none. Paragraph 135(a) simply confirms that no distinction is to be made in the application of the rates in annex A between part-time and full-time practitioners. I also agree with the EAT that the exceptions relating to part-time medical and dental officers tend if anything to support their construction. As has been seen, such practitioners, unlike other part-time appointments (paragraph 69), are not confined to the remuneration from a single such NHS appointment (paragraphs 94(b) and 105). As Rix LJ said, the reasoning behind the limitation to “nine notional half-days” is not entirely clear. He regarded it as a special case “governed by complex provisions” from

which no wider inference could be drawn (para 76). However, the existence of such a specific limitation makes it more difficult to imply some other unspoken limitation applicable in Dr Verma's case.

29. In conclusion I would allow the appeal, upholding the reasoning and conclusion of the EAT, and restore their order. In accordance with that order the case will have to be remitted to the Employment Tribunal to determine the outstanding issues identified in the order.