Neutral Citation Number: [2017] EWHC 1839 (QB)

Case No: HQ17X00700

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2017

Before:

MR JUSTICE JAY

- -

Between:

MINISTRY OF JUSTICE **Claimant**

- and –

THE PRISON OFFICERS' ASSOCIATION **Defendant**

- -
- -

Daniel Stilitz QC and Jane Russell (instructed by **Government Legal Department**) for the **Claimant**
John Hendy QC and Stuart Brittenden (instructed by **POA In-House Legal**) for the **Defendant**

Hearing dates: 4th and 5th July 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE JAY

MR JUSTICE JAY:

A. Introduction

1. The Claimant ("the MoJ") is the government department with powers and duties relating to Her Majesty's prisons. The entity within the MoJ with specific responsibility is currently known as Her Majesty's Prison and Probation Service ("HMPPS"). The Defendant ("the POA") is an independent Trade Union representing uniformed prison grades and other staff working within the field of secure forensic psychiatric care.

2. HMPPS is under considerable pressure at the moment and has been for some time. It is uncontroversial that Government has been operating in circumstances of financial stringency, and between 2010 and 2015 the number of prison officers was reduced by almost one-third. I was told that the current complement of prison officers is approximately 20,000 but my own researches reveal that the figure is in the region of 18,400. Assaults and violence within prisons have been growing, together with rates of self-harm and suicide. Inevitably, this has increased the pressure on prison officers whose job always has been difficult and stressful. Thus, whilst the physical dangers and rigours of the job have increased, prison officers have felt commensurately undervalued and diminished.

3. On 27th February 2017 the POA issued its Circular 21/2017 ("the Circular") which lies at the heart of these proceedings. I will need to examine its terms and likely effects with some care. The MoJ's case is that the Circular amounted to an inducement to the POA's members to withdraw services in breach of section 127 of the Criminal Justice and Public Order Act 1994 ("the CJPOA"). The POA's case is that the Circular did no more that instruct its members to comply with the letter of their contractual obligations, such that no breach by them, and no concomitant inducement by the POA for the purposes of section 127, arose.

4. This, in broad outline, is the central issue which arises in this expedited trial for final declaratory and injunctive relief. There are subordinate issues which I am also required to resolve, and which I will identify in due course.

5. The resolution of the issues between the parties turns largely on documentary evidence. I also received witness statements from Martin Beecroft (dated 28th February, 8th June and 23rd June 2017), Francis Stuart (dated 8th June 2017) and Phil Copple (dated 9th June 2017) for the MoJ, and Glynn Travis (dated 28th February and 9th June 2017), Steve Gillan (dated 9th June 2017), David Cook (dated 9th June 2017) and Wendy Price (dated 9th June 2017) for the POA.

6. I heard oral evidence from Mr Copple, Mr Travis and Mr Gillan. I will address their evidence to the extent necessary under chapters E and F of this judgment.

7. This judgment is divided into the following chapters:

   B. Essential Factual Background.

C. Relevant Legislative Provisions.

D. The Circular.

E. Evidence Bearing on the Contractual Position.

F. Other Relevant Evidence.

G. Identification of the Issues.

H. The Rival Contentions.

I. Findings, Discussion and Conclusions.

B. Essential Factual Background

8. It is unnecessary to examine the history of the relationship between the MoJ and the POA over the years. I will take up the story in the autumn of last year.

9. On 28th October and 15th November 2016 the POA called for strike action by issuing circulars 97/2016 and 104/2016. Kerr J ordered injunctive relief on 15th November 2016. The MoJ mentions that, although Kerr J's order was granted at 14:30 that day, the circular informing members of its existence did not go onto the POA's website until approximately 18:10. According to paragraph 40 of Martin Beecroft's first witness statement, on 15th November 2016 (he does not specify the time) two prison officers were assaulted, two prisoners required restraint, and six prisoners were moved out of HMP Exeter. A cell fire occurred at HMP Littlehey.

10. Further strike action was threatened on 21st February 2017, but the parties were able to come to terms.

11. As I have said, the Circular was issued on 27th February 2017. I will be setting out its provisions in more detail, but by way of summary it instructed POA's members to: (i) conduct branch meetings outside prison establishments at 7:30am on Wednesday 1st March 2017, (ii) only attend their workplaces at the official start time at the gate, (iii) withdraw from a range of duties described as "voluntary tasks" until further notice, and (iv) embark on a course of withdrawal from "Payment Plus", an overtime scheme. The Circular also instructed members fully to comply with the provisions of Bulletin No.8 "if the Governor asks members to work additional hours unpaid".

12. On 28th February 2017, at approximately 16:30, Leggatt J granted urgent injunctive relief. Mr John Hendy QC attended the hearing in Court 37, but his clients had been given little notice of it and I accept did not have a proper opportunity to prepare and marshal the evidence and arguments which have been carefully arrayed before me. Leggatt J ordered the POA to withdraw the Circular. His reasoning on the critical question was as follows (reported at [2017] IRLR 621):

> "8. … as I construe section 127(1A) of the 1994 Act, the definition of "industrial action" is not confined to services which prison officers may be contractually obliged to

> undertake. Considered by reference to the purpose of the provision which I have identified earlier, I see no reason to put such a gloss on the language used. It seems to me that the natural and ordinary meaning of the words is that it will constitute industrial action if a person induces a prison officer to withhold any services which that person would otherwise have provided as a prison officer. I see no reason for reading into the definition the qualification that the services not only must be services that would be provided as a prison officer, but services which the individual could be contractually required or instructed to undertake.
>
> 9. In any event, even if that is wrong, on the material before the court today it seems to me that the evidence indicates that the proposed action will constitute industrial action also in the second statutory sense, that is to say, "action that would be likely to put at risk the safety of any person, whether a prisoner or a person working at a prison etc.
>
> 10. It is necessary in that regard to consider the totality of the action which is to be taken and not to focus narrowly on each individual aspect of it. What is being proposed is on a national basis that all members of the POA should withdraw from a whole series of voluntary roles. Those include such matters as the provision of first aid and undertaking assessments to determine whether prisoners are at risk of suicide and self-harm. It seems to me self-evident that a nationwide policy of withdrawing from providing such assessments, to take that as an example, gives rise to a risk to the safety of prisoners. When one looks at the proposed actions as a whole, that risk is further magnified."

Although Leggatt J did not apply the serious issue to be tried test, and effectively decided that the MoJ's case was made out (compare American Cyanamid v Ethicon [1975] AC 396 with NWL Ltd v Woods [1979] 1 WLR 1294), I do not regard myself as bound by his reasoning. Not merely did Leggatt J not hear full argument on the point, his decision is only dispositive of the issue between the parties at all material times up to trial. Leggatt J made an Order restraining the POA, its branches and members from inducing, authorising or supporting any form of industrial action in contravention of section 127 of the CJPOA, and requiring the POA to withdraw the Circular in full.

13. Pursuant to Leggatt J's Order, the Circular was withdrawn at approximately 18:30 on 28th February 2017 by Circular 23/2017. On the same day, the National Executive Committee ("NEC") of the POA passed a motion instructing all its members to attend branch meetings "outside of their establishments at their own time prior to commencement of duty on the morning of Wednesday 1st March". Mr Daniel Stilitz QC put to the POA's General Secretary, Mr Steve Gillan, that this was a confusing and contradictory instruction – members were simultaneously being advised *not* to attend meetings at 7:30am, which had been the plan under the Circular. However, I accept his evidence that the purpose of these branch meetings, to be held at

unspecified times "at their own time", was merely to explain and clarify the position to POA's members; and, furthermore, there is no evidence that any disruption was caused.

14. There was a further uncontested hearing before Turner J on 14th March 2017 when the injunction was held in place until the trial date, with an expedited timetable imposed.

C. Relevant Legislative Provisions

15. Section 127 of the CJPOA provides, in so far as is material, as follows:

> "**127 Inducements to withhold services or to indiscipline.**
>
> (1) A person contravenes this subsection if he induces a prison officer—
>
> (a) to take (or continue to take) any industrial action;
>
> (b) to commit a breach of discipline.
>
> (1A) In subsection (1) "industrial action" means—
>
> (a) the withholding of services as a prison officer; or
>
> (b) any action that would be likely to put at risk the safety of any person (whether a prisoner, a person working at or visiting a prison, a person working with prisoners or a member of the public).
>
> (2) The obligation not to contravene subsection (1) above shall be a duty owed to the Secretary of State.
>
> (3) Without prejudice to the right of the Secretary of State … by virtue of the preceding provisions of this section, to bring civil proceedings in respect of any apprehended contravention of subsection (1) above, any breach of the duty mentioned in subsection (2) above which causes the Secretary of State … to sustain loss or damage shall be actionable, at his suit or instance, against the person in breach.
>
> (4) In this section "prison officer" means any individual who—
>
> (a) holds any post, otherwise than as a chaplain or assistant chaplain or as a medical officer, to which he has been appointed …,
>
> (aa) holds any post, other than as a chaplain or assistant chaplain, to which he has been appointed for the purposes of section 7 of the Prison Act 1952 (appointment of prison staff),

> …
>
> (c) is a custody officer within the meaning of Part I of this Act or a prisoner custody officer, within the meaning of Part IV of the Criminal Justice Act 1991 or Chapter II or III of this Part.
>
> (5) The reference in subsection (1) above to a breach of discipline by a prison officer is a reference to a failure by a prison officer to perform any duty imposed on him by the prison rules or any code of discipline having effect under those rules or any other contravention by a prison officer of those rules or any such code.
>
> (6) In subsection (5) above "the prison rules" means any rules for the time being in force under section 47 of the Prison Act 1952 …
>
> …
>
> (8) Nothing in the relevant employment legislation [including the Trade Union and Labour Relations (Consolidation) Act 1992 and the Employment Rights Act 1996] shall affect the rights of the Secretary of State … by virtue of this section.
>
> (9) In this section "the relevant employment legislation" has the same meaning as in section 126 above."

16. By Rule 62(1) of the Prison Rules 1999 ("the Prison Rules") made under section 47 of the Prison Act 1952, prison officers owe a duty to conform to the Prison Rules and regulations of the prison, to assist and support the governor in their maintenance, and to obey the governor's lawful instructions.

17. One of the examples of "misconduct" under the terms of the Disciplinary Code for prison officers (PSI 06/2010) issued pursuant to Rule 68 of the Prison Rules is "failure to obey a lawful and reasonable order or written instruction".

D. The Circular

18. The Circular issued on 27th February 2017 provided in so far as is material:

> "The POA condemn the systematic failure of NOMS to provide Safe, Decent and Secure Prisons, failures which have created a Prison Service in crisis.
>
> …
>
> The NEC has been in dialogue with representatives of NOMS for two days following the decision of the membership to reject the best and final offer from NOMS [the predecessor to

HMPPS] on Pay, Pension Reform and local Disputes Procedure …

During the two-day meetings NOMS questioned the decision of the NEC to ballot OSG's for industrial action and made it clear that this was not helpful to good industrial relations and would be challenged. The NEC will not allow NOMS or Government to threaten the POA or stop it from acting as a Trade Union.

At the NEC meeting on 22nd February 2017 the NEC accepted the following proposal:

'That all POA members withdraw from voluntary tasks from 1st of March following branch meetings which will include a brief from the NEC, this will then be complemented by a withdrawal from P/P [Payment Plus] on the 1st April for a one week period. There will be a two week ban in May followed by a three week ban in June culminating in total bans from July.'

As a result of that decision all branches will conduct a branch meeting at 07.30am on the 1st of March 2017 outside their establishment.

The local committee will read out the content of this briefing paper and persuade their members to follow Conference and Union Policy as follows:

All members should withdraw from voluntary roles until further notice this includes but is not limited to:

- ACCT Assessor
- First Aider
- C&R Advanced training and call outs save for the protection of life and staff safety.
- Covering non-profiled work, save for the protection of life
- C&R Instructor
- Hostage Negotiator
- Staff mentor
- Overtime
- Detached Duty
- Payment Plus as set out within the proposal

> This list is not exhaustive but should be used to demonstrate to members that if they continue to volunteer for work that is not profiled and work for nothing NOMS will continue to ignore the real issues of staff safety, pay and conditions.
>
> In order to comply with the withdrawal of Payment Plus members must notify the establishment that they will not be available to work additional hours for the time specified.
>
> All members should ensure that the provisions of Bulletin 8 are fully complied with if the Governor asks members to work additional hours unpaid …
>
> The NEC are aware that local Governors will try to intimidate and bully members, when they attend branch meetings outside, especially if permission is not granted. NOMS may also threaten to stop members pay if they are late on duty and the provision of their NTS dictate half a day if you return before 12 and a full day if it is after that. Don't volunteer to work for nothing." [emphasis in original]

19. Bulletin No.8 stipulates what should happen in situations where minimum staffing levels at an establishment are not met. In such circumstances, the governor has a contractual right to instruct prison officers to work additional hours. I will be returning to the provisions of Bulletin No.8 under Chapter E below.

20. At this stage, I have set out the terms of the Circular without comment. Two issues arise: the first is whether the Circular correctly characterised the roles listed as bullet points as "voluntary"; the second is how the Circular was intended by the POA to be acted upon and/or would have been interpreted by its members. I will address these matters below.

E. Evidence Bearing on the Contractual Position

General

21. I agree with Mr Hendy that in so far as is relevant for present purposes the principal sources of prison officers' contractual terms and conditions of engagement are to be found in: (i) the engagement letter; (ii) the contract of employment; (iii) the Employee Handbook; (iv) the Civil Service Management Code; (v) Bulletin No.8; (vi) various Prison Service Instructions ("PSIs"); (vii) various Prison Service Orders; and (viii) various Notices to Staff.

22. It is common ground that prison officers owe implied obligations to serve HMPPS with good faith and fidelity; not to act in a manner likely to destroy or seriously damage the relationship of trust and confidence as exists between employer and employee; and to obey lawful and reasonable instructions given by prison governors.

23. Mr Hendy carried out a thorough analysis of a prison officer's express contractual rights and obligations using Mr Phil Copple as his sounding-board.

24. The starting-point is that prison officers have all the powers of constables. Further, prison officers in bands 3, 4 and 5 are civil servants. By section 126 of the CJPOA, prison officers are also deemed to be employees for the purposes of the employment protection legislation.

25. Annexed to a prison officer's standard engagement letter is a summary of the principal terms and conditions of appointment. This states that a prison officer's duties are set out in the job description which is available on the intranet. Further, "the list of duties contained in the job description is not an exhaustive list and you will be required to undertake activities that are appropriate to the level of your Group Profile".

26. I have been provided with the job description for a prison officer, band 3. This lists in non-exhaustive fashion the responsibilities, activities and duties that a prison officer is required to undertake. The list does not include the activities that are specified as "voluntary" in the Circular, and to which I will be reverting in more detail shortly. On my reading of this document, the employer may make "reasonable alterations and [add] additional tasks of a similar level", but cannot make significant adjustments without conducting an examination under the Job Evaluation Scheme. On one reading of Mr Stilitz's closing argument it may be the MoJ's case that its power to make reasonable alterations and adjustments under the job description is wide enough to embrace the activities listed in the Circular. If Mr Stilitz is indeed seeking to go that far, I simply cannot accept this argument. It is obvious to me that including the bullet-pointed activities within the job description would require an appropriate evaluation with possible knock-on effects regarding remuneration; and it is for that reason that HMPPS has not sought to carry one out.

27. Mr Hendy made a forensic point on the proposed band 4 job description which does explicitly cover many of the activities listed in the Circular. The contrast, he says, is stark. That may be so, but in my view I cannot recruit post-contractual material of this nature in direct support of submissions intended to assist me ascertain the express terms of the contracts in issue. The point remains a forensic one. Even so, the fact remains that the job description for band 3 prison officers does not list any of the activities specified in the Circular.

28. The current Conduct and Disciplinary Code is contained in PSI 06/2010, notwithstanding that it is expressed to expire on 10th April 2015. Prison officers are under a duty to carry out their duties loyally, conscientiously, honestly and with integrity. Examples of misconduct leading to disciplinary action include, as I have pointed out, "failure to obey a lawful and reasonable order or written instruction". Mr Copple agreed in cross-examination with the generality of the proposition that a refusal to carry out an activity which was voluntary could not amount to a disciplinary offence. Although he did not expressly say so, the premise would have to be refusal in the absence of an instruction which would make the activity compulsory. I should point out that Mr Copple's opinion on this topic is scarcely conclusive because what matters is how the Conduct and Disciplinary Code should be construed on standard interpretative principles. But this is academic, because I agree with Mr Copple's analysis in this regard.

29. I turn now to consider the various categories of so-called "voluntary roles" listed as bullet points in the Circular. It is unnecessary to address all of these because there are recurring themes. I will follow the sequence that Mr Hendy took when cross-examining Mr Copple.

Payment Plus

30. The Payment Plus scheme was introduced by PSI 24/2008 on 14th July 2008. The purpose of the scheme was to provide for the payment of additional hours' working "outside of normal conditioned hours" in four specified circumstances. The scheme is separate and distinct from Bulletin No.8. Further:

> "7. Payment Plus will only be utilised in accordance with the criteria set out in paragraph 4 above [the four specified circumstances]. Volunteers will always be sought in the first instance but where insufficient volunteers are available Bulletin No.8 procedures apply.
>
> 8. Where Payment Plus additional hours are available, Governors must ensure that flexible systems are put in place to allow staff to choose when they wish to work (subject to paragraph 7). This will require local systems to be put in place to ensure predictable forecasting to maintain operational delivery.
>
> 9. Individuals will be given the opportunity to exercise their right to opt out from working any Payment Plus additional hours; however failure to indicate such a preference on implementation of this PSU will mean their automatic inclusion for consideration for such hours working. Following initial roll out, staff are required to give 28 days' notice of withdrawal in writing [save in exceptional circumstances] …
>
> 10. Where an individual has opted out from working Payment Plus additional hours they will be able to opt in."

31. In my judgment, these provisions are clear in some respects but not in others. Although a prison officer is deemed to have opted in, as and when 28 days' notice has been given s/he has opted out. Thus, for someone who has opted out there is no obligation to carry out any additional work under these arrangements; or, put another way, there is no contractual obligation to volunteer. For someone who has or is deemed to have opted in, I construe paragraph 7 as meaning that a prison officer has considerable latitude and ability to choose exactly when and for how long s/he wishes to work under these arrangements, subject to availability. It is not entirely clear whether the effect of paragraphs 8 and 9 read in combination is that an opted-in prison officer is able to refrain from volunteering to carry out *any* additional hours under Payment Plus. I think that s/he probably can, but given Mr Stilitz's stance in this litigation, it is unnecessary to decide that point.

Detached Duty

32. NOMS as the predecessor to HMPPS published "National Detached Duty Guidance" in February 2014. I agree with Mr Hendy that this is a contractual document. By paragraph 2 of that guidance:

> "The selection of staff must be shared fairly amongst all available staff on a rotational basis, from within establishments. In the first instance, volunteers must be sought, if insufficient staff can [*sic*: this should read, "cannot"] be identified through volunteers, then staff will be detailed accordingly. It would be good practice to issue a notice to staff detailing the scheme and its parameters. Examples of NTSs issued at establishments can be obtained …"

33. In the first instance, therefore, the system works on the basis that prison officers will volunteer for detached duty. Mr Copple accepted that a refusal or failure to volunteer for detached duty could not amount to a disciplinary offence. If, however, insufficient volunteers should come forward, "staff will be detailed accordingly" pursuant to local arrangements which good practice requires should be promulgated. At that stage of the process the fulfilment of the duty to work elsewhere becomes a contractual obligation. It is true, as Mr Hendy pointed out, that in 2015 NOMS published two documents which emphasised the desirability of taking all reasonable steps to avoid any state of affairs based on compulsion.

34. In the event that a prison officer is "detailed" to undertake detached duty, it seems to me that the normative basis of a governor's instruction issued pursuant to local arrangements or otherwise is Rule 62 of the Prison Rules.

First Aid

35. It is clear that HMPPS owes a legal obligation to ensure the provision of adequate first aid facilities within HM Prisons; and it is also clear, although Mr Glynn Travis did not accept this, that the nature of the prison population must place demands on first aid provision which are greater than those in the standard workplace. Pursuant to PSI 29/2015 (issued 16th November 2015, with effect from 16th May 2016) "the role of First Aider" is voluntary, and not all prison officers may be suited to undertake these duties. Further, and self-evidently, staff must undergo initial and refresher training.

36. Mr Copple was asked whether he agreed with Mr Travis' evidence that a prison officer could cease to be a first aider at any stage. His evidence was that s/he could not, because reasonable notice would have to be given, and that would depend on all the circumstances of the case. The issue has never been tested, because there have always been sufficient volunteers. Mr Copple gave the same evidence in relation to the other categories of task where similar issues arise. In my judgment, there may well be some force in Mr Copple's point but I do not have to decide it. There is no express

obligation to give notice, let alone reasonable notice. Reliance on any implied obligation has not been pleaded. On the first day of the hearing I indicated to Mr Stilitz that his Particulars of Claim would require amendment if reliance on an implied obligation was sought to be placed. I also indicated that he would struggle to persuade me that an application to amend at this very late stage should be permitted. He did not pursue the matter.

Assessment, Care in Custody and Teamwork (ACCT)

37. This is a system or process for addressing the needs of prisoners at risk from suicide and self-harm. The latest iteration of the HMPPS's policy is PSI 64/2011 which is still in force. In short, all prison officers have responsibility for the identification and management of prisoners at risk but ACCT assessors have a particular role under the policy. These assessors volunteer for this task and undergo a five-day training course. In theory, as with all these specific roles, governors could instruct prison officers to put their names forward in the event that insufficient volunteers should present themselves, but I understand that this has never proven necessary. Again, the normative source of the governor's power to do this would be Rule 62 of the Prison Rules. Mr Travis' evidence, as it was elsewhere, is to the effect that an ACCT assessor could withdraw from the role at any stage without giving notice or reasons. As before, Mr Copple's evidence was that reasonable notice would be required. Whether or not that is the case, the issue does not arise for my determination on the pleadings.

C&R Advanced

38. Governors are required to ensure that their prisons are adequately resourced in terms of prison officers trained in the use of control and restraint techniques. Relevant policy is contained in PSO 1600 issued on 31st August 2005 and still in force. All prison officers are trained in basic C&R – if their services are required to deal with a specific incident, they work in teams of 3. A smaller number are trained in advanced C&R – if their services are required, they work in teams of 14, and may have to be deployed to other prisons. Further, governors are required to ensure that there are sufficient C&R trainers (described as "instructors" in the Circular) for both the basic and advanced levels.

39. Mr Copple accepted that, although PSO 1600 states that "any officer [below a certain age etc.] may be asked to undergo training to C&R advanced level", in practice HMPPS always has had sufficient volunteers. The same applies to the C&R trainers.

40. A specific issue arose in relation to the wording of the Circular – "C&R Advanced training and call outs save for the protection of life and staff safety". Mr Copple told me that prison officers at the C&R advanced level may be telephoned at home and their availability sought for a particular incident. The expectation or understanding is that, given the urgency of the situation, the prison officer will respond positively. He said that this was an obligation which went with the training. Mr Copple accepted that a prison officer could reasonably decline the request if good reasons prevailed.

41. In my judgment, Mr Copple was wrongly equating a moral obligation with a legal one, unless he was relying on some form of implied obligation to undertake this role in the absence of good reasons. As I have already pointed out, such an argument has been eschewed. Furthermore, the scope of any implied obligation would require further evidence and careful analysis. Far preferable, in my view, for the position clearly to be spelt out in contractual documentation.

42. A further issue arises on the terms of the Circular which it is convenient to mention at this stage: namely, the exception "for the protection of life and staff safety". I asked Mr Copple whether this exception would apply almost by definition in all cases requiring the calling-out of a C&R advanced team. His evidence was that this would be so in the vast majority of cases. I bear that evidence in mind in relation to the issue of safety, but it is far from determinative.

43. It is unnecessary to address the other categories of role specifically bullet-pointed in the Circular (e.g. staff mentoring; hostage negotiator) because the issues are the same.

Bulletin No.8

44. Both Mr Copple and Mr Travis gave evidence about this document. It was promulgated on 1987 under the banner, "Fresh Start – The New Improvements". The relevant provisions appear in Annex A. In essence, governors are required to set "minimum staffing levels" in consultation with line managers and after discussion with the local branch of the POA. These levels will normally be met by the use of conditioned or contract hours. However, pursuant to paragraph 17 of Annex A staff may be required to work longer than their average weekly hours in the event of "(i) an operational emergency, (ii) the need to ensure minimum staffing levels are maintained, [or] (iii) unavoidable or unforeseen operational reasons …". Annex A provides that staff should be given time off in lieu. Mr Copple's evidence was that payment could also be made in monetary form.

45. Mr Hendy sought to persuade me with reference to antecedent provisions of Bulletin No.8 that governors were empowered to garner additional hours from prison officers even in excess of minimum staffing levels. I do not read the document in that way, but whether governors have more general powers is a matter I address below.

46. Paragraph 19 of Annex A provides:

> "Wherever possible, additional hours should be met by volunteers. Where this does not meet the need, officers with "banked" hours or who have contracted in should normally be called upon first. When asking staff to work additional hours, the Group Manager should ensure fairness of treatment."

47. Thus, the system works on the basis of prison officers volunteering in the first instance to work the additional hours necessary to meet minimum staffing levels, but in the event of a shortfall governors have power to instruct individuals to come forward. This is subject to the conditions set out in paragraph 17.

48. Mr Hendy raised the issue of whether governors could deploy Rule 62 of the Prison Rules in order to issue instructions to prison officers to undertake additional duties which would, viewed cumulatively, be in excess of minimum staffing levels: in other words, the governor would have power to override the express terms of Bulletin No.8. Mr Hendy's purpose was no doubt to improve his client's position under section 127(1A)(b) of the CJPOA. The point is an interesting and tricky one which I believe I do not have to resolve. This is because (i) the Circular is limited to powers exercised pursuant to Bulletin No.8, and (ii) if a Governor tried to use any general and wider powers under Rule 62 against the backdrop of industrial action, in breach of the collective agreement which led to the promulgation of Bulletin No.8, it is unlikely that his instructions would be swiftly obeyed.

Other Matters

49. It was a central feature of the evidence of Mr Copple and Mr Beecroft that the services bullet-pointed in the Circular were only voluntary in the narrow sense of that term. By that they meant that the provision of these services is absolutely essential to the safe and proper running of HM prisons, and that concerted action by the POA across the whole estate would mean that the full range of duties specified in the Prison Rules, the PSOs, the PSIs and the Notices to Staff could not be provided. Further, staff are required to comply with the reasonable lawful instructions of governors.

50. It is convenient to deal with this evidence at this stage. In my judgment, both witnesses have presented me with a mélange which needs to be disaggregated. If and to the extent that the MoJ's case depends on proof of underlying contractual obligations, that case is not enhanced by characterising these services as "essential". There is force in the POA's submission that the MoJ is relying on the goodwill of their staff. By parity of reasoning, the fact that concerted action by the POA may well jeopardise the provision of the panoply of services mandated under the Prison Rules etc. is a neutral factor in the context of the contractual analysis. Finally, the fact that staff must comply with the reasonable lawful instructions of Governors raises a separate matter. At that stage (but only at that stage) does it become clear that a contractual obligation crystallises. On the other hand, I am not oblivious to the force of the contention that the concerted withdrawal of services might have an impact on prison safety generally.

My Approach to the Evidence Bearing on the Contractual Position

51. Thus, I proceed on the following basis:

    (i) in the absence of a lawful instruction given by a governor, the roles or tasks itemised in the Circular as bullet points are voluntary in the sense that there is no contractual obligation to perform them. In his closing submissions to me Mr Stilitz did not argue to the contrary.

    (ii) governors are empowered to issue instructions under Rule 62 of the Prison Rules (and, possibly, the provisions of

some of the PSIs) requiring prison officers to undertake some or all of these tasks should the need arise.

(iii) governors also have power under Bulletin No.8 to instruct officers to undertake additional hours in order to ensure that minimum staffing levels are fulfilled.

F. Other Relevant Evidence

Interpretation of the Circular

52. Mr Copple's evidence was that significant number of prison officers would have complied with the Circular by withdrawing their services even if instructions were given by governors. He accepted that the Circular was silent in that regard, and mentioned other previous POA Circulars which specifically stated that the reasonable lawful orders of governors must be obeyed. Although I have no reason to doubt Mr Copple's evidence on this last point, none was drawn to my attention. Mr Copple did not accept the semantic or textual point that, in the event that a governor should order a prison officer to undertake a particular task, it would no longer be "voluntary". Mr Copple's explanation for failing to include this seam of evidence in his witness statement was that he did not believe it to be in issue.

53. Mr Travis' evidence was that the wording and meaning of the Circular is clear, and that the NEC of the POA has never called into question the integrity of lawful orders made by governors. It is the voluntary nature of these roles which lies at the heart of the POA's grievance. He accepted that, in contrast with Circular 50/2017 which did state (the MoJ would add, just about) that lawful orders should be complied with under protest, the Circular was silent on this topic. He did not accept that this amounted to an important distinction.

54. A separate issue arises in relation to the instruction in the Circular that branches should conduct branch meetings at 7:30am outside their establishments. Mr Travis told me that members would not be expected to attend these meetings if already at work, because (for example) their shift had started at 6:30am. He said that most shifts begin at 7:45am or 8:00am. The evidence was that it would take some time, perhaps up to 15 minutes, for a prison officer to proceed from the prison gate to the wing within the establishment where s/he was working. Mr Travis also said that, given that branch officials could summarise the terms of the Circular to meet local circumstances and that members would already have received the Circular by email, no delay would have been caused. I will need to address Mr Stilitz's point that the Circular was inducing a breach of contract because, irrespective of whether the start time should be measured with reference arrival at the gate or arrival on the wing, it was inevitable that prison officers would have arrived at work late on 1st March 2017.

Safety

55. Mr Copple's written evidence was that "the overall impact of Prison Officers withdrawing from their duties will be substantially to disrupt the regimes in prison establishments". That evidence was not particularly specific in this regard, although he pointed out the difficulties inherent in governors deploying Bulletin No.8.

56. In cross-examination, Mr Copple was pressed on this point, and my note of his exchange with Mr Hendy reads as follows:

> "Q. given that the prison service has power to instruct, the refusal to volunteer is not likely to put safety at risk?
>
> A. If this is a general scenario, that can be planned. If there are insufficient volunteers, steps can be taken to compel. This is a general planned scenario. If there are sufficient trained people, and large numbers withdraw, then it would be extremely unsafe – unless, if they were ordered, they complied."

57. Mr Beecroft's evidence deployed before Leggatt J (and also relied on before me) was and is more specific. He informs the Court that "disruption to the prison regime by prison officers will inevitably result in serious risk of injury, damage and disorder in individual prisons and across the prison estate". The principal reason for this is that prisoners would have to be locked up in their cells for longer, increasing their frustration and tension, and enhancing the risk of suicide and self-harm. A reduction in staff deployment would also inevitably increase the risk to prison officers and other staff members.

58. In re-examination Mr Copple explained that minimum staffing levels were lower than what he called "normal or full staffing levels". In effect, they are a base level, below which safety, security and control would be jeopardised. At normal or full staffing levels, the entirety of the prison regime may be delivered, including work, visits, courses etc. At minimum staffing levels, some of these will not be provided. Mr Copple further explained that if an establishment were run at minimum staffing levels for a prolonged period, an "adverse reaction" would be expected, and the risk that discipline, order and control might be undermined would be enhanced. The regime, as he put it, would be impoverished.

59. Mr Travis did not agree that running a prison at minimum staffing levels for prolonged periods would be unsafe. He described these levels as "safe and decent". He pointed out that the vast majority of prisons are run at minimum staffing levels every weekend. He did not accept that locking up prisoners in their cells for longer would increase the risk of suicide and self-harm. He said that when he joined the prison service in 1984 there were 45,000 prisoners, more staff and the risk to prisoners was lower than it is now. Further, and in answer to my question, Mr Travis also said that mental health problems in prison have increased dramatically since 1984, that 85% of the prison population suffers from such problems, and that drug abuse is also significantly greater.

60. Mr Travis was closely cross-examined by Mr Stilitz on whether the withdrawal of these essential services would have the tendency to undermine the service and increase the risk. This was on the premise that governors' instructions had not been given. Mr Travis was adamant that this would not be the case, although he did

eventually accept in relation to the advanced C&Rs that if everyone refused, including governors (whom he told me have advanced C&R training) then "we would have a difficulty". In the alternative, on my understanding of his evidence, Mr Travis relied on governors' instructions and the terms of Bulletin No.8.

61. It is to be noted that both Mr Gillan and Mr Dave Cook stated in their witness statements that staffing levels are already so low as to be unsafe. I doubt whether Mr Travis disagrees. In his oral evidence he added that minimum staffing levels translates to full staffing levels in certain circumstances. My note as to these circumstances is deficient. The POA's solicitor's note is that Mr Travis specifically mentioned women's prisons, YOIs, and high security establishments. The MoJ's solicitor's note is less specific. Ultimately it is unnecessary for me to resolve whose note is correct.

62. Mr Travis eventually accepted in cross-examination that, had the Circular not been withdrawn following Leggatt J's Order, prison officers as a group would not have carried out services that they would otherwise have performed. In my view, Mr Travis was far too slow in not accepting the obvious.

63. I will be analysing this evidence under Chapter I below. At this stage, I leave this marker. It is clear, and Mr Hendy did not seriously dispute, that adherence to the Circular would have been likely to place the safety of persons at risk, subject only to whether the governors' powers to compel performance of the bullet-pointed services would have avoided that state of affairs. Additionally, the parties are not in agreement about whether the maintenance of minimum staffing levels over significant periods would be likely to put the safety of persons at risk. Finally, there is the separate point as to whether any short to medium term disruption would be likely to induce the same consequences.

Subsequent Events

64. Following the hearing before Turner J on 14th March 2017, the POA's National Chair circularised members as follows:

> "There is much frustration, anger and expectation amongst our members at the moment. The Government has rushed to injunct us at every opportunity and, in return, has forced a form of modern day slavery on POA members …
>
> …
>
> We stirred up the hornet's nest last year and gained much needed media coverage and political clout. An interest in our establishments has re-emerged and given us the confidence to pick up previously neglected books and open the cover once again."

Mr Gillan was cross-examined about these passages. He explained that he was not their author. In my view, the language is intended to strike a chord with the POA's members and is certainly a clear indication of the strength of feeling that exists. Mr

Gillan was at pains to point out that the POA's quarrel is not with the Court but with the Government, and I accept that. However, I could not accept his evidence that the reference to "the hornet's nest" was not to the threat of strike action in November 2016; in my view, it obviously was.

65. The MoJ also draws to my attention that at local level the POA has not always adhered to the terms of Leggatt J's Order. Its purpose no doubt is to demonstrate the need for permanent injunctive relief in the event that I should uphold its case on the main issue. In particular, the MoJ relies on the following:

(1) On 1st March 2017, at HMP Brinsford, the POA branch met and voted to withdraw from Payment Plus from 1st April 2017. That instruction was withdrawn on or before 3rd March.

(2) On 3rd March 2017, at HMP Bure, a concerted withdrawal from First Aid duties occurred.

(3) On 3rd March 2017, at HMP Lancaster Farms and HMYOI Risley, there were concerted refusals to perform ACCT and C&R Advanced training.

(4) On 31st March 2017, at HMP and HMYOI Hindley the POA local branch instructed its members to refuse to undertake Payment Plus or bed watches "to offer solidarity with our colleagues at HMP Risley [see (5) below]". This instruction was withdrawn on 12th April.

(5) On 5th April 2017, at HMP Risley, the POA local branch advised its members to withdraw from Payment Plus, to refuse to unlock prisoners from their cells, and to withdraw to a place of safety. The MoJ threatened to return to court, and the matter was resolved that day.

66. On 13th April 2017 the POA issued Circular 50/2017 which was "intended to be the POA's guidance as to how you should conduct yourself following the above Judgment [of Leggatt J]". Some time was spent parsing paragraphs 1 and 2 of this document. In my opinion, the POA was making clear to its members that they would have to comply with "lawful orders" (cf. unlawful orders, which were specifically defined), and that if they were instructed to do something outside the terms of their contracts of employment, they should comply but only "under protest". Further:

> "The POA's advice is that if you are instructed to undertake payment plus without volunteers first having been sought you should:
>
> INFORM MANAGEMENT THAT YOU WILL UNDERTAKE THE WORK UNDER PROTEST BUT THAT MANAGEMENT ARE IN BREACH OF THE PSI AND YOU WILL PUT IN A GRIEVANCE AND REPORT THE MATTER TO THE UNION …"

67. Mr Steve Gillan has assisted the Court (see his witness statement dated 26th June 2017) in relation to the incidents itemised under paragraph 65 above, and with the terms of Circular 50/2017. As for the former, these were isolated incidents occurring

at branch level which were speedily resolved. He takes issue with certain matters of detail which in my view do not require resolution. However, I do set out passages from paragraphs 19 and 22 of his witness statement:

> "[19] With regard to the Union's position on repudiation generally, the Union would never repudiate the actions of a Branch, this is the long established and settled practice of the Union. To do so would undermine the Branch and its ability to represent its members and drive a wedge between the NEC and the Branch and possibly the wider membership …
>
> …
>
> [22] I do not accept Mr Beecroft's assertions concerning the further Circular 50/2017 which was sent to members confirming that they had to comply with the Order and the lawful orders of management. I accept the Circular was "grudging" to the extent that it did not enthusiastically endorse the predicament members find themselves in whereby they must obey any lawful order no matter how unfair or contrary to HMPPS's own instructions. The Circular stated that if members received such orders they should object and lodge a grievance as they are entitled to but made it absolutely clear that they had to obey the order. There is nothing unlawful about adopting this stance …"

68. In his oral evidence, Mr Gillan explained that the reason why the POA would never repudiate the actions of a Branch is because the NEC would not be in possession of all relevant facts. However, he added that, once in possession of all the facts and being aware of the legal position, the NEC has instructed branches to desist; and that this happened in early April this year.

69. In my judgment, nothing turns on Mr Gillan's frank acceptance that the POA's compliance has been "grudging". Enthusiasm in this domain would be a naïve aspiration. That aside, two points emerge from a consideration of the foregoing recent history. First, feelings are running high in the POA as a whole, and the NEC does not have full control over what is or may be happening at grass-roots level. Secondly, although Circular 50/2017 is not as clear as it might be, it is explicit in what it says about the need to obey the lawful orders of governors, regardless of a member's perception of the contractual position.

G. Identification of the Issues

70. The MoJ's formulation of its case has changed since Mr Stilitz filed his Opening Argument shortly before the hearing. It now fully accepts that, in the absence of an instruction from the governor, the various bullet-pointed roles in the Circular are "voluntary" in the sense that there is no contractual obligation to undertake them.

71. Mr Stilitz and Mr Hendy sought for their own forensic reasons to present their closing arguments to me in a different sequence. In my view, I should address the issues which arise in the following logical order.

72. The first issue is whether, on a proper construction of the Circular, the POA's members were being induced to withdraw from the roles described as "voluntary" regardless of any instruction given by a governor. The POA accepts that instructed services are services which a prison officer is contractually obliged to undertake. Thus, the resolution of this issue does not depend on the true construction of section 127 of the CJPOA. A subsidiary matter arising under the rubric of this first issue is whether the instruction to attend branch meetings at 7:30am was an inducement to breach contract.

73. The second issue is whether, on a proper construction of section 127 of the CJPOA, "withholding of services as a prison officer" covers services which s/he is not contractually obliged to perform. If so, the POA by issuing the Circular would have induced breach of contract even if the services in question were all "voluntary".

74. The third issue is whether, on all the evidence available to the Court, the Circular amounted to "industrial action" within the meaning of section 127(1A)(b) of the CJPOA because it was action "that would be likely to put at risk the safety of any person".

75. The fourth issue is whether, in all the circumstances of this case, Circular amounted to an inducement to "commit a breach of discipline" for the purposes of section 127(1)(b) of the CJPOA.

76. The fifth issue is whether, without prejudice to the MoJ's case on the first and second issues, the Circular was an instruction to "work to rule", and therefore a breach of the implied term to act with good faith and fidelity.

77. The sixth issue is what relief, if any, should be granted to the MoJ in the event that it is successful on one or more of the foregoing issues.

H. The Rival Contentions

78. I will summarise the parties' submissions taking the six issues one by one. In doing so I will take the liberty of reformulating some of their points in my own way.

79. In relation to the first issue, Mr Stilitz submitted that the Circular, read as a whole, was clearly instructing prison officers to withhold their services in an unqualified manner: in other words, the bullet-pointed services, described as "voluntary", should be withdrawn regardless of any instruction from a governor to perform them. The instruction was not to cease such tasks on a voluntary basis. The only caveat related to Bulletin No.8. The 18,400 or so prison officers reading the Circular would have interpreted it as a blanket rather than as a qualified instruction. Mr Stilitz invited me to take into account the recent history of industrial relations between the parties and the militant, defiant tone of the document.

80. I asked Mr Stilitz to assist me with the legal test. He submitted, and I agree, that the Court's task is not precisely akin to the construction of a contractual document. In his submission, the test is: how is the Circular likely to have been understood by the 18,400 prison officers? When forced, Mr Stilitz submitted that for this purpose it was sufficient to identify just one prison officer who would understand it in the suggested manner.

81. Mr Stilitz also advanced forensic points in relation to Mr Hendy's skeleton argument deployed at the hearing on 28th February 2017.

82. On the subsidiary issue, Mr Stilitz submitted that the Circular, read as a whole, was clearly instructing POA members to arrive for work late on 1st March 2017; and, moreover, that there was no point in their "working for nothing" by arriving at the gate at any time before 11:59am.

83. Mr Hendy's riposte was that the legal test governing my approach to the Circular should be: how would it have been read and understood by a reasonable body of prison officers? Adopting this approach, I should accept Mr Travis' evidence that it is axiomatic that prison officers would and should obey the lawful instructions of governors: that principle has never been called into question. Indeed, Mr Hendy relied on paragraph 9 of Mr Beecroft's witness statement dated 8th June 2017 which recognised that governors always have power to issue instructions under Rule 62 of the Prison Rules. Thus, what the Circular was doing was instructing prison officers to withdraw from voluntary tasks, being tasks which, by definition, they have not been ordered by a governor to carry out.

84. Mr Hendy accepted that the point about adherence to governors' instructions had not been taken at the hearing before Leggatt J on 28th February. Indeed, the skeleton argument submitted at that hearing had taken a bolder line. However, I accept his explanation that the hearing took place at such short notice that it was not possible to marshal properly considered submissions.

85. Mr Hendy too made forensic points directed to Mr Copple's evidence. He submitted that Mr Copple's evidence about how significant numbers of prison officers would have interpreted the Circular (see paragraph 54 above) should not be relied on because it was not in his witness statement. Given my overall conclusion about Mr Copple as a witness, I cannot accept that submission.

86. On the subsidiary issue, Mr Hendy submitted that the Circular was not instructing members to miss any part of their shift. Prison officers whose shifts started at 7:45am would understand that they might have to leave the branch meeting before it concluded. The Circular expressly stated that members should arrive at the gate at their allotted start time. Furthermore, the final paragraph of the Circular had not been written with the intention that prison officers whose branch meetings ended, say, at 8am should decline to start working before 11:59.

87. In relation to the second issue, Mr Stilitz submitted that section 127 of the CJPOA created a new autonomous statutory liability tailor-made for prison officers and their Union. Its purpose was to preclude industrial action of any sort. The wording of the section was extremely broad, and fell to be contrasted with other legislation (e.g. section 219 of the Trade Union and Labour Relations (Consolidation) Act 1992)

which expressly tethered the inducement to a breach of contract. No words of qualification should be read into section 127(1A)(a), in particular words which define "services" as those which a prison officers is contractually obligated to undertake. All that needs to be shown is that the services were "services as a prison officer", i.e. services which s/he carries out in that capacity.

88. In reply, Mr Hendy accepted that section 127 created a free-standing statutory tort but submitted that it was anomalous, and therefore not Parliament's intention, that there could be a parasitic secondary liability in circumstances where the putatively induced prison officer could owe no underlying primary liability. Mr Hendy's core submission was that the words "services as a prison officer" mean "the services which the MoJ has identified in the contractual documents as being those to be provided by a prison officer". These services are to be contrasted with those which some prison officers may have previously have performed on a contingent or optional basis, including voluntary services in a prison officer's own time, such as helping prisoners with their reading skills or refereeing a football match. Mr Hendy noted that Leggatt J's analysis introduced additional wording into the sub-section: services "which that person would otherwise have performed as a prison officer".

89. In relation to the third issue, Mr Stilitz invited me to apply a modicum of common sense to the Circular and its effects. He relied on the evidence of Mr Beecroft and Mr Copple which was effectively left unchallenged on this issue. Mr Stilitz also relied on Mr Travis' tardy concession that the effect of the Circular would have been that services which would otherwise have been performed would not have been. There were two limbs to Mr Stilitz's argument on this matter. The first was that a sudden unplanned withdrawal of services would, at a minimum in the short term, bring about a much heightened risk. There would have been a "kicking off" on 1st March 2017 and a hiatus before governors could have organised a concerted use of Bulletin No.8 (in relation to securing minimum staffing levels) and the giving of relevant instructions (in relation to the bullet-pointed services). Furthermore, even a concerted use of governors' instructions would not have created order out of chaos because in the febrile atmosphere which would inevitably have accompanied this industrial action prison officers would not in practice have been immediately quiescent. There would have been recalcitrance, the raising of grievances, threats of disciplinary action etc. The second limb of Mr Stilitz's argument was that, even if minimum staffing levels could in due course be achieved by the sedulous use of Bulletin No.8 and/or Rule 62, I should accept the evidence of the MoJ's witnesses to the effect that any prolonged maintenance of a prison regime on such a basis would be "impoverished" and lead to enhanced frustration, potential disruption and risk.

90. Mr Hendy's answer to these submissions was that the MoJ has advanced an exaggerated case on the basis of assertion, speculation and surmise. He reminded me of Mr Travis' evidence that many prisons currently operate on the basis of minimum staffing levels without, it must be inferred, any significant risk to prisoners' well-being. Further, this was not a question of prison officers going on strike; they would still be on duty.

91. As for the first limb of Mr Stilitz's case on this issue, Mr Hendy submitted that a simple instruction could have been issued by all governors on 1st March 2017 in these terms: "anyone with the relevant qualifications (e.g. as a first-aider) is under an instruction to provide that service when required". A governor's powers under Rule

62 are wide enough to ensure that the previous regime, operated under conditions of volunteering and goodwill, would be maintained on a compulsory basis.

92. As for the second limb of Mr Stilitz's case on this issue, Mr Hendy relied on Mr Travis' evidence.

93. In relation to the fourth issue, Mr Stilitz accepted that a breach of discipline would only arise if prison officers disobeyed the lawful instructions of governors. This would happen only if prison officers reasonably interpreted the Circular as an invitation to defy such instructions. In my judgment, the fourth issue collapses into earlier issues and I need say little more about it.

94. In relation to the fifth issue, Mr Stilitz submitted that this was a classic case of "work to rule", and that I was bound by the decisions of the Court of Appeal in Secretary of State for Employment v ASLEF [1972] ICR 19 and British Telecommunications plc v Ticehurst [1992] ICR 393 (c.f. the decision of the Privy Council in Burgess v Stevedoring Service Ltd [2002] 1 WLR 2838). In short, the principle – based on the implication of contractual terms - covers any "work to rule" which materially disrupts the business or undertaking in question, being undertaken with that objective. Mr Hendy's riposte was that the principle does not cover the non-performance of duties in respect of which there is no contractual obligation.

95. Both Counsel advanced detailed submissions on these authorities. It is unnecessary for me to set these out. I will bear them in mind when I come to analyse the jurisprudence under Chapter I below.

96. In relation to the sixth issue, Mr Stilitz submitted that I should grant both declaratory and injunctive relief. He accepted that the latter involved an exercise of judicial discretion, and drew my attention to the decision of the Supreme Court in Lawrence v Fen Tigers [2014] AC 822. The presumption was that I should grant final injunctive relief if the POA would otherwise, but for Leggatt J's Order, have been in breach of section 127 of the CJPOA. Further, I should take into account the POA's inflammatory rhetoric as well as the subsequent history.

97. Mr Hendy's submission was that declaratory relief should be sufficient. The POA has withdrawn the Circular and would, subject to any appeal, respect my judgment and pronouncement of the law. The POA's grievance is not with the Court but with the MoJ.

I. Findings, Discussion and Conclusions

The First Issue: the Circular

98. The legal test I apply is: how would the Circular be read and acted upon by a hypothetical reasonable prison officer with general rather than specialised knowledge and understanding of the relationship between the MoJ and the POA, the terms and conditions of contract, and the powers and duties of governors. I appreciate that there may be considerable variability within the overall cohort of 18,400 prison officers in relation to these issues, and that individual experience, education and ability will also

diverge. However, I need to be sensible about this, and I do not propose to adopt the maximal, worst-case approach urged on me by Mr Stilitz.

99. At the same time, I think it right to take into account two further considerations. The first is that the strength of feeling within the NEC of the POA and union officials at local level is likely to be shared by many prison officers up and down the country. The second is that many prison officers would be likely to follow the instructions of the POA reached after the democratic processes applied by the Union to its own workings.

100. I do agree with Mr Stilitz that the Circular must be read as a whole. The Circular is not a legal document and in my view it had the benefit of little, if any, legal input – at least as regards its wording. In my judgment, the Circular should not be construed as if it were a contractual document but in a looser, less analytical way. Thus, I agree with Mr Hendy that the Court's interpretative exercise requires a degree of what I would call cognitive empathy: how would a reasonable prison officer have read it and acted upon it?

101. Applying a common sense approach to the Circular also entails paying some heed to the overall context. This included the threat of outright strike action in November 2016 (being action which would undoubtedly have been in breach of section 127 of the CJPOA) and the threat of similar action which was resolved by agreement as recently as 21st February. The NEC meeting authorising the promulgation of the Circular took place on the very next day.

102. On two occasions, one of which was highlighted in the text, the Circular instructs members to "withdraw from voluntary tasks". This instruction is given without qualification save in relation to Payment Plus, where it is made clear that notice must be given (see the second paragraph on the final page after the bullet-pointed list). Although this analysis clearly avails the POA in relation to Payment Plus, it is unhelpful to its case in all other respects.

103. It is true that the language used in the paragraph immediately succeeding the bullet-pointed matters is less prescriptive ("… if they continue to volunteer for work that is not profiled …) in the sense that it more readily could be interpreted as excluding instances where non-profiled work has been instructed by the governor, but in my view the Circular must be read in its entirety. There is no express carve-out or exception for governors' instructions save in relation to Bulletin No.8. Mr Travis was quite adamant that loyalty to governors' instructions is axiomatic within the prison service (my wording, not his). I have no doubt whatsoever that would be so in normal circumstances outside the context of industrial action. However, I cannot accept the universality of his proposition, still less its application to the present situation.

104. It is right that I should state that there were aspects of Mr Travis' evidence that caused me some concern. I do not doubt his overall honesty and strength of feeling. He was a somewhat dogmatic, inflexible witness who was unwilling to accept the obvious common sense of some of the propositions put to him by Mr Stilitz. For example, he doughtily stated that he did not believe that the withdrawal of essential services could jeopardise the safety of prisoners and staff (this was on the premise that no governors' instructions were issued). He was too slow in accepting that the overall effect of the Circular would have been to cause a reduction of these services across the prison

estate (on the same premise). In my judgment, that proposition was so obvious that its correctness should have been accepted without demur.

105. I return to the absence of any express carve-out for governors' instructions. The third paragraph after the bullet-pointed matters refers to Bulletin No.8 but does so in terms which indicate that the real point here is that governors should comply with the requisites of this document by providing time in lieu of notice or equivalent payment. Nothing is said about obeying governors' instructions. In any event, this paragraph is solely addressed to Bulletin No.8 and minimum staffing levels, and has no relevance to the performance of the "voluntary" tasks and roles. If the hypothetical reasonable prison officer were tapped on the shoulder and asked – "is your Union instructing you to withdrawal from these roles even if the governor should instruct you to perform them?" – I have little doubt that the answer would be in the affirmative. This absence of doubt is reinforced when consideration is given, admittedly in a different context, to the tone of the final paragraph ("local governors will try to intimidate and bully members …").

106. Mr Hendy submitted that the purpose of the Circular was to bring management to the negotiating table. This is usually the purpose of industrial action, interpreting "purpose" in a teleological way. I think that is too narrow. In any event, if the Circular were truly saying – voluntary tasks do not include tasks which are made compulsory by governors' instructions to that effect – the hypothetical reasonable prison officer would begin to wonder why it was issued in the first place. There would be little or nothing to negotiate with; the Circular would be toothless; management would not be brought to the table at all.

107. On a related theme, I reject Mr Hendy's textual argument that a voluntary task cannot by definition include a task which is ordered. That is a semantic, legalistic interpretation which defies any sensible reading of the document.

108. In my judgment, viewing the Circular as a whole and applying the approach I have outlined, the POA's instruction to withdraw from these services would have been interpreted as meaning: do not perform them. Any interpretation which holds that members' withdrawal from these services is always subject to an instruction from governors to contrary effect would (i) be unreasonable, and (ii) cause the hypothetical reasonable prison officer to believe that the POA was not living in the real world.

109. Thus, I find that the Circular amounted to an inducement by the POA to withhold services including services which prison officers would have been contractually obligated to provide.

110. It is unnecessary for me to dwell on the subsidiary point about the 7:30am branch meetings. It is sufficient for me to state that Mr Hendy has persuaded me that the Circular did not amount to an inducement to members to arrive at the gate after their respective start times. In any event, this matter viewed in isolation would be an insufficient basis to grant declaratory or injunctive relief.

111. My holding on the first issue is sufficient to determine this case in the MoJ's favour, subject to Mr Hendy's fall-back submissions relating to the need for injunctive relief. However, given the importance of the issues I must go further.

The Second Issue: "Withholding of Services as a Prison Officer"

112. Although section 127 of the CJPOA has been in force for over 20 years, this is the first occasion on which it has been considered at a full hearing. Fortunately, the section has been subjected to close submissions and analysis by able and experienced Counsel.

113. No difficulty arises in the presence of an instruction from governors to carry out such services. Mr Hendy agrees that these would be contractually obligated services clearly caught by section 127(1A)(a). However, in my judgment it is necessary carefully to discriminate between questions of law, of mixed law and fact, and of fact. Accurately doing so, the *context* giving rise to the question at issue – namely, (i) no contractual obligation, (ii) no breach of discipline if an induced prison officer complies with the POA's instruction, and (iii) no breach of any implied term of the contract of services (here, I am foreshadowing my conclusion on the fifth issue) - cannot logically provide the answer to that question. I confess that the considerable attraction I felt and expressed during the hearing to the POA's case was based, at least in part, on a failure carefully to distinguish the factual and legal questions.

114. The section creates an autonomous, self-contained statutory tort which is tailor-made for prison officers alone. I agree with Mr Stilitz that (cf. other legislation) it is not expressly couched in terms of parasitic or secondary liability. The purpose of the section is clear: to prohibit all industrial action that is caught by its terms. At the same time, I doubt whether it crossed Parliament's mind in 1994 that prison officers might be performing a range of services outside the scope of their obligations, whether strictly defined as contractual or otherwise. Accordingly, recourse in this case to Parliament's presumed intention is likely to generate circular reasoning.

115. I also agree with Mr Stilitz that the clause under scrutiny has a wide application. The meaning would be the same if the adjective "any" were inserted before "services". The section is not expressly limited to services of a contractual nature. In terms of their legal taxonomy, the disputed services are "services" rather than something else altogether. Additionally, I agree with Mr Stilitz that the correctness of his submissions does not depend on notionally adding the words of qualification which appear in Leggatt J's analysis of this provision. "Withholding" must entail a consideration of what was previously provided but that is a factual question logically posterior to the legal one.

116. Mr Hendy's submission was that the statutory wording should be supplemented or modified. He did not set out the basis for my doing so, but I have in mind the principles enunciated by Lord Simon of Glaisdale in Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231:

> "… a court would only be justified in departing from the plain words of the statute were it satisfied that: (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be

> obviated without detriment to such legislative objective; (4) the language of the statute is susceptible of the modification required to obviate the anomaly."

I deal with this, and related matters, below.

117. I consider that Mr Hendy has mounted a powerful case which cannot be lightly dismissed. There are situations where statutory language can be given a restrictive or limited meaning: see Bennion on Statutory Interpretation, 6th edition, pages 462-5. On my understanding of his submissions, Mr Stilitz accepted that "as a prison officer" means "in his capacity as a prison officer". There is some force in the argument that Mr Stilitz is constrained to allow some qualification of the wording under scrutiny. It could further be argued that it is but a short step from this qualification to a further one which ties "services" to the terms of a contract of services. Thus, on such an approach the same reasoning inevitably leads one to ask: *what* services undertaken in that capacity are included?

118. Mr Hendy pointed out that any individual prison officer could simply decide to withhold his or her services, and there could be no remedy. A group of prison officers could come to the same conclusion and, assuming that there have been no mutual inducements, there could be no remedy. I accept Mr Hendy's submission that the breadth of the statutory tort as urged on me by Mr Stilitz achieves an unattractive inherent tension between the absence of a contractual obligation on the one hand, and the presence of a tortious obligation on the other. Whether that tension is sufficient for Mr Hendy's purposes is another matter.

119. I had been troubled by the absence of wording (c.f. the 1992 Act) which expressly linked the question of inducement to the express terms of contracts of employment. Mr Hendy suggested that historically prison officers would not have been regarded at common law as having contracts of employment with the Crown. My researches have revealed that this historical anomaly was finally removed by the Employment Rights Act 1996 – enacted two years after the CJPOA. It follows, in my view, that the absence of any reference to contracts of service in section 127(1A)(a), and/or to the express terms of such contracts, is explicable. A point which would have counted against Mr Hendy's case is, on analysis, a neutral one.

120. My attention was not drawn to the canonical texts on this topic: Bennion (*loc. cit.*), and Craies on Legislation, 11th Edition. I have reminded myself of the narrow and limited circumstances in which a restrictive interpretation of primary legislation is permissible when the natural and ordinary meaning is clear and free from ambiguity. One example is where the draftsperson has used ellipsis and it is clear what the missing words would have been. On a separate but not unrelated topic, the interpolation of additional text can be made only in order to obviate absurd, anomalous or plainly unintended outcomes: the Court is not equipped with wide powers of statutory rectification or implication. On my understanding of his argument, Mr Hendy relied on the second category (interpolation) but not the first (restrictive meaning). In my judgment, the present case does not fall into the second of these exceptional categories because the outcome cannot be characterised as absurd, anomalous or plainly unintended. These are very high bars. In my view, the natural and ordinary meaning of the text gives rise to an outcome that generates a

generalised sense of unfairness, but that is far from saying that these bars are surmounted.

121. That could be the end of the matter, but given that I have been more attracted by the possibility of bringing this case within the first category, and that I do not think that I should hold Mr Hendy to any particular formulation, some further analysis is required. The MoJ is not prejudiced by this.

122. In my judgment, the critical issue is whether it is open to me to give a limited or restrictive meaning to the clause "withholding services as a prison officer" *without* impermissibly interposing additional wording into this provision. The natural and ordinary meaning of the disputed text covers *any* services carried out by a prison officer, by necessary implication *qua* prison officer. A construction which holds that the true meaning of this text is, "services which prison officers are required to perform pursuant to their express or implied contractual obligations", cannot be achieved without inserting additional wording. This is not a case of according a restrictive meaning to wording which is ambiguous. Returning to the question I left unanswered at paragraph 117 above, that requires to be answered in a way favourable to Mr Hendy's case only if section 127(1A)(a) excludes anything other than contractually obligated services. That exclusion depends on Mr Hendy's suggested insertion.

123. It follows that there no principled basis for acceding to the POA's case, however it was or might have been advanced. A strong feeling that the contrary result is unfair, uncomfortable and grounded on a taking advantage of goodwill and supererogation is insufficient.

124. In short, I am driven to conclude that the clause "withholding of services as a prison officer" includes any services that a prison officer was carrying out in that capacity before the putative withholding took place. That is the answer to the question of law which this second issue raises. It is not in dispute that, on the facts, the "voluntary tasks" were being carried out by prison officers before the Circular was issued.

The Third Issue: "Likely to Put at Risk the Safety of any Person"

125. Section 127(1A)(b) of the CJPOA raises a question of fact rather than of law. Certain matters are not in dispute. The system is operating under pressure. It would not take much to tip it over the edge. The withdrawal of essential services, albeit outwith section 127(1A)(a), would as a matter of mixed law and fact amount to "action" within the meaning of sub-paragraph (b). In one sense that has unattractive and unfair consequences (which proved to be a relevant factor in the context of the second issue); but under the rubric of this third issue there are clear and obvious reasons why Parliament would have sought to safeguard the safety of prisoners and staff.

126. An additionally unattractive feature of the MoJ's case is that its ability to rely on sub-paragraph (b) is enhanced by (i) existing pressures for which the POA has no responsibility (I am not making a political judgment here), and (ii) the fact that the risk to safety is apt to be created by the withdrawal of services which prison officers are under no compulsion, at least without more, to carry out. Be that as it may, the

issue of fact which this third issue raises must be viewed against the backdrop of an existing state of affairs.

127. To the extent that the resolution of this question turns on disputed evidence, I prefer the evidence of Messrs Beecroft and Copple on this issue. The bullet-pointed services are important, essential services which, *pace* Mr Travis, would if withdrawn cause significant risk to prisoners, in particular those who are violent or vulnerable. This has two aspects. First, I do not accept that the concerted withdrawal of services at short notice could readily be ameliorated by the blanket issuing of instructions in the form suggested by Mr Hendy. I accept Mr Stilitz's submission that, as a matter of common sense, there would be chaos in the first instance; and that on any view of the evidence it would take time for governors to mobilise and identify specific requirements in relation to each and all of the bullet-pointed tasks. These matters would have to be addressed on a case-by-case basis, and it is obvious to me that there would be logistical and practical difficulties. I should make clear that these findings also apply in the event that I am wrong about the first issue: if I am right, the point is so obvious it goes without saying. On any view, there would be scope for debate as to whether governors' instructions were lawful *and* reasonable; and that scope would be fully deployed. Secondly, I also accept Mr Copple's evidence that the perpetuation of minimum staff levels on an unremitting basis for anything beyond the short to medium term would lead to an impoverished regime and an unacceptable level of risk amongst a volatile and frustrated prison population, held in their cells for longer than normal. I reject Mr Hendy's submission that Mr Copple has exaggerated the dangers. In my judgment, he gave his evidence in a measured, compelling manner, and I should accept it.

128. Mr Travis' evidence that women's prisons, YOIs and high security establishments typically run at minimum staffing levels, as do all prisons at weekends, was not directly contradicted by the MoJ's witnesses. It was evidence which came out, quite properly, in answer to one of Mr Stilitz's questions, but it was unheralded. Even if that evidence is correct, and even assuming that there is no element of exaggeration, I cannot see that it helps the POA's case. The issue under section 127(1A)(b) is not the level of risk at the moment, but what the level would be if predicated action were taken.

129. Mr Hendy urged me to accept that the POA's intention was not to jeopardise the safety of prisoners and staff. Rather, it was to bring management to the negotiating table. In the sense that he was using the term "intention" I have no doubt that Mr Hendy is right. However, the sub-paragraph imports an objective test, and it is not concerned with issues of motive. Further, I have already made the point that the Circular must have been intended to create significant consequences otherwise it would have been an ineffective instrument.

130. It follows that I must uphold the MoJ's case on the third issue.

The Fourth Issue: "To Commit a Breach of Discipline"

131. In my view, the fourth issue does not raise separate questions. If I am right about the first issue, the Circular did induce prison officers to commit breaches of discipline. If

I am wrong about the first issue, it did not. The same reasoning applies to the second issue but the other way round.

The Fifth Issue: "Work to Rule"

132. Mr Stilitz's submission was that the Circular was inducing a "work to rule" whose purpose was plainly to disrupt the HMPPS's operation of its prisons.

133. In my view, this submission needs to be deconstructed. I accept Mr Stilitz's analysis of purpose, but care must be taken with the link, if any, between purpose and "work to rule". Further, that expression does need to be defined. I consider that Mr Stilitz needs to establish that by issuing the Circular the POA was inducing breaches of the implied terms of prison officers' contracts of employment with the MoJ by withholding services which they were not bound by any express obligation to perform. The premise for my consideration of the fifth issue is that the POA's case has prevailed on the first, second and fourth issues.

134. In the ASLEF case the Union instructed its members to work strictly to the rule-book and to ban overtime, rest day and Sunday working. It was conceded by the Railways Board that there was no contractual obligation on railwaymen to work on Sundays or on rostered rest days. On the other hand, railwaymen were contractually obliged to work 9 hours' overtime, when booked, rather than the 8 hours the Union's instruction specified. The real issue in the case was whether strict adherence to the rule book could amount to a breach of contract.

135. The evidence was that the rule book, which formed part of railwaymen's contracts of employment, was being interpreted unreasonably with the clear intention of disrupting the efficient and safe operation of the railways.

136. The Court of Appeal (Lord Denning MR, Buckley and Roskill LJJ) were not in agreement as to the formulation of the implied term and the nature of the breach, but there was agreement that sticking to the letter of the contract in the circumstances of that case was a breach of contract.

137. Lord Denning's analysis was that there was a breach of the implied obligation to act in good faith. Thus:

> "Those rules are to be construed reasonably. They must be fitted in sensibly the one with the other. They must be construed according to the usual course of dealing and to the way they have been applied in practice. When the rules are so construed the railway system, as we all know, works efficiently and safely. But if some of those rules are construed unreasonably, as, for instance, the driver takes too long examining his engine or seeing that all is in order, the system may be in danger of being disrupted. It is only when they are construed unreasonably that the railway system grinds to a halt. It is, I should think, clearly a breach of contract first to construe

> the rules unreasonably, and then to put that unreasonable construction into practice." [at 54D-F]
>
> and
>
> "So much for the case when a man is employed singly. It is equally the case when he is employed, as one of many, to work in an undertaking which needs the service of all. If he, with the others, takes steps wilfully to disrupt the undertaking, to produce chaos so that it will not run as it should, then each one who is a party to those steps is guilty of a breach of his contract. It is no answer for any one of them to say "I am only obeying the rule book," or "I am not bound to do more than a 40-hour week." That would be all very well if done in good faith without any wilful disruption of services; but what makes it wrong is the object with which it is done. There are many branches of our law when an act which would otherwise be lawful is rendered unlawful by the motive or object with which it is done. So here it is the wilful disruption which is the breach. It means that the work of each man goes for naught. It is made of no effect. I ask: Is a man to be entitled to wages for his work when he, with others, is doing his best to make it useless? Surely not. Wages are to be paid for services rendered, not for producing deliberate chaos." [at 56B-E]

138. I agree with Mr Hendy that it is clear from Lord Denning's judgment read as a whole that his conclusions were based on the premise that the railwaymen were in breach of the implied term of good faith in relation to the performance of their express contractual obligations. The same analysis was not applicable to the non-performance of something which fell outside the ambit of these express terms: see 53H, 54F-H, and 55F-H. I agree that the passage at 56B-E is capable of being read more broadly, at least in isolation, and Mr Stilitz submitted that I should so read it; but in my judgment it is plain from the passages I have just noted that the relevant context for Lord Denning's statement about taking steps to disrupt the undertaking, and the relevance of motive, is tied to his conclusion that certain activities were in principle within the scope of the contracts, and others were not.

139. In Buckley LJ's opinion, there were breaches of an implied term to serve the employer faithfully within the requirements of the contract (at 62E). He mentioned that Sunday and rest day working fell outside the requirements of the contract. Further:

> "With regard to the direction to the men to work strictly in accordance with the rules, the contracts of employment between the board and the railwaymen are entered into as part of the board's commercial activity. Such contracts have commercial objectives and are based on commercial considerations. Just as, where a contract is entered into the performance of which requires the continued existence of a particular state of affairs, the wilful act of one party in bringing that state of affairs to an end so as to render the performance of

> the contract impossible constitutes a breach of an implied term of the contract, so, in my judgment, in the case of a contract of a commercial character the wilful act of one party which, although not, maybe, departing from the literal letter of the agreement, nevertheless defeats the commercial intention of the parties in entering into the contract, constitutes a breach of an implied term of the contract to perform the contract in such a way as not to frustrate that commercial objective.
>
> Assuming in the appellants' favour that the direction to work to rule avoided any specific direction to commit a breach of any express term of the contract, the instruction was, nevertheless, directed, and is acknowledged to have been directed, to rendering it impossible, or contributing to the impossibility, to carry on the board's commercial activity upon a sound commercial basis, if at all. The object of the instruction was to frustrate the very commercial object for which the contracts of employment were made. It struck at the foundation of the consensual intentions of the parties to those contracts, and amounted, in my judgment, to an instruction to commit what were clearly breaches or abrogations of those contracts. These are or would be, in my judgment, breaches of an implied term to serve the employer faithfully within the requirements of the contract. **It does not mean that the employer could require a man to do anything which lay outside his obligations under the contract, such as to work excess hours of work or to work an unsafe system of work or anything of that kind, but it does mean that within the terms of the contract the employee must serve the employer faithfully with a view to promoting those commercial interests for which he is employed**." [at 62B-F] (emphasis supplied)

140. I think that it is clear from the whole of this passage, in particular the sentence I have highlighted, that Buckley LJ was rejecting the very argument that Mr Stilitz pressed on me in this case. Had it been otherwise, Buckley LJ would have concluded that a wilful refusal to work on Sundays and rostered rest days would also have amounted to a breach of the implied term. I see no material distinction between "voluntary" Sunday working and "voluntary" provision of first aid services, however essential both might be.

141. In Roskill LJ's opinion, there were breaches of an implied term not to seek to obey the rule book (*qua* lawful instructions of the employer, and consequently contractual obligations) so wholly unreasonably as to disrupt the efficient running of the system in which they were employed (see 72G-H). He too tied his analysis to a prior identification of the relevant express terms: see 70H and 71E. Roskill LJ's core reasoning was as follows:

> "Notwithstanding the skill with which the contrary view has been urged upon us, I regard it as self-evident that each party to each service agreement must, as rational beings, be taken to have assumed as a matter of course, when each service contract

> was entered into, that the employee would never seek so to interpret and act upon the rules as to disrupt the entire railway system. Accordingly, I have no hesitation in implying a term into the contract of service that each employee will not, in obeying his lawful instructions, seek to obey them in a wholly unreasonable way which has the effect of disrupting the system, the efficient running of which he is employed to ensure. I prefer to rest my decision that work to rule is a breach of contract on this ground rather than on the alternative ground, clearly equally tenable, advanced by the Solicitor-General, that work to rule involves a breach of the positive obligation of faithful service owed by employee to his master." [at 72G-73A]

142. Again, in my view it is clear that the breach of the implied term of faithful service was not operating in some sort of vacuum; it related to the employee's interpretation of the rule book, which fell four-square within the scope of the services he was expressly bound to provide. In my judgment, there is a clear distinction to be drawn between the ASLEF case (not an inducement case, but that in my view does not matter) and the circumstances of the instant case, where the prison officers were being directed to say – "we will interpret our contracts strictly and will no longer carry out duties which fall outside the black letter of those contracts", or something to similar effect.

143. On close analysis, therefore, the ASLEF case supports Mr Hendy's argument rather than Mr Stilitz's.

144. In Ticehurst the Court of Appeal directly applied ASLEF. Some time was spent by Counsel analysing the facts of that case as set out at length in the judgment of Ralph Gibson LJ. There are several references in his judgment to the "withdrawal of goodwill", a formulation which on the face of things lends some support to Mr Stilitz's argument. However, I agree with Mr Hendy that what was critical in that case was that Mrs Ticehurst as a BT manager was given discretion under the terms of her contract in instructing others and in supervising their work (at 398E-F). Within that discretion, and within therefore the scope of the express terms of the contract, Mrs Ticehurst was obliged to serve her employer's faithfully (at 398G) within the principle enunciated by Buckley LJ in ASLEF (at 398D). Further:

> "The terms is breached, in my judgment, when the employee does an act, or omits to do an act, which it would be within her contract and the discretion allowed to her not to do, or to do, as the case may be, and the employee so acts or omits to do the act, not in the honest exercise of choice or discretion for the faithful performance of her work but in order to disrupt the employer's business or to cause the most inconvenience that can be caused." [at 399B-C]

145. I have wrestled somewhat with this dense sentence. Both Counsel recruited it for their forensic purposes. I cannot accept Mr Stilitz's submission that it accommodates the mode of omission to perform services which are not contractually compelled. What Ralph Gibson LJ was saying that, in a situation where an employee has a contractual choice, she cannot exercise it (to perform or not to perform) in a manner which

frustrates the employer's business. On analysis, therefore, the Ticehurst case does not assist Mr Stilitz's argument.

146. This brings me to the final case in the trio of authorities to which I was referred on this topic: Burgess. This was a decision of the Privy Council which is not strictly binding on me. The Opinion of the Board of the Judicial Committee was given by Lord Hoffmann. The facts of that case were slightly unusual in that, pursuant to the tripartite arrangements between the employer, its employees and the Union, the latter was under an unenforceable obligation to provide gangs to work overtime when requested to do so by the employer, and employees were required to report for such duty only when they had been so assigned and notice was given. In the absence of such notice, the employees were under no contractual obligation to work overtime. The Unions imposed an overtime ban with the purpose of disrupting the employer's undertaking; but, given that there was no breach of contract by the employees, there could be no "irregular industrial action short of a strike" within the meaning of the relevant statutory provision.

147. It is true that the case turned on the correct application of these facts to particular statutory wording, but the Privy Council was required to address a wide-ranging submission (in my view, exactly the same submission that Mr Stilitz arrayed before me) to the effect that the employees' failure to work overtime was a breach of their implied contractual obligations because it was done wilfully in order to cause disruption and inconvenience (see 2846B-C). Lord Hoffmann reviewed the passage in Lord Denning's judgment in ASLEF that I have set out under paragraph 137 above (see page 56B-E of the Law Report). He said this:

> "But their Lordships do not think that Lord Denning MR intended to go that far. It seems clear from the example which he gave that he had in mind that employees may legitimately perform their duties in a way which does not suit their employer (like keeping the train waiting while they check the engine) if they have a bona fide reason but not in their purpose is to be wilfully obstructive. But that does not mean that they are in breach for refusing to do things altogether outside their contractual obligations (like going to work on Sunday) merely because they do not have a bona fide reason for refusal. They do not have to have any reason at all." [at 2846C-D]

148. Mr Stilitz attempted to link the final two sentences of this passage to what he called the particular and unusual facts of Burgess, but in my view that is not right. Lord Hoffmann was continuing to analyse Lord Denning's judgment in ASLEF and he was defining its parameters. In my opinion it is quite clear that Lord Hoffmann was drawing a distinction between unreasonable performance of obligations within contractual scope (where the implied term is applicable) and non-performance, unreasonable or otherwise, of obligations outside contractual scope (where the implied term is inapplicable). Furthermore, I do not consider that Lord Denning ever lost sight of that distinction. If he did, as Lord Hoffmann also pointed out, he was in the minority (see 2846D-H).

149. Overall, this trilogy of cases avails Mr Hendy's argument and not Mr Stilitz's. I would hold that, given that the bullet-pointed matters fell outside the prison officers'

contracts of employment with HMPPS, no question of any implied obligation arises, still less an obligation to refrain from non-performance only if their intention or motive was not to disrupt the MoJ's undertaking. Their intentions and motives could be good, bad or indifferent; in terms of the legal analysis, this can make no difference.

The Sixth Issue: Relief

150. I have found for the MoJ on the first, second and third issues. I have also found for the MoJ on the fourth issue on the basis that such a finding flows from my conclusion in relation to the first issue.

151. It follows that the MoJ is entitled to declaratory relief, and I did not understand Mr Hendy to submit otherwise. Mr Hendy's submission was that it is unnecessary to order injunctive relief in all the circumstances of this case because (i) the Circular has been withdrawn, (ii) in the event that I should find against him on one or more of the substantive issues, the POA would not seek to reinstate the Circular (subject to any appeal) and (iii) his client's grievance is not with the Court but with the MoJ. He submitted that the grant of injunctive relief is squarely within the discretion of the Court and that there is no presumption in favour of a claimant (c.f. Lawrence). I agree with his formulation of the test.

152. I think that had the POA succeeded on the second issue I would probably not have ordered final injunctive relief. In the event, the POA has lost not just on the facts - the wording of the Circular, and the finding that the Circular was likely to generate a risk to the safety of prisoners and staff – but also on the important point of principle. I have noted Mr Hendy's statement of his client's position under paragraph 151 above. It follows that, in the absence of a successful appeal, the POA are bound by the terms of this judgment and the declaration I have ordered. But I have also noted the subsequent history (see paragraphs 65-66) and the strength of feeling that exists. In all the circumstances of this case, I have concluded that the MoJ is entitled to both declaratory and final injunctive relief.

153. I invite Counsel to agree the form of Order failing which I will have to resolve their differences on the basis of competing drafts.