Neutral Citation Number: [2019] EWCA Civ 1394

Case No: A2/2018/1080/QBENF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MRS JUSTICE SIMLER
Case No HQ16X04417

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2019

Before :

LORD JUSTICE BEAN
LORD JUSTICE SIMON
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

DR SARAH LOUISE HALLETT	**Appellant**
- and -	
DERBY HOSPITALS NHS FOUNDATION TRUST	**Respondent**

- -
- -

Mr John Cavanagh QC and **Ms Sarah Keogh** (instructed by **Capital Law Limited**) for the **Appellant**
Mr Richard Leiper QC (instructed by **Brown Jacobson LLP**) for the **Respondent**
Adrian Lynch QC (instructed by **Government Legal Department**) for the **Secretary of State for Health**

Hearing date: 26 June 2019

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Approved Judgment

Lord Justice Bean:

Introduction

1. This appeal from Simler J (as she then was) raises a question of some importance concerning the extent to which the Defendant, an NHS Foundation Trust, complied with its contractual obligation to monitor whether junior doctors employed by it take 30 minute natural breaks after approximately 4 hours' continuous duty. There are financial incentives (or penalties) for NHS Trusts to secure compliance with rest break requirements and other controls on hours and intensity of working: where valid monitoring demonstrates non-compliance junior doctors are entitled to a supplement to their pay, known as a Band 3 supplement, which is worth 100% of basic pay.

2. The Claimant, Dr Hallett, was at the material time a junior doctor employed by the Defendant as a Foundation House Officer Year 1 (F1) at the Royal Derby Hospital. She is now Deputy Chair of the BMA's Junior Doctors Committee, and brings this as a test case with the BMA's support.

3. The claim is for declaratory relief only at this stage. It concerns a period spent by the Claimant on the Defendant's General Surgery F1 rota between 7 August 2013 and 3 December 2013. The rota consisted of 22 posts or slots, which rotated in a four-month working pattern. Two particular monitoring exercises (known as monitoring rounds) were in evidence at the trial. The first, referred to as "MR1", was conducted between 8 and 22 July 2013 and predated the Claimant's employment. The second was conducted between 14 and 28 October 2013 and is referred to as "MR2". The two exercises concerned different groups of doctors. The first group was posted in General Surgery between April and early August 2013. The second group was posted in General Surgery between 7 August and 3 December 2013 and included the Claimant.

4. We were told that this is a test case of significance across the whole NHS. The way in which the Defendant Trust has interpreted and applied its obligations to monitor compliance with the contractual provisions relating to natural breaks is consistent with the way NHS Trusts have behaved in many areas of England and Wales, at least in part because many of them monitor compliance by using the same commercially available software. The software used by the Defendant formerly had the trade name 'Zircadian', and is now known as 'Allocate'.

5. The Claimant contends that the use of Allocate software leads to outcomes that are in breach of the Defendant's contractual obligations, and if her claim is established, and financial losses are successfully claimed as a consequence, the cost to the Defendant could be around £250,000 in supplementary pay for the Claimant's group of junior doctors over an eight month period. The cost more generally, for both the Defendant and the NHS as a whole, is potentially substantial.

The documents relied on

6. The two principal documents which on any view govern the relationship between the Claimant and the Trust are her contract of employment with the Trust and the Terms and Conditions of Service ("the TCS"). The contract of employment was referred to at the trial before Simler J as the Derby contract, but there is nothing particular to Derby in it (other than the name of the Trust as employer of Dr Hallett) and it is common

ground that it was a standard form used at the relevant time by most, if not all, NHS Trusts for the employment of junior doctors at grade F1. It is preferable, therefore, to refer to it (as both leading counsel did before us) as "the F1 contract".

The F1 contract

7. The F1 contract is the principal document containing or evidencing the contractual terms and conditions of employment between the Claimant and the Defendant. It made the following provision relevant to the issues in this case.

8. Clause 1(b) stated that the Claimant's 'Rotation 1' would be from 7 August 2013 to 3 December 2013 in breast surgery and would be a full shift at the "1B pay banding (40%)".

9. Clause 2 stated:

> "Your appointment will be subject to the Terms and Conditions of Service of Hospital Medical and Dental Staff and Doctors in Public Health Medicine and the Community Health Service (England and Wales) as amended from time to time and any reference in those Terms and Conditions to an employing Authority shall be construed as if it were to include a reference to an employing Trust."

10. Accordingly, the F1 contract expressly incorporated certain provisions of the TCS, including in particular provisions imposing limits on duty hours and providing for pay protection in respect of banding supplements.

11. Clause 3 of the F1 contract stated:

> "(a) Your hours and duties are as defined in your rota and Training Programme. You will be available for duty hours which in total will not exceed the duty hours set out for your working pattern in paragraph 20 of the Terms and Conditions of Service.
>
> …
>
> (e) Banding supplements may be altered (in accordance with paragraphs 6(e) and 7(c) below) in the light of changes in working patterns in order to make posts compliant with the New Deal and the Working Time Regulations as amended. If the payband changes, you will be issued with a letter of variation (in accordance with paragraph 7 below). Pay protection will apply in accordance with paragraph 21 of the terms and Conditions of Service."

12. Clause 6 of the F1 contract sets out the Claimant's and Defendant's contractual obligations in respect of monitoring of working patterns, hours and natural breaks [I have corrected what was agreed to be a numbering error in the original document]:

> "(a) *The Trust is contractually obliged to monitor junior doctors' New Deal compliance and the application of the banding system,*

> *through robust local monitoring arrangements supported by national guidance. You are contractually obliged to cooperate with those monitoring arrangements*. [emphasis added]
>
> (b) These arrangements will be subject to:
>
> - review by the regional improving junior doctors working lives action team (or equivalent); and
> - for the Trust, the performance management systems.
>
> (c) The Trust must collect and analyse data sufficient to assess hours' compliance and/or to resolve pay or contractual disputes. Therefore, when the Trust reasonably requests you to do so, you must record data on hours worked and forward that data to the Trust.
>
> (d) The Trust is required to ensure that staff in all training grades comply with the controls on hours of actual work and rest detailed in sub-paragraph 22.a of the Terms and Conditions of Service, and with the requirements of the Working Time Regulations as amended from time to time.
>
> (e) You are required to work with your employer to identify appropriate working arrangements or other organisational changes in working practice which move non-compliant posts to compliant posts and to comply with reasonable changes following such discussion."

13. Clause 7 provides for potential revision to pay banding:

> "(a) The Trust will notify you in writing of its decision on banding.
>
> (b) Full details of the procedure for appealing against banding decisions are in the Terms and Conditions of Service sub-paragraph 22.1.
>
> (c) Full details of the procedure for re-banding posts are in the Terms and Conditions of Service sub-paragraph 22.m."

14. There are some 'Notes' in the contract. Some are obviously linked to the content of the relevant paragraph of the contract to which they refer; others are not. Note 4 appears immediately after clause 11, which deals with residence in hospital accommodation and provides that appointment requires no such residence; but its content indicates that there is no link with that paragraph. It provides:

> "Copies of HSC 2000/031 – Modernising Pay and Contracts for Hospital Doctors and Dentists in Training, may be obtained on request"

HSC 2000/31 is a Department of Heath circular issued in 2000, to which I shall return later.

The TCS

15. Paragraphs 18 to 24 of the TCS set out a number of inter-related provisions relating to shift patterns, pay banding and pay supplements for junior doctors in training grades. Paragraph 18b provides that the Defendant is obliged to ensure that controls on contracted hours are met:

> "b. Practitioners in these grades [training grades] work on an on-call rota, partial shift, 24 hour partial shift, full shift or hybrid working arrangement. Controls on the contracted hours of duty for each of these working arrangements are set out in paragraph 20 below and employing authorities shall ensure that these controls are met. They shall keep the working and contractual arrangements under review to ensure that they remain in line with the demands of the post. Hours of duty include periods of formal and organised study (other than study leave), training, all rest while on duty, and prospective cover where applicable."

16. Paragraph 19c appears under the heading 'Definitions'. The Claimant's shift pattern during the disputed rota (which was a full shift) is defined in the following terms:

> "c. A full shift will divide the total working week into definitive time blocks with practitioners rotating around the shift pattern. Practitioners can expect to be working for the whole duty period, except for natural breaks. Practitioners will be rostered for duty periods that do not exceed 14 hours. Practitioners working on full shifts shall have adequate rest during a period of duty."

17. Paragraph 20 provides for controls on junior doctors' working hours. The contractual limits for junior doctors working a full shift pattern are found at paragraph 20c:

> "Controls on Hours
>
> 20. The following controls on hours of duty shall apply to practitioners in the training grades working…full shifts..:
>
> c. Full Shifts
>
> Employing authorities shall ensure that:
>
> i. The maximum average contracted hours of duty for practitioners working a full shift do not exceed 56 per week including handovers at the start and finish of shifts.
>
> ii. No period of continuous duty for practitioners working full shifts is longer than 14 hours, including the time required for handovers.

> iii. Practitioners working full shifts have a minimum period of 8 hours off duty between shifts; do not work more than 13 days without a minimum period of 48 hours of continuous off duty time; and have one minimum continuous period off duty of 62 hours and one minimum continuous period off duty of 48 hours in every period of 28 days."

18. Paragraph 20h imposes obligations on both junior doctors and employing authorities to contribute to suitable working arrangements to ensure compliance with the controls:

> "h. Employing authorities shall ensure that practitioners in the training grades comply with the relevant controls on hours of duty. Practitioners and their employing authority shall agree to work together to identify appropriate working arrangements or other organisational changes in working practice to ensure the controls on hours of duty, actual work and rest described in sub-paragraphs 18b, 20a to d above and 22a below are met for practitioners in all training grades, and to comply with reasonable changes following these discussions; changes to working arrangements shall be monitored by regional improving junior doctors working lives action team's (or equivalents)."

19. Paragraph 21 relates to pay arrangements, and at paragraph 21a and 21p states:

> "Payment
>
> 21a. Full time practitioners in the training grades receive a base salary. Part time practitioners in these grades receive as base salary a proportion of the full time base salary based on average weekly hours of actual work. An additional supplement will be paid according to one of the pay bands, in accordance with the assessment of their post as described in paragraph 22 below, at the rates set out in Appendix 1." ……..
>
> "21p. In the event of a rota, without any change in working pattern, being shown to belong in a higher pay band as a result of a valid monitoring round, pay at the higher level shall be backdated to the point three calendar months after the first day of the previous successful monitoring round, i.e. that which most recently showed the lower pay band, except:…"

20. Junior doctors are therefore entitled to receive a pay supplement if their rota is shown to belong in a higher pay band as a result of a valid monitoring round. Each junior doctor affected receives an additional supplement to basic salary pursuant to paragraph 21a; but it is the rota as a whole that is monitored and assessed to determine whether it is correctly designated as belonging to the existing or a higher pay band. Accordingly, all junior doctors on the particular rota receive the supplement if it is payable. Paragraph 21p provides for the supplement to be backdated to three months after the last valid monitoring round except in certain cases of no relevance here.

21. Paragraph 22, so far as relevant, provides:

> "Assessment of Pay Supplements
>
> 22….the assessment of pay supplements for staff in the training grades shall be made as follows:
>
> a. Band 3 shall apply to full time and part time practitioners in posts which do not comply with the controls on hours of duty described in paragraph 20 above or with the controls on hours of actual work or rest described below (refer HSC 1998/240 and HSC 2000/031 including agreement to modify weekend rest requirements for on call rotas) applicable to their work pattern**,**
>
> i. That practitioners working any of the working arrangements defined in paragraph 19 above, work on average no more than 56 hours of actual work per week**;**
>
> **…**
>
> *vii. That practitioners working full shifts shall have natural breaks as minimum rest during the whole of each duty period with at least 30 minutes continuous rest after approximately 4 hours continuous duty.* [emphasis added]
>
> **…**
>
> f. Band 1B shall apply to full time and part time practitioners who work within the controls on hours applicable to their working arrangement as described in paragraphs 20 and 22a above, and who work on average 48 hours or less of actual work per week and, for part time practitioners, more than 40 hours; and who do not fulfil the criteria for Band 1A or 1C described in sub paragraphs 22d and e above."

22. Paragraph 22k provides for the application of certain definitions for the purposes of the assessment of pay supplements in paragraph 22. At (ii) rest is defined as:

> "All time on duty when not performing or waiting to perform a clinical or administrative task, and not undertaking a formal educational activity; but including time spent sleeping. Natural breaks do not count as rest"

How was monitoring to be conducted?

23. It is common ground that neither the F1 contract nor the TCS themselves spell out how monitoring should be conducted, what is a valid monitoring round or what criteria are to be met to establish non-compliance with controls on hours of duty or hours of actual work or rest applicable to a junior doctor's working pattern. It is at this point that the parties' cases diverge. The Claimant contends that Department of Health Circulars and Monitoring Guidance, which were all the product of collective negotiation and agreement, supply the necessary detailed contractual provisions. The Defendant relies

on clause 6(a) of the F1 contract, which refers expressly to robust local monitoring arrangements, and contends that the local monitoring arrangements found in the Trust's Hours Monitoring Guide and an accompanying Frequently Asked Questions ("FAQs") document supply the necessary detailed provisions.

Department of Health Circulars 98/240 and 00/031

24. The Claimant relies on two Department of Health Circulars. The first of these, HSC 98/240, provides so far as relevant as follows:

> "Summary
>
> 1. This circular provides guidelines for trusts and other signatories to the New Deal for Junior Doctors on the consistent interpretation of acceptable standards on juniors' working hours and living conditions. It sets out further points for trusts to action in making progress towards New Deal accreditation.
>
> 2. The New Deal hours' controls are set out at Annex A. This circular provides agreed national guidance in the following areas:
>
> - rest requirements within New Deal working arrangements (Annex B)…
>
> 3. Our aim is to encourage a consistent approach across trusts and task forces and to promote understanding where new guidance is being introduced."

25. The "New Deal" is convenient shorthand for those aspects of the nationally agreed TCS which reflected, by successive amendments beginning in 1991, the policy of the Department of Health ("DH") that junior doctors' working hours should be reduced in the interests both of patient safety and of doctors' welfare. No-one suggests otherwise.

26. Annex B, Appendix 1 to HSC 98/240 sets out the rest periods required for each working pattern, with a minimum 30 minute continuous break after approximately four hours' continuous duty, and provides [emphasis in the original]:

> "Reasonable expectation of rest: In each of these working patterns, rest targets must be met during at least *three quarters* of all rostered duty periods. Where this target is not met, urgent consideration will need to be given to changing the working pattern, or reviewing working practices within the existing working pattern, to reduce work intensity to acceptable limits."

27. HSC 00/031 is also directed at Trusts. Unlike HSC 98/240, it is headed "for information only". It provides:

> "Monitoring Arrangements
>
> Key principles and detailed arrangements for the transition period and for ongoing monitoring purposes after 1 December

> 2000 are contained in monitoring guidance on the Website. There will be contractual obligation on employers to monitor hours' compliance and the application of the banding system through robust local monitoring arrangements; and on individual junior doctors to cooperate with those arrangements. If either party is not fulfilling their obligations, this could affect the means of determining pay banding, and in some circumstances sanctions may apply. "

Department of Health monitoring guidance

28. The monitoring guidance referred to as "on the Website" in the paragraph cited above, is the document "Junior Doctors' Hours – Monitoring Guidance" issued by the Department ("the DH Monitoring Guidance"). This states [emphasis in the original]:

> "Mutual obligation to monitor hours
>
> 4. From 1 December 2000 there will be a contractual obligation on employers to monitor junior doctors' New Deal compliance and the application of the banding system, through robust local monitoring arrangements supported by national guidance, and on individual junior doctors to cooperate with those monitoring arrangements……
>
> 6. In practice, if either the employer or the employee is not fulfilling their obligations, this could affect the means of determining pay banding and lead to financial and contractual uncertainty. Paragraphs 22 and 23 at Part C below cover the circumstances in which sanctions may apply."……..
>
> "7. To ensure consistency across the eight English regions in implementing the new contract, the paragraphs below provide **a *national framework, containing an agreed set of key principles and standards, together with detailed operational guidance***. The guidance outlines what should be monitored, and when so that information can be properly aggregated in trusts and regions and supplied centrally for strategic purposes. The guidance also covers the respective responsibilities of the key parties involved in monitoring. "

29. Paragraph 9 set out key principles for a national monitoring framework. These include:

- "Agreed national set of standards and guidance
- Simple to use and easy to understand…
- Accurate and transparent…
- Properly resourced locally, with the ultimate contractual responsibility for providing and overseeing monitoring

> processes resting with NHS Trusts as the employers of junior doctors
>
> - Monitoring systems must be capable of adaptation to take into account any future changes in contractual or legal requirements and the extent of the data required, on an ongoing basis, at local level to reassess hours' compliance and/or to resolve disputes."

30. Part C deals with operational guidance for introducing a national monitoring framework and provides at paragraph 10:

> "10. Trusts will need to ensure they collect and analyse data sufficient to implement the new pay bandings and juniors' contract from 1 December 2000, and to build on this for the future for reassessing hours' compliance and/or resolving pay or contractual disputes. Junior doctors, in turn, will be responsible for recording data on hours worked, and forwarding that data, at the employer's request. This annex therefore outlines (a) pay banding monitoring requirements and (b) ongoing requirements for monitoring hours, in accordance with current New Deal targets and, subsequently, with agreed new transitional hours limits through the Working Time Directive."

31. Paragraph 16 states:

> "Doctors who have identical duties and responsibilities when working on a shift… should be assessed as working on the same rota or shift. Where this is not the case, those with different duties and responsibilities should be assessed separately. This will enable trusts to ensure that banding decisions can be made which accord with the core principle that ***all doctors working on the same rota or shift are allocated to the same pay band***."

32. Paragraph 17 states:

> "Each duty period must be assessed individually to determine whether the New Deal requirements have been met on the required proportion of occasions as defined in HSC/1998/240 (as amended for assessing weekend rest in pay banding guidance."

33. Paragraph 25 states:

> "What needs to be done locally?
>
> Junior doctors and relevant working colleagues (e.g. medical and other clinical staff, medical staffing officers etc) must be notified adequately in advance of the agreed monitoring period. Those being monitored must have received at their induction or soon thereafter local guidance and instructions on the purposes of monitoring and what is entailed. Job descriptions, letters of

> appointment and individual contracts should remind all juniors of their contractual obligation to monitor hours on request. In turn, every effort should be made by trusts to assist and encourage full participation in the exercise. Juniors should know where to send the information recorded, adequate collection points on site shall be established, and they should know how to get feedback on the outcome of their participation."

34. Paragraphs 26 and 27 of the DH Monitoring Guidance, relied on by the Claimant, provide:

> "How should the data be collected?
>
> 26. Much of the data needed for assessing banding criteria or New Deal compliance as listed above will already be available in trusts' Medical Staffing sections, e.g. contracts of employment, contracted duty periods, calculations for prospective cover within the team, weekly shift/rota timetables. This data will need to be supplemented by accurately recorded data; e.g. actual length of working week, including early starts/late finishes, rest achieved during the day and overnight, natural breaks, actual working times as opposed to rostered duty periods. Monitoring may throw up situations where the working reality is very different from the expected working patterns, and could indicate the likely source of non-compliance.
>
> 27. Under this national framework a minimum return rate for monitoring data should be set at 75% of all doctors in training in each rota or shift (irrespective of grade) participating in the monitoring round, **and at 75% of all duty periods worked over the monitoring period**, provided this is deemed to be a representative figure in both cases. This threshold is important for making a valid and accurate assessment of hours worked and rest attained."

35. Paragraphs 28 to 31 state:

> "How should the hours data be processed and analysed?
>
> 28. There should be clear local arrangements for the designation of staff who will process, record and analyse data collected, together with robust performance management structures at all levels in the NHS to ensure that national framework guidance is observed in all trusts employing junior doctors.
>
> 29. The system selected for the processing of data should comply with the key principles at Part B. It should be consistent across trusts within the region, compatible with other data and capable of determining New Deal compliance and pay banding. Original data and summary documents should be kept by trusts for a minimum of six years in case of future dispute. The requirements

of the Data Protection Act regarding access to individual records and maintaining confidentiality must be followed at all stages.

30. The processing of data should take place immediately after the exercise, allowing adequate time to chase up 'non-returns' or follow up individual queries. The trust should then publish a summary report **within 15 working days** of receipt of an adequate sample of monitoring data. The report should be set out in a simple, easy to understand format through which duty and working hours can be clearly assessed against New Deal requirements and pay banding criteria. The summary should serve as helpful feedback to individual juniors thereafter. In addition, results on the monitoring exercise should be published locally, broken down by grade and by specialty, and giving response rates in each case. Publication will provide information on problem areas and allow for subsequent discussion by trusts, juniors and others on action plans for the future. This will encourage greater joint ownership of problems raised in the drive for workable, sustainable solutions.

31. For pay banding purposes the mechanisms for agreeing whether monitoring results are valid are laid down in the accompanying guidance. For ongoing compliance purposes, results should be made available to the local New Deal implementation group and/or the BMA junior doctors representative(s) nominated as monitoring validation officer(s). The implementation group or nominated junior can then check to see if monitoring procedures were properly applied, and can test current data against previous monitoring outcomes and any subsequent known changes in working practices, working arrangements or workload pressures. The opportunity for re-monitoring should be given where formally requested either by the trust or junior(s):

- in cases of contractual dispute over the results
- where there is a demonstrable and substantial change in working pattern or working practices in the post(s) during the training period; or
- in the circumstances outlined in paragraph 19

and where reference to the regional task force (or future equivalent) for advice or independent arbitration is unlikely to result in early local resolution without further hours' information."

The local Hours Monitoring Guide

36. The Defendant's document "Hours monitoring process and you! A guide for junior doctors" (which I will call "the local Hours Monitoring Guide") provides so far as relevant [emphasis added]:

> "The purpose of this guidance is to explain your contractual responsibilities and those of [the Defendant] as your employer, for monitoring your hours of work to evidence compliance with the New Deal and Working Time Regulations (WTR). *The New Deal is contractual legislation agreed between the Government and the British Medical Association (BMA).* It was introduced to improve your working life and to restrict your average hours of work to 56 hours per week. It allows for you to be rostered for longer periods of duty if rest is included, subject to your rota complying with WTR rules on the definition of work and rest.
>
> …
>
> As the employee, paragraph 6 of your contract of employment requires that you comply with any hours monitoring system introduced by [the Defendant] (to enable them to discharge their legal responsibilities). Furthermore, [the Defendant] is contractually required to ensure the pay banding system is applied appropriately to contracts for doctors in training. Accurately recording your working hours will ensure you are correctly paid for the hours you work.
>
> When does monitoring happen?
>
> All rotas worked by doctors in training must be monitored at least twice a year, and more frequently where problems with compliance are identified or where a minimum return rate of 75% is not achieved…
>
> Re-monitoring may take place at the request of either the doctors or the Trust within a reasonable period of time…Wherever possible, re-monitoring will take place with the same set of doctors.
>
> **…**
>
> How will monitoring be conducted?
>
> The Trust currently uses the Junior Doctor Portal online rota management system from a company called Zircadian.
>
> Using information on shift patterns and the doctors working each rota provided by your Divisional Medical Staffing Administrator, the Medical Workforce Team will set up the monitoring exercises on the Junior Doctor Portal system.
>
> Once the exercise has been set up and activated, you will receive an automated email informing you that the monitoring exercise

will be taking place. As well as reminders of the importance of monitoring and the contractual obligation, the email will notify you of:

- The period and duration of the monitoring exercise.
- Advice on using the on-line monitoring process.
- The information required from you.
- An explanation on using the monitoring tools.

Three days before the monitoring exercise is due to start, you will receive 2 further emails from Zircadian, one containing your username, the other your password. If you fail to record your hours for a period of 3 days, the system will send you an automated email to remind you to log on and record your hours.

Once the monitoring exercise has ended, you will have 2 further days to log on and complete your working hours record. After this time, you will be locked out of the system and the exercise will close.

…

Important points to remember when recording information during the monitoring period

- Duties should be recorded within 48 hours of working the duty to ensure accuracy of data.
- You must complete your duty periods as accurately as possible, including start and finish times, details of any breaks taken and reasons for any additional hours worked.
- Any rostered days off (including Saturday and Sunday) must be recorded.
- Shifts/on-call duties must be recorded correctly e.g. if you are working a 24 hour on call, one continuous duty should be recorded and not 2 normal working days.
- Annual leave, study leave or sick leave days must be recorded.

…

Number crunching and return rates

- A 75% doctor and duty return rate is required for a monitoring exercise to be valid.

- A return rate below 75% will necessitate a repeat of the monitoring exercise… However, in some circumstances, a lower return rate may be considered valid…

- If a Band 3 result is returned, the rota will also need to be re monitored within 6 weeks to verify whether this was an accurate return.

- If, after the second monitoring exercise, a valid monitoring return is still not received, then an assessment will be made on the best available information from both sets of monitoring looking also at the rota pattern and the result of the last valid monitoring exercise. The decision would be agreed jointly by the Division and the Medical Workforce Team where appropriate.

- If the return rates are valid, the Medical Workforce Team will analyse the monitoring records. If the analysis differs from the contracted rota then the Medical Workforce Team will review the monitoring records to ascertain the reason for this.

…

How does re banding work?

If appropriate, re-banding of rotas will apply from either the date a new rota is implemented or from the start date of the monitoring exercise.

…

Teamwork!

You may be asked to work with the Trust to identify appropriate working arrangements or other organisational changes which will assist the move to compliance. You will be required to comply with any reasonable changes following discussion and agreement."

The local FAQs document

37. The Defendant's FAQs document provides, so far as relevant:

"14. Question: is a 100% return needed for each rota?

Answer:

A 75% doctor return rate is required for each rota monitored to be deemed as a viable return and a 75% duty return rate is also usually required i.e. actual hours worked recorded (not annual

> leave, study leave etc) for the return to be deemed viable to analyse…"
>
> "20. Question: What happens if there is a non-return?
>
> Answer:
>
> For each exercise there are two return targets which are set at 75%.
>
> The first is the Doctor Return Rate. On an exercise of 10 doctors, you would expect at least 8 doctors to return a diary card for this to be considered a valid exercise based on the Doctor Return Rate (80%).
>
> The second is the Duty Return Rate. Any missing duties are taken from the planned rota so that the monitored average hours are a true reflection of the planned rota. At least 75% of the duties taken into account in the monitoring analysis have to be monitored, which allows up to a maximum of 25% of substituted date for annual leave, study leave or any shifts not recorded.
>
> In the event of invalid doctor and/or duty returns below the 75% target, the rota will be re-monitored and an assessment of the rota's compliance made on both sets of monitoring data."

The General Surgery F1 rota

38. There is no dispute that the Claimant and her cohort worked a full shift pattern (as referred to at paragraph 19c of the TCS); and that the General Surgery F1 rota she worked was in place during the previous posting of doctors from around 3 April to 6 August 2013 without any change in working pattern between those dates. Both General Surgery F1 rotas comprised 22 doctor slots rotating in a four month working pattern. The expected working pattern, if doctors in post were able to work the rostered duties assigned to them and take natural breaks as required by paragraph 22 of the TCS, was calculated by the Defendant to be at Band 1B at the start of the April 2013 rota. This represented a 40% uplift on basic starting salary. The Claimant and her cohort were therefore paid at Band 1B from their start date in post and throughout their posting under the General Surgery F1 rota.

39. The judge found:-

> 38. The Claimant received a pack of documents at the start of her employment, containing the Derby contract which made clear what her working hours and natural breaks were. There was an induction programme on 8 August 2013 which emphasised the importance for junior doctors of taking natural breaks, as the Claimant accepts.
>
> 39. She was also, together with her cohort, sent reminder emails, including a few weeks later (on 27 August 2013, before any monitoring exercise was in process) emphasising the importance

> of taking natural breaks and asking junior doctors to let the Defendant's Medical Staffing department (led by Bob Smyth) know if they were not able to take breaks and the reasons why. Although she described that in her witness statement as a strange request, it seems to me to reflect the actions of a responsible Medical Staffing department taking appropriate steps to ensure that natural breaks are being taken on an ongoing basis; and where they were not being taken, helping junior doctors to report that fact so that it could be addressed for the benefit, both of junior doctors, and patients.
>
> 40. It is clear from the evidence that emails were also sent during the monitoring exercise itself, MR2. For example, by email dated 16 October 2013, Bob Smyth reminded junior doctors of the importance of taking natural breaks and indicated that he would be making random calls to see if they were taking their breaks and if not what help could be provided to ensure that was done. Similarly, emails from Mr Dickenson (Director of Postgraduate Medical Education), for example dated 4 July 2013, reflect appropriate management determination to support junior doctors by securing a change of culture in respect of natural breaks, including by gaining the support of individual consultants on this issue. I do not read this (or other reminder emails) as the Claimant does, as showing the Defendant "*desperately trying to avoid a seemingly inevitable non-compliant result…*". Different proposals were made to achieve the change of culture referred to (or better compliance with natural break requirements), including a proposal to bleep every junior doctor each day reminding them to take their natural breaks and I am satisfied on the evidence that this was not just done during a monitoring exercise or as a way of avoiding an inevitable non-compliant result.

40. The finding in the last sentence that the Defendant Trust were acting in good faith is not open to challenge in this court.

Monitoring – calculating the validity of the exercise

41. The Defendant Trust carried out monitoring using the Allocate software programme. Simler J described how it worked as follows:

> "64. …For a monitoring exercise to be considered valid, two thresholds must be met. First the returns from monitoring must capture 75% or more of the doctors in training on the monitored rota (this is referred to as the doctor return rate). In other words, 75% or more of the junior doctors on the rota being monitored must submit a diary card return to achieve a valid doctor return rate. Secondly, to be valid there is a threshold of 75% or more of all duties expected to be worked over the monitored period, based on the rota template, that must be captured (this is referred to as the duty return rate).
>
> 65. The Allocate system calculates the duty return rate by counting the number of duties (or shifts) monitored by junior doctors and dividing that by the number of duties

expected in the two-week monitoring period of the planned rota. In other words, the system uses the expected number of contracted duties (whether worked or unworked) as the denominator when calculating if the duty return validity threshold is met. To calculate the expected number of duties, the system totals the number of each contracted duty type in the contracted rota, divides that figure by the cycle length to produce a weekly number, and then multiplies this figure by two, in order to reflect the fact that the monitoring period is two weeks. The monitoring exercise is considered valid by the system if both the doctor and duty return rates are 75% or above on the basis just set out."

Monitoring compliance

42. For the purpose of monitoring compliance with contractual controls on hours and natural breaks, the Defendant also has regard to expected data. The judge summarised the way this operates at paragraph 76 of her judgment:

    i) The Allocate system works from a starting point of the total number of shifts or duties which are expected to be performed on the particular rota contracted for.

    ii) This is calculated on the basis of prospective cover and as an average over the total rota period. The total number of expected shifts or duty days is determined on this basis (and can include fractions of a duty). It is then divided by the number of weeks of the particular rota, 22 in this case, and multiplied by two to produce an average number of duties expected in the two-week monitoring period. In the case of the two monitoring rounds here, the total number of expected duties was 218 duty periods across the two weeks.

    iii) The system automatically adds in, or substitutes, data where it is missing.

    iv) This is done both in the case of duties worked but not returned in the monitoring; and in the case of duties not worked because taken as annual leave, sick leave or study leave. In other words, it substitutes data for unmonitored duty periods expected to have occurred by reference to the total number of expected duties.

    v) When substituting for unmonitored data in this way, the system assumes full compliance with hours and natural break controls.

    vi) Thus, where annual leave, sick leave or study leave is taken, or a doctor fails to record his or her worked duty, the system assumes that the junior doctor started and finished his or her duty at the time set out in the rota and took his or her natural breaks compliantly with the way in which the rota was established.

43. The justification which the Trust's witness Mr Digweed put forward for this method of calculation is set out in detail at paragraphs 67 to 74 of the judge's judgment. In the case of doctors who work a duty period but fail to submit a return stating that they have *not* been able to take their rest breaks, it is assumed (paragraph 75) that they have been able to take them and that the shifts complied with the New Deal provisions. In the case of doctors on any form of leave the justification is far more complicated: a combination of, among other things (a) the monitoring being time-consuming; (b) a wish to assess the rota period as a whole even though only one fortnight is being monitored; and (c)

the fact that "establishing the rota is itself a complicated process that depends inevitably on a number of variables".

The first monitoring round

44. MR1 for the General Surgery F1 rota was conducted between 8 and 22 July 2013 and did not involve the Claimant or her cohort. Emails were sent to doctors participating in MR1 attaching the Defendant's Guide, the FAQ and the Zircadian Manual. Of the 22 doctors rostered full-time on the General Surgery F1 rota who were monitored, two completed no records at all and the remaining doctors completed between nine and 14 daily record cards each, producing a doctor return rate of 20/22 x 100 = 90.91%.

45. For the purposes of calculating the duty return rate, the monitoring exercise report shows that 162 worked duties and 5 study leave duties were monitored out of 218 expected duties in the rota for the two-week monitoring period. The Defendant's approach was for the number of duty returns to be divided by the number of expected duties to produce a percentage duty return figure: that is, 167 divided by 218, which produces a duty return rate of 76.61%.

46. Since the threshold doctor return rate and duty return rate for the exercise was 75% the exercise was regarded as valid by the Defendant with a doctor return rate of 90.91% and a duty return rate of 76.61%.

47. So far as compliance with natural breaks is concerned, this is calculated under the Defendant's system by looking at the monitored, unmonitored and expected duties. The expected data based on the contracted rota for doctors participating in MR1, together with the data returned by them showed 162 worked duties as having been monitored by the doctors in question. 62 duties were treated as expected but unmonitored. The monitored and unmonitored duties were added together to produce a total of 224 duties. Of those, 54 were recorded as having been non-compliant as regards natural breaks. This produced a percentage compliance calculation for MR1 of 170/224 = 75.89%. The rota was accordingly treated as compliant.

The second monitoring round

48. MR2 for the General Surgery F1 rota (which included the Claimant and her represented class) was conducted between 14 and 28 October 2013. Again, the threshold doctor return rate and duty return rate for the exercise was 75%.

49. Although there were 22 doctors assigned to this rota, there were only 21 doctors who took part in the monitoring exercise as one doctor (Dr Mohammed) was retaking one of his seats and was limited in his working pattern to day shifts only. The system treated his doctor returns as unassigned for the purposes of establishing validity. Another doctor (Dr Clarke) produced no returns within the exercise. Accordingly, the doctor return rate was calculated on the basis of 20/21 doctors engaging in the exercise and produced a return rate of 95.24% which was therefore valid.

50. Moving on to the duty return rate, the monitoring exercise report shows that there were 218 expected duties (calculated on the basis of 22 doctors) out of which 156 were monitored. The duty return rate was calculated as follows: 156/218 x 100 = 71.56%.

This did not meet the duty return threshold of 75% and the exercise was treated as not valid.

51. The natural breaks calculation was nevertheless carried out. In addition to the 156 worked duty periods monitored, the system expected shifts as follows to be monitored but they were not in a further 62 instances. The monitored and unmonitored duties were added together to produce a total of 218 duties. Of those, 55 were recorded as having been non-compliant as regards natural breaks and 163 were treated as compliant. This produced a percentage compliance calculation of 163/218 = 74.77%. This would have been a non-compliant result but was not acted on because the exercise was not treated as valid.

52. Since the duty return rate was regarded as invalid because below the 75% threshold, by email dated 10 December 2013, Ms Atkins notified the doctors concerned that the monitoring exercise was deemed invalid on this basis. The doctors were advised that the rota would be re-monitored in January 2014 with the new cohort of F1 trainees working in General Surgery. This was done subsequently and the result was a valid, compliant monitoring round.

The judgment of Simler J

53. The judge dealt first with the question of which documents (other than the relevant parts of the TCS) were incorporated into the F1/Derby contract as enforceable contractual terms:-

> "105. The first and overriding question (as Hobhouse J explained in Alexander) is whether the parties have agreed (expressly or impliedly) that additional documents should form part of the contract between them. My starting point is the Derby contract which is (and is agreed to be) the principal document establishing contractual terms and conditions between the Claimant and the Defendant. It must be considered to determine whether as a matter of construction it evidences an intention by the two parties to it, to incorporate contractually some or all of the external documents contended for by them, and if so, whether any particular provision or provisions of those documents is apt to be a term of the contract between these parties.
>
> 106. The Derby contract deals expressly at clause 6 with the contractual obligations on both parties to it in respect of monitoring of working hours and natural breaks. Clause 6 (a) provides, in clear unambiguous language, that the Defendant has a contractual obligation
>
> "to monitor junior doctors' New Deal compliance and the application of the banding system through robust local monitoring arrangements supported by national guidance."
>
> That is mirrored by the contractual obligation (also found in clause 6(a) on junior doctors) to "cooperate" with the local monitoring arrangements.

107. In other words, the source of the contractual bargain as to what obligations apply to the parties in respect of monitoring of hours (including natural breaks) is clause 6(a). This deals with the substance of the parties' obligations: the Defendant is contractually obliged to conduct monitoring; it is contractually obliged to conduct that monitoring through robust local arrangements; and those robust local arrangements are to be supported by national guidance. The Claimant is contractually obliged to cooperate with the local monitoring arrangements.

108. There is nothing in the TCS that detracts from or alters that clear contractual obligation. Though the TCS contains contractual provisions relating to pay and the assessment of pay supplements dependent on the banding to be applied to posts which do not comply with the controls on hours set out at paragraph 20 and/or 22 of the TCS, the terms of the TCS are silent as to the system of monitoring that must be undertaken or how the monitoring is to be done. This is unsurprising. The TCS provides a broad national framework under which the details of local implementation are left to individual Trusts. Some of those details are contractual but others may not be. As the authorities referred to above recognise, good practice guidance is not generally apt for incorporation.

109. The language used in clause 6(a) contradicts and is inconsistent with the argument advanced by the Claimant that the contractual intention was for the Defendant to conduct monitoring through arrangements set out in national guidance in the DH documents relied on. It would have been easy for clause 6(a) to impose a contractual obligation on the Defendant to conduct monitoring through nationally agreed arrangements, or through arrangements set out in national guidance. That is not what the contract says as a matter of the natural and ordinary meaning of the contractual words used. It is also not how the contractual obligation was understood in the DH documents relied on by the Claimant: see for example the statement in HSC 00/031 (repeated in the DH Monitoring Guidance) that there will be "*a contractual obligation on employers to monitor hours' compliance and the application of the banding system <u>through</u> robust <u>local monitoring arrangements</u>* .." (my emphasis).

110. The Claimant submits that the words in clause 6(a) (requiring monitoring to be conducted through robust local arrangements) are to be interpreted as limited to the practical, physical or logistical arrangements made for collecting monitoring data (including, whether by paper diary cards, software entries or a man with a clipboard) rather than directed as a matter of substance at how the Defendant should go about monitoring and determining whether controls on hours are complied with.

111. I do not accept that submission. Clause 6(a) provides in terms that monitoring is contractually required to be carried out in the manner provided for in relevant local arrangements. I can see no basis for restricting the meaning of these clear words as required by the Claimant's argument. Further, the argument is inconsistent with the reference to local arrangements being supported by national guidance since the relevant national guidance is plainly concerned, not with the physical or logistical arrangements by which monitoring is conducted, but with the substantive methodology for monitoring and determining whether controls on hours are complied with. Put shortly, it is difficult to see why clause 6(a) should address physical or logistical arrangements but not the substantive methodology to be used for monitoring.

112. What then are the robust local monitoring arrangements supported by national guidance? It seems to me, in agreement with Mr Leiper QC, that the local monitoring arrangements referred to in clause 6(a) of the Derby contract are those contained in the Defendant's local documents, the Hours Monitoring Guide and the FAQ. These are the documents sent (or readily available) to junior doctors at the beginning of each monitoring round and in context and in light of their content, they are the "local monitoring arrangements" referred to in clause 6(a) and incorporated by reference by it. The fact that they are not referred to by name is neither here nor there. The Hours Monitoring Guide states in terms that its purpose is to explain both the individual doctor's and the employer's contractual obligations for monitoring compliance with the New Deal. In other words, the source of the contractual obligation to conduct monitoring by robust local monitoring arrangements is clause 6(a) and the Hours Monitoring Guide and FAQ explain or provide the detail of those local monitoring arrangements. The fact that the documents explain contractual obligations does not mean they are not contractual; nor do I accept that neither document purports to have contractual force in the sense that neither states that it has contractual force. That is not a necessary requirement.

113. The local arrangements are required to be 'supported' by national guidance; in other words, consistently with what is contemplated by the relevant national guidance. It is unsurprising therefore, that these documents do not state that they diverge from the national guidance. It is also unsurprising in these circumstances that Ms Atkins supplied the auditor, in the course of an independent audit of monitoring in 2013, with the HSCs and the DH Monitoring Guidance and said that the national guidance in the HSCs 'have formed the basis of the Trust's Junior Doctors Hours Monitoring Handbook and

Monitoring Procedure….'; and unsurprising that she responded in cross-examination as follows:

Q. "So far as you were aware, was there a positive decision by Derby to depart from the national guidance and to set up its own rules about monitoring?

A. I think we follow the national guidance but with local arrangements"

That does not mean that the national guidance governed the individual employment contract; nor did Ms Atkins acknowledge that the national guidance was part of the Claimant's contract, as the Claimant suggested at paragraph 47.2 of her witness statement.

114. The two documents are not simply giving practical assistance to doctors participating in the monitoring process. Rather, in the language of conferring rights and obligations they set out targeted rules. There is a recognition that junior doctors' have a contractual obligation to comply with the monitoring system introduced by the Defendant (pursuant to clause 6 of the Derby contract) and the Defendant has a contractual obligation to ensure the pay banding system is applied appropriately. The Hours Monitoring Guide then sets out:

i. the current system in use is the Zircadian (Allocate) Junior Doctor Portal online rota management system.

ii. The Defendant must monitor rotas worked by junior doctors at least twice a year and for a minimum of two weeks.

iii. Duties should be recorded by junior doctors within 48 hours of working the duty to ensure accuracy of data, and records must be completed as accurately as possible.

iv. Annual leave, study leave or sick leave days must be recorded.

v. Junior doctors must work together and with the Defendant to identify appropriate working arrangements and comply with reasonable changes following discussions.

vi. The doctor and duty return rate thresholds are set at 75% for a monitoring exercise to be considered valid.

vii. If a Band 3 result is returned, the rota will need to be re-monitored within 6 weeks to verify whether this was an accurate return.

viii. The FAQ document confirms the two return rate thresholds consistently with the Hours Monitoring

> Guide. It states that "*missing duties are taken from the planned rota so that the monitored average hours are a true reflection of the planned rota. At least 75% of the duties taken into account in the monitoring analysis have to be monitored, which allows up to a maximum of 25% of substituted data for annual leave, study leave or any shifts not recorded.*"

115. Adopting the approach suggested by Dyson LJ in Keeley, if these provisions had been set out in identical terms in the Derby contract, it could not seriously have been argued as a matter of construction that they are not apt for incorporation as contractual terms and, on that account, not part of the Derby contract. They are rules that are important to the overall bargain and the contractual working relationship; they are workable and logical.

116. True it is (as Mr Cavanagh submits) that neither document states in terms that the Defendant will not rely solely on actual duty periods worked in order to determine validity for monitoring purposes or will treat each duty period actually worked but for which no return is made as compliant or will count days of annual leave etc. as compliant duty periods. It is also true, as Mr Cavanagh submits, that neither document reserves to the Defendant a general discretion to set the criteria for determining whether a monitoring round is valid or compliant. However, I do not consider that these points assist the Claimant's case.

117. Although the FAQ is not as clear as it could and should have been (and there is some internal inconsistency within it) I have concluded that this document does make sufficiently clear that the monitoring system used by the Defendant substitutes data taken from the planned rota to make up for missing hours (see answer to Q20 in particular). It does not state that data will be substituted on the assumed basis that the duty was fully compliant with New Deal controls on hours and breaks. Nor does this appear in the Hours Monitoring Guide.

118. In the case of both points, if I am wrong about the FAQ and/or in the absence of an express statement that substituted data will be treated as fully compliant, it seems to me that the result is simply that the local monitoring arrangements set out in the Hours Monitoring Guide and FAQ do not prescribe a detailed methodology for monitoring to that level of detail. That does not mean that the adoption of a particular approach or methodology is necessarily impermissible. Rather, it means that the contract of employment does not make express provision at that level of detail about, for example, the way in which particular calculations will be performed, or how prospective cover will be factored into the process. That is not unusual in a contract of

employment; these often leave the detailed methodology to be adopted for a particular purpose (for example the precise method of calculating annual bonuses payable to employees) to the discretionary judgment of the employer. It seems to me, on this basis, the detailed methodology to be used in the software set up (or otherwise) for calculating duty return rates and compliance where data is missing is left to the discretionary judgment of the Defendant, subject to the duties of rationality and trust and confidence owed by the Defendant to its employees. It was not necessary for the Derby contract to include an express provision reserving discretion to the Defendant in order to achieve that result.

119. I do not accept Mr Leiper's alternative argument that the Defendant's methodology in respect of monitoring (in particular by the use of expected/substituted data) was incorporated into the Derby contract as a matter of custom and practice. It seems to me that there is no room for custom and practice here. There are express contractual terms dealing with the monitoring process, though they do not make express provision at the level of detail that would prescribe a particular methodology. Furthermore, given that the methodology has never been explained clearly to junior doctors, I cannot see how they can be said to have agreed to it as a matter of custom and practice.

120. The Derby contracts refers to local arrangements supported by national guidance, and as set out above, is inconsistent with the Claimant's case in this regard. Moreover, the language of paragraph 22a of the TCS (relied on by the Claimant as effecting the incorporation of the DH documents) does not demonstrate an intention by both parties to incorporate the DH documents into the Derby contract. This provision simply stipulates that junior doctors who are in posts that do not comply with the controls on hours of duty should in principle be entitled to supplemental payments. It makes no provision at all in respect of monitoring arrangements. Read in context, I do not consider that the tangential language ("refer HSC 98/240…") is capable of being construed as evidencing such a common intention: the natural and ordinary meaning of the language used at paragraph 22a is that it is drawing attention to, or noting the HSCs as documents relevant to the provision given effect to in paragraph 22a. The fact that the relevant words appear in parenthesis suggests that they are by way of explanation of the operative provision at paragraph 22a.

121. Further, I do not consider that the provisions of the DH documents relied on by the Claimant are apt for incorporation. HSC 98/240 expressly states that it provides "guidelines" for Trusts (paragraph 1). It characterises the document as providing agreed "national guidance" (paragraph 2) on certain topics,

(though not on the methodology or arrangements for monitoring). At paragraph 3 it states that its purpose is to "encourage" a consistent approach across NHS employers. The language of "guidelines", "national guidance" and "encourage" indicate that the content is aspirational rather than contractual. Further, I do not accept Mr Cavanagh's contention that the Defendant relies on this document as incorporating certain provisions relied on by it, such as the 75% threshold compliance figure. As indicated above, the 75% compliance figure is expressly provided for in the Hours Monitoring guide and FAQ, consistently with the national guidance.

122. Further, the passage in Annex B, Appendix 1 relied upon by the Claimant (containing guidance on "reasonable expectation of rest") summarises rest targets to be met during at least three quarters of all rostered duty periods. Again, this is guidance. The contractual provisions are contained at paragraph 20 and 22 of the TCS; in particular paragraph 22a(vii) sets out the requirement for natural breaks of at least 30 minutes rest after approximately 4 hours' continuous duty. It is implicit in the paragraphs of the TCS dealing with pay, additional supplements and pay bands that junior doctors in the same rota or shift will receive the same pay band.

123. HSC 00/031 states on its front cover that the document is "for information only". That is inconsistent with an intention to create contractual relations. Instead, it indicates that monitoring guidance on the website contains key principles; but makes clear that the contractual obligation on employers and junior doctors is to conduct or cooperate with monitoring <u>through local monitoring arrangements</u>.

124. So far as the DH Monitoring Guidance is concerned, there is no reference to this document in either the Derby contract or the TCS. Furthermore, the wording of HSC 00/031 that describes the DH Monitoring Guidance reflects the difference between it and contractual obligations found elsewhere by describing the DH Monitoring Guidance as containing "key principles and detailed arrangements" on the one hand, in contrast to the "contractual obligations" on both NHS employers and junior doctors in respect of "robust local monitoring arrangements" on the other. The contractual obligation referred to at paragraph 4, a mutual obligation on employers and on junior doctors) is to monitor and cooperate with monitoring "through robust local monitoring arrangements supported by national guidance". Paragraph 7 explains that the "*paragraphs below provide a national framework, containing an agreed set of key principles and standards, together with detailed operational guidance. The guidance outlines what should be monitored, and when…. the guidance also covers the respective responsibilities*

of the key parties involved in monitoring." Again, this is the language of guidance and the provision of a framework within which to approach the adoption of local monitoring arrangements (see also paragraph 27 to similar effect). The guidance does not identify or prescribe any particular monitoring system that must be used and recognises at paragraph 8 that different approaches are available and are used to monitor successfully.

125. The guidance on data processing and analysis is couched in the language of how the exercise "should" be carried out (see, repeatedly, paragraphs 28-31). Again, I read this as providing guidance as to what Trusts should do, rather than imposing mandatory obligations on them.

126. Perhaps more importantly, and in any event, I have concluded that the DH Monitoring Guidance and other DH documents do not have the meaning and effect contended for by the Claimant. First, the DH documents make clear that they are subject to the terms of the local monitoring arrangements (here, the Hours Monitoring Guide and FAQ). For example, see paragraph 4 of the DH Monitoring Guidance and the statement at page 3 of the HSC 00/031. Secondly, Annex B, Appendix 1 of HSC 98/240 is not concerned with pay banding dealt with by paragraph 22 of the TCS; rather it is directed at working patterns in practice. That is clear from the consequences of failure to meet rest targets:

"…urgent consideration will need to be given to changing the working pattern, or reviewing working practices within the existing working pattern, to reduce work intensity to acceptable limits"

Thirdly, when properly construed the DH Monitoring Guidance provides for the exercise of discretionary judgment by NHS Trusts in relation to the process of data collection and analysis. Detailed guidance is given about data that should be collected. This makes clear that contracted working arrangements (shift, on-call rota, prospective cover arrangements etc) and contracted duty hours data should be collected, and that contracted hours and hours of actual work should be assessed (see paragraphs 11 and 12). I do not read the paragraphs relied on by the Claimant as indicating that only "worked" duty hours/shifts can or must be assessed. Rather, the statement at paragraph 17 that "each duty period must be assessed individually" means no more than that employers should seek a monitoring return in relation to each duty period; and paragraph 26, read as a whole identifies the starting point as the data available to employers before monitoring, namely data for 'contracted duty periods, calculations for prospective cover', that is the data as to how the rota is expected to operate. This information is to be

> supplemented by accurately recorded data – in other words, actual working data as opposed to rostered duty periods data. The paragraph does not say only actual working data can be relied on.
>
> 127. Paragraph 27 expressly states that it provides a "national framework", under which "a minimum return rate for monitoring data should be set at 75%". It was for individual employers to decide where to set their own return rate (provided it was at or above the minimum). This paragraph does not stipulate that the duty return rate is required to be calculated by reference to 75% of the duty periods recorded by junior doctors as actually worked during the monitoring period. Rather, it refers to "75% of all duty periods worked over the monitoring period" and its focus is on ensuring a representative assessment, in other words, a "valid and accurate assessment of hours worked and rest attained". The expectation that systems will be determined, developed and operated locally is also apparent in the language of paragraphs 28 to 31 (and paragraphs 20 to 21).
>
> 128. Further, I do not agree that paragraphs 17 and 26 mean that the result of the monitoring round must be calculated entirely using 'actual' data, with no 'substitution'. That is not what either paragraph says. On its proper construction, the DH Monitoring Guidance is silent as to whether or not the use of substituted data is permissible. Paragraph 26 expressly recognises that information or data on "contracted duty periods", "calculations for prospective cover within the team" and "weekly shift/rota timetables" will be available. It states that this "data will need to be supplemented by accurately recorded data…". That does not mean that only actual recorded data relating to working times and natural breaks can or must be used.
>
> 129. Accordingly, applying the legal principles I have summarised above, the Hours Monitoring Guide and the FAQ contain the local monitoring arrangements that the Defendant was required to operate by clause 6 of the Derby contract. To the extent referred to above, the provisions contained in the two documents were apt for incorporation and were expressly incorporated into the contract between the Claimant and Defendant. To the extent that the contract does not make express provision at the level of detail as to methodology for calculating validity and compliance, that was a matter for the discretionary judgment of the Defendant.

54. She went on to summarise the true meaning and effect of those terms in respect of monitoring and pay banding at paragraph 130:

> i. The Claimant was to work a 'Full Shift' work pattern (clause 1 of the Derby contract). A 'Full Shift' is defined

by paragraph 19c of the TCS and is subject to the controls on hours stipulated in paragraph 20c of the TCS.

ii. The Claimant was entitled to a base salary of £22,636 (clause 4 of the Derby contract and paragraph 21a of the TCS). The base salary would be supplemented according to a pay banding pursuant to clauses 4(c) and 3(d) of the Derby contract (and in accordance with paragraph 22 of the TCS). The Claimant's post fell within Band 1B (clause 1 of the Derby contract and paragraph 22 of the TCS).

iii. However, if the junior doctors on the Claimant's rota were not having 'natural breaks' of at least 30 minutes' continuous rest after approximately 4 hours' continuous duty, the Claimant would be entitled to be paid under Band 3 (paragraph 22a (vii) of the TCS).

iv. The Defendant was contractually obliged to ensure that controls on hours of duty were met and to keep working arrangements under review (clause 6(d) of the Derby contract and paragraphs 18b and 20h of the TCS).

v. The Defendant was contractually obliged to monitor New Deal compliance and the application of the banding system through robust local monitoring arrangements supported by national guidance (clause 6(a) of the Derby contract and the Hours Monitoring Guide/FAQ). To that end:

vi. the Defendant was required to collect and analyse "sufficient" data for it to be able to assess New Deal compliance (clause 6(c) of the Derby contract).

vii. A monitoring exercise would only be considered valid where both the doctor and duty return rates were at least 75% (the Hours Monitoring Guide and the FAQ).

viii. These assessments could incorporate up to 25% of substituted data in respect of periods of annual leave, study leave or any shifts not recorded by submitted returns (the FAQ).

ix. The Defendant was required to carry out a monitoring exercise at least twice a year for a minimum of two weeks each time (the Hours Monitoring Guide).

x. The junior doctors (including the Claimant) were contractually obliged to cooperate with the Defendant's local monitoring arrangements (clause 6(a) of the Derby contract and the Hours Monitoring Guide). Specifically, that included: an obligation to

> record and provide monitoring data when reasonably requested to do so (clause 6(c) of the Derby contract); and an obligation to complete duty recording as accurately as possible, and in line with the other requirements stated in the Hours Monitoring Guide.
>
> xi. The junior doctors were contractually required to work together and with the Defendant to identify appropriate working arrangements and to comply with reasonable changes following discussions (paragraph 20h of the TCS; clause 6(e) of the Derby contract; the Hours Monitoring Guide).

ii. The judge continued:

> 131. Subject to the implied term of trust and confidence and the duty not to act irrationally, I have concluded that the Derby contract does not impose any further contractual obligations in respect of the approach to be taken to monitoring and the precise methodology to be adopted. Subject to those terms, the Defendant had a residual discretion as to the precise methodology to be applied in practice in conducting the analysis of validity and compliance.
>
> 132. In light of these conclusions, and the further conclusions on rationality and the disputed monitoring rounds set out below, it is not strictly necessary to reach a conclusion on the question whether the Defendant is entitled as a matter of discretion to wait before acting on a valid non-compliant monitoring round result, and re-monitor before taking action in relation to re-banding. There is no doubt that the Hours Monitoring Guide makes clear that re-monitoring will occur following a valid non-compliant result, but the consequence for pay banding is not spelt out in writing by the Defendant. It seems to me that paragraph 21p of the TCS provides a right to back-dated pay at the higher level if it is shown that the particular post belongs to a higher pay band as a result of a valid monitoring round. Properly construed, this appears to afford a right to a higher pay band rating following a single valid monitoring round that reflects non-compliance with at least 75% return rates. That is inconsistent with the Defendant's asserted right to operate a 'two-strikes' policy as a matter of discretion.

55. The judge then turned to the argument based on irrationality. She said:

> 133. Irrespective of my conclusions above, the Claimant contends that the Defendant has acted irrationally in breach of contract in relation to the disputed decisions taken in MR1 and MR2.
>
> 134. I accept the Claimant's contention that the court is entitled and required to scrutinise the exercise of powers or discretions

by employers in cases involving an imbalance of power between contracting parties (see Braganza v BP Shipping [2015] ICR 449 (SC)). I do not agree however, that this is a case involving specific criteria to be applied in the exercise of such discretion, or that all criteria are formally established, so that the exercise simply involves determining whether they were properly applied or not. In particular, although there is undisputed data, I do not agree that this question simply concerns whether a state of fact existed, namely whether 75% of duty periods or 75% of actual duty periods were compliant.

135. The Claimant challenges the use of substituted or expected data as irrational and against the spirit and intendment of the validity requirement; and further, challenges the assumption of full compliance when substituting such data. Mr Cavanagh ……..submits, in summary, that there was readily available actual data that should have been used to reflect the actual experience of the rota, to the exclusion of hypothetical and/or artificial data when monitoring. The Defendant's approach involves assumptions that make it harder to achieve the 75% thresholds than it ought to be and means that in a group of 22 doctors, it would never be possible to achieve 100% returns because there will never be as many monitored duties as there are expected duties when expected duties include periods of annual leave which will not be taken into account when the total numbers for monitored duties are counted. Further, the object of the return rates is to assess whether the sample is sufficiently large to be relied on. Since the monitoring process is designed to look at the working reality, the returns that matter are the returns that provide information about actual duty periods and that can only mean duty periods that are actually worked. The monitored data provides that information because, although it includes annual leave and days off, those duty periods are stripped out when the monitored data figure is calculated by the software. Thus, the monitored data figure reflects only periods that are actually worked together with study leave. The expected duties on the other hand, do not compare like with like because expected duties do include annual leave and other empty slots so that the comparison is not a like-for-like comparison. Furthermore, the use of 'expected' data based on incorrect assumptions of compliance led to an assessment of MR1 as compliant when it was in fact non-compliant; and in MR2 it led to a conclusion that the duty return rate was invalid when it was plainly valid. Only duty periods actually worked should have been considered. If unmonitored duties can be considered at all, that cannot be done on the assumption of full compliance.

136. I do not accept these (and the other written) arguments lead to the conclusion that the Defendant's approach in relying, in addition to data on actual worked duties, on expected duties data

in substitution for missing data for monitoring purposes, is irrational. My reasons follow.

137. While I accept that there may be a number of different methodologies for assessing validity and compliance of monitoring data, and that the software used could be set-up to accommodate different approaches, that is not sufficient to establish the Claimant's case. In agreement with Mr Leiper, I consider the only basis on which I could hold the Defendant's approach to be unlawful is if its methodology is one that no rational NHS employer of junior doctors could have adopted.

138. The purpose of monitoring any given two-week period is to assess compliance with controls on hours and natural breaks to ensure that the contracted pay band for the junior doctors on a particular rota is appropriate for that rota as a whole (here, the General Surgery F1 rota). The system adopted by the Defendant must be capable of producing monitoring results for up to 80 rotas in each monitoring exercise.

139. As the evidence established, the contracted rota and pay band allocated to it, assumes compliance with natural breaks within its construction and pay band, and importantly, is constructed on the basis of prospective cover. Further, although contractually obliged to cooperate with monitoring, junior doctors do not always return monitoring records.

140. In these circumstances, it is rational to conclude that missing data undermines the accuracy and reliability of the assessment that any monitoring round will be able to produce: it is likely to skew the results of a monitoring exercise and make it unrepresentative. Further, it is rational to conclude that assessing monitoring against worked duties only in the monitoring period would not provide a proper comparison with the expected duties across the rota as a whole, and rational in the circumstances to assess the validity threshold for monitoring of the two-week period by reference to the expected number of contracted duties (whether worked or not) in the rota.

141. Where data for unworked shifts (as a consequence of prospective cover) is missing from the monitored data in comparison with the contracted rota, and is added back or substituted, an assumption must inevitably be made about that rostered shift. Since what is being assessed is compliance with the rota as a whole and not merely those junior doctors who chose to submit monitoring returns, I consider it rational to assume that the substituted shifts that are added back, reflect compliance with the contractual controls on hours and natural breaks inherent in the rota and pay band that applies to it. So far as worked but unmonitored shifts are concerned, since junior doctors are under a contractual duty to submit returns and know

they may benefit financially where shifts are non-compliant, it is reasonable to assume that junior doctors would file returns where shifts are non-compliant. It is therefore a reasonable assumption that if a junior doctor does not return monitoring data this is because the shift was compliant.

142. Although the Claimant and the BMA criticise the use of assumptions by the Defendant, their own proposed approach is also predicated on deploying assumptions and extrapolation. While their assumptions are more likely to favour the interests of junior doctors that provides no proper basis for concluding that the Defendant's approach is irrational. As Mr Wakeford accepted, the BMA's preferred methodology "involves an assumption in the way that any approach would do that lacks perfect data". As he also accepted, the true position is that any monitoring exercise involving duties for which returns are not submitted necessitates the use of assumptions of one sort or another. Any approach has limitations or potential drawbacks, and there is, in reality, no perfect or objectively correct solution. Rather, there is a choice to be made by Trusts between a number of potential but imperfect options, and it a question of judgment or evaluation as to whether the merits and demerits of one approach outweigh those of another.

143. Furthermore, it is accepted by the Claimant and the BMA that substituting missing data is appropriate in the case of hours monitoring. In other words, expected data can legitimately be used for some monitoring purposes. It seems to me in the circumstances, that it is not unreasonable for the Defendant to conclude that applying a methodology that permits substitution when monitoring hours but not when monitoring natural breaks is an unfairly inconsistent approach. It is significant that the DH Monitoring Guidance recognises that junior doctors' failures to supply monitoring data can have an adverse effect on their pay banding (see paragraph 23, and to similar effect, HSC 00/031). This indicates an expectation that in the event of non-returns, the analysis would need to make use of expected data instead.

144. While the choice adopted by the Defendant may tend to skew the assessment towards compliance, that is the natural converse of the Claimant and the BMA's proposed approach, which would skew the assessment towards non-compliance. It does not lead to the conclusion that it is irrational.

145. Finally, the evidence shows that the Defendant's methodology (in particular, the use of substituted data on the basis of assumed full compliance) was widely used across NHS employers of junior doctors. The Allocate/Zircadian software has been used by the Defendant since about 2005. As Allocate state in their response to the BMA FOI request, the software application has been "developed and maintained in conjunction

> with industry experts [and] regional action teams". The document says in terms that where junior doctors' returns in a monitoring round are incomplete, or there is missing data by reference to the contracted rota, the software substitutes expected data. In light of Mr Digweed's evidence, it is clear that approach has been applied by software systems throughout the NHS since the introduction of the New Deal."
>
> 146. Having dealt with the Defendant's general approach and methodology, I turn to address the particular criticisms of the way in which MR1 and MR2 were conducted.
>
> 147. I am satisfied that MR1 was a valid exercise in respect of both return rates. The Defendant was entitled to conclude as a matter of contract and on a rational basis, by reference to reliance on expected duties assumed to be fully compliant (as set out above), that junior doctors were able to take the requisite natural breaks in 75.89% of shifts.
>
> 148. MR2 had a doctor return rate of over 75% but was considered by the Defendant to be an invalid exercise because the duty return rate was only 71.56%. Therefore, although it found compliance with the natural break requirements to be below 75% (74.77%), the outcome was regarded as invalid because of the duty return rate.

56. Finally the judge dealt with the specific issues of fact relating to the conduct of MR2. One of these was an argument for the Claimant that the returns of Dr Clarke should have been included despite having been submitted out of time. Simler J rejected that argument and the point has not been pursued in this court. The other was that Dr Mohammed, who was on restricted duties, should not have been included; and that if he had been excluded from the calculations as he should have been, MR2 would have been valid and demonstrated non-compliance with rest break requirements. The judge held:

> 151. It is common ground that one of the 22 doctors on the General Surgery F1 rota during MR2, Dr Mohammed, was working on restricted and not ordinary contracted duties. This doctor did not take part in the monitoring exercise because his work pattern differed from that of the other junior doctors on the rota. Nevertheless, the Defendant calculated the expected duties on the basis of 22 doctors and did not exclude Dr Mohammed from the analysis when calculating the duty return rate and compliance rates. In other words, 218 duties based on the expected shifts of 22 doctors in the two-week monitoring period were relied on as the denominator for validity purposes. Ms Atkins accepted that this was a mistake on the part of the Defendant and that the better approach would have been to treat this "unassigned" slot as not being included in the calculation of expected duties. As Ms Atkins also accepted, the expected duty figure for a 21-doctor shift would have been 206.17 duty periods

> (the figure used for the following monitoring round when the mistake was corrected) and the exercise would have been valid on this basis.
>
> 152. However, I do not consider that this means that the Defendant acted irrationally [or] in breach of contract. For the reasons given above the Defendant was entitled (as a matter of contract) to adopt a denominator of 218 being the shifts expected to be worked by reference to the contracted rota as a whole which was being tested during this particular monitoring period. Since the purpose of the monitoring exercise was to assess compliance across all expected shifts for that rota, the Defendant was entitled to conclude that the exercise would be valid only where actual returns were submitted in respect of 75% of the shifts expected in the relevant period.
>
> 153. Alternatively, if the Defendant was required to exclude Dr Mohammed altogether, the logical consequence is that this monitoring exercise was rendered invalid by reason of the flawed basis on which it was conducted (or, as Ms Atkins expressed it, it was "a cancelled or void exercise"). I do not consider that the only option open to the Defendant was to treat MR2 as valid in the circumstances, by performing an alternative calculation that excluded Dr Mohammed after the event. Rather, the Defendant was or would have been entitled to conclude that MR2 was invalid and that re-monitoring was called for……"

57. After dealing with the issue of Dr Clarke, and finding that "neither Ms Atkins nor the defendant were seeking to skew the results", the judge concluded:

> "155. For all these reasons I accept that MR2 was an invalid exercise that required re-monitoring. This occurred in January 2014 producing a valid, compliant result."

The Grounds of Appeal

58. The Claimant's Grounds of Appeal are as follows:

> "Ground 1
>
> The Judge erred in law in finding that the relevant parts of the following documents were not incorporated into the Appellant's contract of employment ("the National Documents*"*):
>
> i. Health Service Circular 1998/240 (*"HSC 98/240"*);
>
> ii. Health Service Circular 2000/031 (*"HSC 00/031"*);
>
> iii. The Department of Health's document 'Junior Doctors' Hours – Monitoring Guidance' ("the DH Monitoring Guidance*"*)

Ground 2

The Judge erred in law in finding that certain parts of the following documents were incorporated into the Appellant's contract of employment ("the Local Documents"):

i. The Respondent's document 'Hours monitoring process and you! A guide for junior doctors';

ii. The Respondent's document 'Junior Doctor Portal Online Monitoring System Frequently Asked Questions'

Ground 3

As a result of the errors set out in Grounds 1 and 2 above, the Judge erred in law in concluding that the detailed methodology to be used for calculating duty return rates and compliance, and therefore the appropriate pay band, was a matter for the discretionary judgment of the Respondent.

Ground 4

Further or alternatively, the Judge erred in law in her interpretation of the National Documents. She ought to have concluded that:

i. The effect of HSC 98/240 Annex B, Appendix 1 when read together with Paragraph 22 of the Terms and Conditions of Service for NHS Medical and Dental Staff (England) 2002 (version 10) (*"the TCS"*) is that Band 3 applied to a full shift working pattern where the rest target for natural breaks was not met during at least 75% of all rostered duty periods in the monitoring round;

ii. The effect of HSC 00/031 and the DH Monitoring Guidance is that all junior doctors in the same rota or shift will receive the same pay band (as opposed to this being a matter for the Respondent's discretion);

iii. Validity: The effect of the contract terms incorporated from the DH Monitoring Guidance is that the Duty Return Rate should be assessed by reference only to the duty periods actually worked during the monitoring round and not to periods not worked or artificially produced duty periods which did not exist;

iv. Compliance: The effect of the contract terms incorporated from the DH Monitoring Guidance is that compliance for natural breaks should be assessed by reference only to actual recorded data for each duty period during the monitoring round.

> Ground 5
>
> Further or alternatively, the Judge was wrong to conclude that the methodology adopted by the Respondent in assessing:
>
> i. the validity of monitoring rounds;
>
> ii. whether a monitoring round showed compliance for natural breaks;
>
> was rational and therefore permissibly within its contractual discretion.
>
> Ground 6
>
> As a result of the above errors of law, the Judge erred in law in finding that the Respondent was not in breach of contract in its assessment of monitoring rounds conducted between 8 and 22 July 2013 ("MR1") and 14 and 28 October 2013 ("MR2").
>
> Ground 7
>
> Further or alternatively, the Judge erred in law in finding that MR2 was rendered invalid in any event by reason of the Respondent having admittedly included artificial data in respect of an unfilled rota slot in error, rather than finding that the only rational response would have been to perform an alternative calculation excluding that data. The alternative calculation, even using the Respondent's methodology rather than that proposed by the Appellant, would have led to the conclusion that MR2 was valid.

The Secretary of State's application to intervene

59. On 14 June 2019, less than a fortnight before the hearing, the Secretary of State for Health applied to intervene in the appeal. Nicola Davies LJ made an order on the papers permitting the application to be made orally, and we heard Mr Lynch QC in support of it at the start of the appeal hearing. We refused the application for several reasons. If the Secretary of State was going to seek to become a party to this litigation the application should have been made in advance of the trial. There is no suggestion that the Department were unaware of the claim. The Claimant and the Trust have each been represented by highly experienced advocates and solicitors who have addressed the points in issue with considerable skill. The two main points which the Secretary of State sought to put before us were (a) that this form of the F1 contract is in widespread use throughout the NHS; and (b) that if the Claimant succeeds the financial implications will be considerable. The first point is common ground and the second cannot affect the proper interpretation of the Claimant's contract.

Discussion

What documents were incorporated into the Claimant's contract?

60. The TCS document was expressly incorporated into the Claimant's contract of employment by Clause 2 of the F1 contract. That was not a matter of choice by either Dr Hallett or the Trust: it was incorporated, in so far as it laid down Dr Hallett's remuneration and conditions of service, because of a statutory requirement that it should be.

61. Paragraph 10(1) of Schedule 5 to the National Health Service Act 1977 (now replaced by other provisions to like effect) empowered the Secretary of State to make Regulations about doctors' pay and conditions of service. From 1991 onwards the relevant Regulations thus made were the National Health Service (Remuneration and Conditions of Service) Regulations 1991 (1991 SI No.481).

62. Regulations 2 and 3 provide:

> **"Remuneration of officers**
>
> 2. Subject to any directions, remuneration, whether or not paid out of money provided by Parliament–
>
> (a) of an officer who belongs to a class of officer in respect of which remuneration has been agreed in negotiations and approved by the Secretary of State, shall be the remuneration so agreed and approved;
>
> (b) of an officer for whom, or for whose class, the Secretary of State has determined remuneration not so agreed and approved, shall be the remuneration so determined.
>
> **Conditions of service of officers**
>
> 3. Subject to any directions, the conditions of service–
>
> (a) of an officer who belongs to a class of officer in respect of which conditions of service have been agreed in negotiations and approved by the Secretary of State, shall include the conditions so agreed and approved;
>
> (b) of an officer for whom, or for whose class, the Secretary of State has determined any other conditions of service, shall include the conditions of service so determined, whether or not they also include conditions agreed in negotiations and approved by the Secretary of State."

63. The TCS document originally published in September 2002 was agreed in negotiations between the BMA and the Department of Health and approved by the Secretary of State,

as were all subsequent versions including Version 10, which came into effect on 31 March 2013.

64. There was much debate before Simler J on the issue of whether Health Service Circulars 1998/240 and 2000/031 and the Department of Health's document "Junior Doctors' Hours - Monitoring Guidance" were incorporated into the Claimant's contract of employment. The judge held that they were not incorporated, and I agree with her. But I do not consider that this issue is as important as it was thought to be at the trial. This is because even if the three documents were not incorporated as terms of the contract, they can be used as an aid to interpretation of the critical provisions of the TCS. Of course an explanatory document issued with the authority of the Secretary of State who had approved the latest iteration of the TCS is not conclusive, and if it clearly contradicted the TCS the latter would prevail. But in the absence of such contradiction it is at least a useful interpretative aid.

65. This is particularly so in respect of the two Circulars, which are expressly referred to in the opening lines of paragraph 22a of the TCS. It is of some significance that after the issue of the Circulars in 1998 and 2000 the annual process of negotiations between the employers' side and the BMA leading to provisions as to remuneration and other terms and conditions being approved by the Secretary of State continued, without apparent protest from either side as to the relevant terms of the Circulars.

66. The next issue is whether the two documents generated by the Trust described in argument as the "local documents", namely the local Hours Monitoring Guide and the FAQs, were incorporated into the Claimant's contract of employment. I cannot agree with the judge that either of these documents was incorporated into, or formed part of, the Claimant's contract of employment. Each of them is an explanation by the employer of how it, the Trust, understands the provisions of the TCS: the FAQs document especially so. Insofar as either document is consistent with the proper interpretation of the TCS it adds nothing. Insofar as it is inconsistent with the proper interpretation of the TCS it cannot be correct. The TCS is a nationally agreed document approved by the Secretary of State. Its meaning cannot be different depending on whether the doctor concerned is working in Derby or in another part of the country.

67. It was argued before Simler J that a crucial issue was the proper interpretation of Clause 6(a) of the F1 contract. As set out above, this provided that:-

> "The Trust is contractually obliged to monitor Junior Doctors' New Deal compliance and the application of the banding system through robust local monitoring arrangements supported by national guidance. You are contractually obliged to cooperate with those monitoring arrangements."

68. The parties' contentions on this issue at trial, which were repeated before us, are set out in the judgment of Simler J, in particular at paragraph 110. Much emphasis was placed in argument on behalf of the Trust on the words "robust local monitoring arrangements supported by national guidance". Mr Leiper argued that this gave the local documents greater force than the national documents. But this gives insufficient weight to the opening words of paragraph 6(a), namely what it is that is to be monitored. The required monitoring is of "junior doctors' New Deal compliance". I shall return to this phrase below, while noting at this stage the succinct description of the New Deal in the

Defendant's own monitoring guidance as "contractual legislation agreed between the Government and the British Medical Association".

69. The question of what tests have to be satisfied for a junior doctor in category F1 to be entitled to a band 3 pay supplement rather than a band 1B pay supplement is a matter of interpretation of the contract of employment, in particular paragraph 22a of the TCS. It cannot vary from Trust to Trust; nor is it a matter of discretionary judgment. Clause 6(a) makes provision for local monitoring, not for local interpretation. I agree with Mr Cavanagh that the "robust local monitoring arrangements" are limited to practical physical or logistical arrangements for collecting accurate data.

The meaning of TCS paragraph 22a(vii)

70. Paragraph 22a of the TCS entitled the Claimant (and, by virtue of paragraph 21p, her colleagues working a full shift working pattern on the same F1 general surgery rota for the relevant period) to be paid a Band 3 supplement if their posts did not comply with the rest break provisions described in paragraph 22a(vii), interpreted with reference to DH Circulars 1998/240 and 2000/031.

71. Paragraph 22a(vii) provided that "practitioners working full shifts shall have natural breaks as minimum rest during the whole of each duty period with at least 30 minutes continuous rest after approximately 4 hours' continuous duty".

72. On a literal interpretation of this paragraph it might be taken to mean that if any doctor on the rota was denied one rest break during the monitored period, Band 3 would apply. The BMA do not seek to press such a reading of the provision, and nor did Mr Cavanagh. Both sides sought instead to interpret it by reference to Appendix 1 of Annex B to DH Circular 1998/240, which states: "Reasonable expectation of rest: in each of these working patterns, rest targets must be met during at least three-quarters of rostered duty periods".

73. The parties disagree on what the final words of that sentence mean. The Claimant's case is that it means that rest breaks must be taken in three-quarters of duty periods actually worked. The Defendant's case is that it means that rest breaks must be taken in three-quarters of the duty periods appearing on the roster as constructed at the start of the four month period; that the employer is entitled to assume that every duty period listed on the roster during the fortnight of the monitoring round included a rest break unless a return has been submitted in respect of that period saying that there was no rest break; and that this rule applies whether the particular shift was (a) worked by a doctor who failed to submit a return; (b) not worked because the rostered doctor was on sick leave; (c) not worked because the rostered doctor was on study leave; (d) not worked because the rostered doctor was on holiday; or (e) not worked because the rota was short staffed, in other words that there were fewer than the expected 22 doctors on the payroll at the relevant time, so that no doctor was actually assigned to work that shift.

74. To my mind there is a clear distinction between the first of these five categories and the other four. The Claimant and her colleagues were under a contractual obligation to cooperate with monitoring exercises by submitting returns: this point is emphasised in DH Circular 00/031. Like the judge, I accept Mr Leiper's argument that if a doctor is known to have been on duty on a particular day in respect of which she has failed to submit a return, the employer Trust is entitled to assume that the rest break requirement

was complied with on that occasion. But it is a big leap from that assumption to go on to treat as rest break compliant a notional duty period which was not in fact worked at all, because the doctor listed in advance as due to be working it was off sick, or on study leave, or on holiday, or had transferred to another rota (or left the Trust) without being replaced. It is a distortion of language to say that in any of these situations a duty period has been worked with the appropriate rest breaks.

75. There is no support for the Defendant's method of calculation in the wording of paragraph 22 of the TCS. In the Annex to DH Circular 98/240 the only support for it is the word "rostered" in the phrase "three-quarters of rostered duty periods"; and then only if one construes "rostered" as meaning "shown on the roster", which I reject for the reasons just given. Paragraph 26 of the DH Monitoring Guidance, on the other hand, supports the Claimant's arguments, by reminding us that "monitoring may throw up situations where the working reality is very different from the expected working patterns".

76. I do not consider that Clause 6(a) of the F1 contract on its proper construction assists the Defendant's argument either. It provides that the Trust is contractually obliged to monitor junior doctors' New Deal compliance. "New Deal compliance" must mean whether the doctors' working hours and rest breaks comply with the New Deal in real life, not on the basis of a spreadsheet compiled at the beginning of a four month period on the apparent assumption (for example) that none of the 22 doctors on the rota will ever be on holiday, at any rate without being replaced. Since junior doctors have a substantial annual holiday entitlement the effect of that assumption in particular is to skew the results towards compliance.

77. Mr Leiper recognised – realistically – that when a significant proportion of doctors nominally on the rota are absent that puts pressure on those who remain at work. He submitted that any apparent unfairness in this method of calculation is offset by the fact that if those who remain are denied their rest breaks they will be entitled to the Band 3 supplements. But this is not a proper aid to interpretation of the contract, and does not justify a method of calculation skewed towards compliance.

78. I therefore accept the Claimant's argument that the assessment of natural breaks compliance should have been calculated using actual recorded data for each duty period during the monitoring round as opposed to the expected data shown on the rota for each duty period during the monitoring round, subject only to the proviso that where a doctor has been at work during a duty period but has failed to submit data about rest breaks, the Defendant is entitled to assume that the doctor has taken the required rest breaks during that duty period. The Defendant's method of calculation is both in breach of the contract on its proper interpretation and also irrational.

The duty return rate

79. I have so far focussed on the issue of compliance with rest break requirements. The parties are also in dispute about the calculation of the 75% duty return rate necessary to validate the monitoring round. This is not a neutral factor, since doctors on the F1 contract can only achieve the Pay Band 3 supplement as a result of a monitoring exercise which is valid.

80. The Claimant relies on paragraph 27 of the DH Monitoring Guidance which states that the minimum return rate should be "75% of all doctors in training in each rota or shift (irrespective of grade) participating in each monitoring round" and "75% of all duty periods *worked* over the monitoring period". [emphasis added]. The Defendant's local Hours Monitoring Guide likewise states that "a 75% doctor and duty return rate is required for a monitoring exercise to be valid"' In the FAQs document the answer to Q14 similarly states that "a 75% doctor return rate is required for each rota monitored to be deemed as a viable return, and a 75% duty return rate is also usually required i.e. actual hours worked recorded (not annual leave, study leave etc) for the return to be deemed viable to analyse…". All these passages point in the same direction, which is that for a monitoring exercise to be valid there must be returns from 75% of the doctors on the rota who participate in the monitoring round and that such returns must cover 75% of the duty periods actually worked.

81. The Defendant's FAQs document, however, contains the two sentences in answer to Q20 set out above: "Any missing duties are taken from the planned rota so that the monitored average hours are a true reflection of the planned rota. At least 75% of the duties taken into account in the monitoring analysis have to be monitored, which allows up to a maximum of 25% of substituted date for annual leave, study leave or any shifts not recorded."

82. The 75% duty return rate is derived from the DH Monitoring Guidance document rather than (as the compliance rate is) from a DH Circular referred to in the F1 contract. The usefulness of the guidance document as an aid to interpretation is less obvious than in the case of the Circulars; and the duty return rate is more a matter of how monitoring is conducted than of whether doctors' hours of duty and rest breaks are compliant with the New Deal. Nevertheless I cannot accept that the Defendant's method of calculation of the duty return rate, reflected in its answer to FAQ 20, is rational. As Mr Cavanagh put it in his skeleton argument on behalf of the Claimant:

> "It would be impossible for there to be a 100% Duty Return Rate, even if all of the junior doctors made a return for every duty period they worked in the monitoring period. Moreover, whilst the figure for 'expected duties' includes those duties which [the Trust] knows have not been worked due to leave, returns which have actually been made in respect of such leave are not deducted from the total number of 'expected returns'. The doctors are therefore effectively penalised for not returning data when they are on leave when in fact they have done so. They are then further penalised because they cannot possibly return data for 'expected duty periods' created by unfilled rota slots of which are artificial and do not exist at all."

83. I therefore accept the Claimant's argument that the duty return rate should have been calculated using actual recorded data for each duty period during the monitoring round, as opposed to the expected data shown on the rota for each duty period during the monitoring round or any artificially produced data.

The inclusion of Dr Mohammed in MR2

84. Monitoring exercise MR2 was declared invalid because the Defendant calculated that the duty return rate was only 71.56%. It was a flawed exercise because Dr Mohammed was included when he should not have been. Had he been excluded from the calculation MR2 would have been declared valid.

85. As the judge recorded, the Defendant's witness Ms Atkins accepted that this had been a mistake. The judge found, as she was entitled to do, that the Defendant was acting in good faith and not trying to skew the results: there is an explicit finding to this effect in relation to Dr Clarke, but I read it as applying generally.

86. Simler J found that, even if the Defendant was required to exclude Dr Mohammed altogether, the logical consequence was that MR2 was rendered invalid by reason of the flawed basis on which it had been conducted. She found that performing a recalculation excluding Dr Mohammed after the event was not the only option open to the Defendant; it was entitled to conclude that MR2 was invalid and that re-monitoring was called for. If there had been a finding that the Trust were trying to skew the result I would disagree: the Trust were clearly under a duty to conduct the exercise in good faith. But on the judge's finding that the Trust were not trying to skew the result I agree with her that it was neither irrational nor a breach of contract for them to repeat the monitoring exercise as they did.

Conclusion

87. I would allow the appeal and set aside the order of the judge, save for the declaration she granted, namely that Paragraph 21(p) of the TCS provides a right to back-dated pay at a higher level if it is shown that the particular post belongs to a higher pay band as a result of a single valid monitoring round.

88. The Particulars of Claim sought a total of 20 declarations. On receipt of this judgment in draft counsel agreed which ones were necessary to give effect to this judgment. They are that:

    (1) The effect of paragraphs 21 and 22 of the Terms and Conditions of Service for NHS Medical and Dental Staff (England) 2002 (version 10) ("the TCS") is that where a post with a particular working pattern is correctly assessed to be at Band 3, the doctors working in that post are entitled to a Pay Band at Band 3 until such time as the post is correctly assessed to belong in a lower Pay Band;

    (2) The correct application of paragraph 21 of the TCS requires that pay bands are assessed by reference to a group of doctors working on the same rota, and not on an individual basis;

    (3) The proper interpretation and rational application of the Appellant's contract of employment required that the result of a monitoring round as regards whether rest targets for natural breaks have been met must be calculated using actual recorded data for each duty period worked during the monitoring round, as opposed to the expected data shown on the rota for each duty period during the monitoring round or any artificially produced data, save where a doctor has actually worked a duty period and has failed to submit a return for that duty period;

(4) The proper interpretation and rational application of the Appellant's contract of employment required that unless an employer sets rates which are higher than 75%, and unless the rates are deemed to be unrepresentative, a monitoring round will be valid where both:

(a) at least 75% of all doctors in training in each rota or shift participating in the monitoring round have returned some recorded data;

(b) data has been returned for at least 75% of the duty periods actually worked during the monitoring period (as opposed to duty periods expected to be worked based on the rota template) regardless of which doctors return the data ("the Duty Return Rate");

(5) The Monitoring Round conducted by the Respondent for the General Surgery F1 Rota between 8 and 22 July 2013 ("MR1") was a valid monitoring round;

(6) Had the Respondent complied with the requirement set out at (3) above in respect of the calculation of natural breaks compliance, MR1 would have been found to be in breach of the requirement to ensure at least 75% of natural breaks were taken and therefore assessed to be at Band 3;

(7) In relation to the Monitoring Round conducted by the Respondent for the General Surgery F1 Rota between 14 and 28 October 2013 ("MR2") the use of expected data as opposed to actual recorded data to calculate the Duty Return Rate was irrational and in breach of contract;

(8) Had the Respondent complied with the requirement set out at (4) above in respect of the calculation of the Duty Return Rate, MR2 would have been found to be valid and in in breach of the requirement to ensure at least 75% of natural breaks were taken and therefore assessed to be at Band 3;

(9) The Appellant and the Represented Class (that is to say the 20 other doctors undertaking postgraduate training who were also employed to work under the General Surgery F1 Rota in the August 2013 House) were entitled to be paid at Band 3 from their start dates in post to their end dates in post and the failure to pay Band 3 was irrational and in breach of contract.

89. I would order accordingly.

Lord Justice Simon:

90. I agree.

Lady Justice Nicola Davies:

91. I also agree.