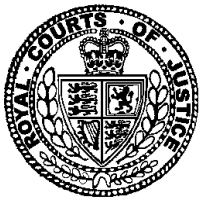

Neutral Citation Number: [2019] EWHC 2900 (Ch)

Case No: CH-2019-000056

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

ON APPEAL FROM

THE PENSIONS OMBUDSMAN

Royal Courts of Justice
7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date: 4 November 2019

Before :

THE HON MR JUSTICE TROWER

- -

Between :

CARL SANDERSON	**Appellant**
- and -	
NHS BUSINESS SERVICES AUTHORITY	**Respondent**

- -
- -

Simon Cheetham QC (instructed by **Capital Law**) for the **Appellant**
Patrick Halliday (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 16 October 2019

- -

Approved Judgment

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

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MR JUSTICE TROWER

Mr Justice Trower:

Introduction

1. This is an appeal from a determination made by the Pensions Ombudsman (the "Ombudsman") on 30 January 2019, by which he refused to uphold a complaint made by Mr Carl Sanderson (the "Appellant"). The complaint arose out of the decision by NHS Business Services Authority ("NHS BSA"), the administrator of the NHS Pension Scheme (the "Scheme"), to award the Appellant, whose wife Dr Helen Sanderson was a member of the Scheme, death benefits from deferred service rather than pensionable service.

2. The decision was made because NHS BSA considered that, at the time of her death, Dr Sanderson was not in *pensionable employment* as that phrase is used in the rules governing the Scheme, the National Health Service Pension Scheme Regulations 1995/300 (the "1995 Regulations"). It is only if a member dies *in pensionable employment* that regulations F1, G2 and G7 of the 1995 Regulations require the lump sums and widower's pensions in issue on this appeal to be paid. As NHS BSA decided that this was not the case, the Appellant was only awarded lump sum and pension benefits under regulations F3 and G4 of the 1995 Regulations on the basis that Dr Sanderson died in deferment. i.e. within 12 months of leaving pensionable employment.

3. Where a member dies in pensionable employment, the lump sum payable is twice the member's final year's pensionable pay and the principal death benefit is one half of the pension which would have been paid to the member if he or she had retired early through ill health. Where a member dies in deferment the lump sum is three times the yearly rate of the member's preserved pension and the principal death benefit is one half of the member's preserved pension. In practical terms this means that the benefits payable on Dr Sanderson's death were materially less generous than would otherwise have been the case.

4. Before making his complaint, the Appellant had challenged the decision of NHS BSA through the Scheme's internal dispute resolution procedure. When he was unsuccessful in that challenge, his complaint to the Ombudsman was first considered by a senior adjudicator (the "Adjudicator") who rejected it in an opinion dated 12 October 2018. The Appellant then referred this opinion to the Ombudsman for a final and binding decision, which led to the determination I have referred to above. The Appellant is entitled to appeal on a point of law to the High Court from the determination of the Ombudsman.

The Factual Background

5. Dr Sanderson was a medical practitioner. At the time of her death, Dr Sanderson was self-employed and practised as a tenant of Greenfields Medical Chambers Ltd ("Greenfields"), a company through which medical practices can book the services of locum GPs. Greenfields operates as a managed group of freelance GPs; it is not an agency.

6. Dr Sanderson had what was described in the argument as a typical ad hoc working pattern, agreeing in advance to work sessions at different GP practices. Sometimes Dr Sanderson was booked to work at the same practice for more than one day and

sometimes she would work at more than one practice on the same day. She worked at some of the practices on a regular basis; at others her attendance was less frequent.

7. Dr Sanderson died on 24 December 2014, a day on which she was not actually working. She had, however, been working on 15 out of the previous 23 days of December, including the day before her death. She was next booked to work on 8 January 2015, some 8 working days later. At the time of her death, she had a significant number of bookings for the period January to April 2015, most of which were with practices for which she had been working during the course of December, including the surgery at which she had been working on 23 December.

8. The terms and conditions on which Dr Sanderson was booked to work were the standard Greenfields Terms of Business, which provided amongst other things that "*Bookings should not be cancelled by either party except by mutual agreement, and in extreme circumstances*". Those terms did not otherwise impose on Dr Sanderson any contractual obligations to the practice by which she was booked from the time of the booking. Their focus was on the obligations to which the practice and the locum was each subject for the period in which the locum was actually working at the practice.

9. One of the terms by which the practice was bound was to issue the GP with a completed superannuation locum A form at the end of every daily/weekly session booked. The Adjudicator found that this was to enable the form to be submitted to the relevant authority for the pension contributions to be paid by the practice and deducted from the locum's pay.

10. Mr Cheetham QC for the Appellant submitted that, at the time of her death, Dr Sanderson was contractually committed to attend the practice for which she was booked on 8 January 2015. Although the only express basis on which cancellation charges might have been levied was where it was the practice as opposed to Dr Sanderson which cancelled the booking, I shall proceed on the basis that, if she had simply failed to attend on that day without good reason, she would have been in breach of contract. Such other express contractual obligations as were imposed on her only arose at and from the time of her attendance.

11. The Adjudicator decided that each session for which Dr Sanderson was booked was a unit used by Greenfields to determine the duration of a booking and did not mean that there was a separate contract in place in respect of each session. Thus, she may have agreed to work more than one session under a single contract at the time that the booking was made. The Adjudicator found that every time a booking was agreed and accepted by Dr Sanderson, she entered into a contract for services with the practice concerned.

The Scheme

12. Membership of the relevant section of the Scheme is open to all employees of a wide range of health service bodies called employer authorities. It is also now open to certain medical and dental practitioners who are not employees, but who work under contracts for services on a self-employed basis.

13. Parts F and G of the 1995 Regulations make provision for the benefits in issue in the present case. By regulations F1, G2 and G7 of the 1995 Regulations, lump sums and widower's pensions are payable if a member *dies in pensionable employment*.

14. A member will be in *pensionable employment* at the time of her death (so that the widower of a female member will be entitled to lump sums and widower's pensions under regulations F1, G2 and G7), if she is then in *NHS employment in respect of which she is contributing to the Scheme* (see the definition of pensionable employment in regulation A2 of the 1995 Regulations).

15. There are two parts to the definition of pensionable employment. As to the first, the member will have been in *NHS employment* at the time of her death if she was then *in employment with an employing authority*, a category of employer which includes a Local Health Board and an NHS Commissioning Board.

16. Dr Sanderson was not an employee. She was self-employed, and on that ground alone was not in *NHS employment* at the time of her death. However, where medical practitioners are or have been *locum practitioners*, a category of health service professional who will always be self-employed, membership of the Scheme is now open to them and the 1995 Regulations (including regulations F1, G2 and G7) are applied subject to the modifications contained in Schedule 2. These modifications were introduced by the National Health Service Pension Scheme (Amendment) Regulations 2002/561 (the "2002 Regulations")

17. For these purposes, the expression *locum practitioner* has the meaning given in paragraph 1 of Schedule 2 to Regulations. It is defined to mean a registered medical practitioner whose name is included in a medical performers list, *and who is engaged, otherwise than in pursuance of a commercial arrangement with an agent, under a contract for services by… a GMS practice… a PMS practice… to deputise or assist temporarily in the provision of services pursuant to an NHS standard contract*…"

18. The way that this definition is drafted means that a registered medical practitioner will not be a locum practitioner as defined merely because that is the way that she is accustomed to conduct her practice. She will only be a locum practitioner as defined while *engaged* in the manner described in the definition.

19. The application of the 1995 Regulations to locum practitioners in their modified form is achieved as follows. Registered medical practitioners who are locum practitioners are a subset of the more general group called *practitioners* as defined in the 1995 Regulations. Regulation R1(1) provides that, even though they are not employees, the 1995 Regulations are to be applied to members who are or have been practitioners as if they were officers employed by the relevant Local Health Board or NHS Commissioning Board, but with the modifications described in Schedule 2.

20. This deeming provision is further refined by the terms of Schedule 2 itself. Paragraph 2(1) of Schedule 2 applies the 1995 Regulations (subject also to the modifications described in Schedule 2) to members who are or have been locum practitioners as if they were officers employed by the listing Authority, defined as the Board which prepares and publishes the medical performers list that I have mentioned above.

21. It follows from the above that, although members who are locum practitioners will always be providing their services on a freelance or self-employed basis, the 1995 Regulations are applied to them as if they were employees. For these purposes the litmus test is not employment by one of the identified authorities, rather it is engagement under a contract for services with one of the identified practices which is then deemed to be employment by one of the identified authorities.

22. The second part of the definition of pensionable employment requires a link (*in respect of*) between the relevant NHS employment and the making of contributions to the Scheme by the member. In the case of a locum practitioner, who is not an NHS employee but who is a member to whom the 1995 Regulations as modified by Schedule 2 applies, the wording of regulation R(1) means that there must still be a link sufficient to satisfy the phrase *in respect of* between the making of contributions by the member and the engagement of the member under a relevant contract for services.

23. One provision of the 1995 Regulations to which my attention was specifically drawn is regulation C3 which is concerned with how qualifying service is calculated for the purpose of ascertaining entitlement to benefits where a member leaves and subsequently returns to pensionable employment.

24. In particular regulation C3(4A) is concerned with the situation in which a member employed on a casual basis ceases to pay contributions because of a break in pensionable employment not exceeding three months, but re-enters pensionable employment on the same basis after the break. In that situation he or she is treated as being in qualifying service during the break and is not required to re-join the Scheme when re-entering pensionable employment. However, if such a member were to die during that break, they would not be entitled to death in service benefits because they would not at the time of death be in *pensionable employment.*

25. The relevant modification in relation to locum practitioners is made by paragraph 9A of Schedule 2, which governs the status and rights of members during any period of up to three months in which they no longer fulfil the requirements of being a locum practitioner. It replaces Regulation C3(4A) with the following specific provision:

> *Paragraph (4A) of regulation C3 does not apply and this paragraph applies instead where a locum practitioner ceases to be engaged as such a practitioner and so ceases to be treated as being in pensionable employment and is re-engaged as such a practitioner before the expiry of a period not exceeding three months from the day on which he so ceases.*
>
> *For the purposes of these Regulations -*
>
> *(a) he is treated as continuing to be in qualifying service during the period whilst he is not so engaged and as not being required to re-join this Section of the scheme at the time when he becomes so re-engaged, but*
>
> *(b) that period does not count as practitioner service (or as a period in pensionable employment).*

26. The phrases *"engaged as such a practitioner"* and "*so engaged"* refer back to the engagement of a locum practitioner under a contract for services of the type described

in the definition of locum practitioner. This modification therefore makes clear that, where locum practitioners cease to be engaged under such a contract for services, they also cease to be treated as being in pensionable employment for the period during which they are not so engaged.

The Decision of the Ombudsman

27. The Ombudsman agreed with the Adjudicator's opinion that a member of the Scheme would only be in the *pensionable employment* contemplated by the deeming effect of Schedule 2 on days he or she actually worked under a contract for services, because it was only then that such a member would be *engaged … under* such a contract as those words are used in the definition of locum practitioner.

28. It is not in issue that Dr Sanderson satisfied the requirements of the definition of locum practitioner for the purposes of the 1995 Regulations while she was actually working at the practices I have referred to above. However, the Ombudsman concluded that, because at the time of her death Dr Sanderson was not actually working under a contract for services of the type described in the definition of locum practitioner, she was not then *engaged as* such a practitioner within the meaning of paragraph 9A of Schedule 2. He decided that this therefore confirmed that she was not then in *pensionable employment*, as that phrase is applied to self-employed locum practitioners by Schedule 2 to the 1995 Regulations.

29. He concluded that the Adjudicator had been correct to decide that *pensionable employment* refers to the days on which a locum practitioner actually works, as opposed to being tied more precisely to the time period in any day on which he or she was actually working. To that extent he concluded that it extended to a broader period than the period for which NHS BSA contended (as illustrated in the LP Fact Sheet referred to below), although that did not assist the Appellant because Dr Sanderson died the day after she had last been actually working.

30. He also agreed with the Adjudicator's view that the purpose of paragraph 9A of Schedule 2 was to prevent locum practitioners from having to leave the Scheme at the end of each period of work and then re-join. Given that locum practitioners are self-employed, he did not consider that the purpose of paragraph 9A was to provide continuing life assurance cover between periods of work.

31. In determining this question, the Ombudsman took into account the fact that Dr Sanderson was not actually contributing to the Scheme at the time of her death. He did not consider that she could be said to have been engaged under a contract for services so as to be a locum practitioner as defined by the 1995 Regulations at a time at which she was not making contributions to the Scheme. As the Adjudicator had explained *"It would be unusual for any pension scheme to which members were required to contribute, to provide death in service cover for a member during periods in respect of which the member made no contributions to the Scheme."*

32. The Ombudsman also placed some weight on the fact that there is a balance of benefit and disadvantage in being self-employed: the benefit of greater flexibility (and sometimes better hourly rates) has to be set against the disadvantage of a lack of paid holiday and sickness cover. In the light of those considerations, he did not find it

illogical or irrational that a member working as a locum should only benefit from death in service cover where they die during a period in which they are actually working.

33. It follows from the structure of the Scheme that the argument on this appeal revolved around the meaning of the word *engaged*. When Dr Sanderson was engaged (whatever that may mean) under a contract for services of the type described in the definition of locum practitioner she will have been in pensionable employment. When she was not engaged under such a contract she was not.

The Submissions of the Appellant

34. It is the Appellant's case that the Ombudsman's conclusion was wrong in law. He argues that the period for which Dr Sanderson was engaged under a contract for services spanned the period between the session that she worked on 23 December 2014 and the session that she worked on 8 January 2015. Formulating this submission by reference to the wording of paragraph 9A of Schedule 2, the period between 23 December and 8 January was not a period whilst Dr Sanderson was not so engaged within the meaning of that paragraph.

35. The Appellant's original skeleton advanced the simple argument that, at the time of her death, Dr Sanderson was booked to work on 8 January and on a number of days thereafter, and was therefore committed or obliged to work in the future under a contract for services by which she was then bound. The existence of a significant number of bookings at the time of her death meant that she was then engaged under relevant contracts for service. She was contractually committed to provide that service and that commitment satisfied the ordinary meaning of the word *engage*.

36. Mr Cheetham readily accepted, however, that there were difficulties in this argument when put in such stark terms, because it would be wrong to treat a locum with a single booking several months hence as being engaged now under a contract for services for the purposes of the 1995 Regulations. However, he submitted that questions of fact and degree must come into the analysis, and in the present case it is no distortion to say that Dr Sanderson's working pattern was such that she was engaged under a contract for services not just throughout the period in which she was actually working, but during the period of the Christmas and New Year gap in which she was not.

37. He submitted that where it is possible to see a regular pattern of work with 15 weekday working sessions in December and 14 weekday working sessions in January with a Christmas / New Year gap, it is legitimate to conclude that the period of engagement covers the whole period of two months including the holiday gap. In particular, he submitted that if a working day can include two sessions, and the gap between those two sessions is treated as part of the engagement, why shouldn't the same apply to (e.g.) weekends, particularly where a locum regularly works on weekdays only? What matters, he submitted was whether it could be said, looking at all the circumstances, that the locum was currently engaged at the relevant time. He said that would be less easy to say if the gap was longer than the gap in this case, or for a different purpose.

38. He points to the fact that "*engaged ... by*" replaces in the context of self-employment the phrase "*employed by*". This emphasises that the focus is on an agreement which (as he put it in his skeleton argument) "*does no more than provide the particular contractual arrangements for self-employed practitioners*." The essence of his

submission was that the word *engaged* is directed at the contract by which the practitioner is bound rather than the carrying out of work under it.

39. The Appellant also argued that the Ombudsman's conclusion was wrong, because, if the draftsman had intended to provide that a locum practitioner was only to be treated as such for the purposes of the 1995 Regulations when working, he would have used the phrase "*working under*" or "*performing*" rather than "*engaged under*".

40. He also contended that there were arbitrary results which flowed from the focus on whether or not the member was actually working, which were unfair and illogical. Thus, he pointed out that, if the member died on the way out of the surgery at 5.05pm on a Friday, having worked there all week, he or she would miss out on the relevant death in service benefits, but that would not be the case if they died after work on the Wednesday evening. He submitted that this seemed to be wrong in principle

41. As to the relevance of the fact that Dr Sanderson was not making contributions at the time (or on the day) of her death, the Appellant said that this was irrelevant because the obligation to contribute only arose if she was then in pensionable employment. It did not follow that merely because she did not make contributions on a particular date she was not then in pensionable employment.

42. The Appellant also relies on the fact that the payment of contributions by locums is quantified by reference to annual pay bands with deductions being made on a monthly basis. It follows that the mechanics for calculating and paying contributions adopt annual and monthly periods which are unrelated to the precise periods of time for which the locum is actually working. This is said to point against the focus on time actually worked adopted by the NHS BSA.

43. Mr Cheetham also submitted that the reliance placed by NHS BSA on cases such as *Quashie v. Stringfellow Restaurants Limited* [2013] IRLR 99, *Stephenson v Delphi Diesel Systems* [2003] ICR 471 and *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (as to which see further below) was misplaced. He contended that the legal principles which assist in determining when there is sufficient mutuality of obligation to found an employment contract do not assist in relation to the quite different question of whether the mutuality of obligation which subsisted between Dr Sanderson and the practices was sufficient to demonstrate that she was engaged under a contract for services at the time of her death.

The Submissions of NHS BSA

44. Mr Halliday for NHS BSA submitted that Dr Sanderson was only *engaged* as that word is used in the definition of locum practitioner and in paragraph 9A of Schedule 2, when she was actually working. He said that it cannot be correct that an obligation to provide services in the future means that a GP is engaged to provide such services now. It followed that a locum GP such as Dr Sanderson would only satisfy the requirements if she owed a current legal obligation to provide services under that contract at the relevant moment. If she did not, she would not then be so engaged.

45. In making that submission, Mr Halliday relied on the fact that the word *engaged* is as capable of meaning "*occupied*" as it is of meaning "*committed*" or "*obliged*". He also

contended that, merely because a member enters into a contract now to provide services in the future does not mean that he or she is now obliged to do anything.

46. Initially it had been said by NHS BSA that a locum member would be "*engaged*" throughout the days on which a locum was actually working under a relevant contract for services. By its Respondent's notice and skeleton argument, however, it contended that, if the Adjudicator was correct in holding that Dr Sanderson was a party to a single contract for multiple sessions, the engagement was only for the period of the relevant session.

47. This made clear that it was NHS BSA's primary argument that the period for which a member was "*engaged*" referred only to the actual period of time in which the locum was working. Therefore, that period would only start at the time she started to work and would finish at the end of the working day. NHS BSA submitted that this was obviously the case where the locum was subject to separate contracts for service for successive sessions, more particularly where those successive sessions were worked on separate days. During the course of his submissions Mr Halliday made clear that this approach also meant that a locum would not be *engaged* under a contract services during lunch breaks and travelling time between sessions booked at different practices.

48. NHS BSA's secondary argument was reflected in its LP Fact Sheet, where it said that, if a locum was scheduled to work at a surgery for a whole week and died on the Wednesday (whether or not during working hours), she would be treated as in pensionable employment and would therefore qualify for death in services benefits. It was said that this would not be the case if the locum member died before 9am on the Monday or after 6pm on the Friday. To that extent the question of whether or not a locum was currently engaged as such was a matter of fact and degree. Looking at the position in the round, could it be said that at the time of their death, the locum member was currently engaged in the provision of services under a relevant contract for services?

49. Mr Halliday advanced this secondary argument without much enthusiasm because he recognised that there would be cases in which it would be difficult to apply on the facts. In particular, factors such as the regularity of the individual's working pattern and the length of the gap would come into play. However, in making its secondary argument, NHS BSA submitted that, even if it was correct, it ruled out success for the Appellant, because Dr Sanderson was not in the middle of an engagement at the time of her death. Although she died only one day after she had last worked, her working pattern was sporadic, she worked for a number of different practices and she died during a gap of more than two weeks before her next booked session.

50. Mr Halliday submitted that this did not mean that an employee working under a contract of employment was only in pensionable employment while actually working. He said that a salaried employment is different; it is continuous and the employee's duties to their employer are constant irrespective of whether or not he or she is actually working. Likewise, the mutual obligations owed by the employer the other way (such as payment of remuneration) are not or may not be referable only to the period in which work is actually carried out.

51. NHS BSA also relied on the fact that the definition of pensionable employment referred to NHS employment *in respect of which* the member contributes to the Scheme. Mr

Halliday submitted that days not worked will not be days in respect of which the member contributes to the Scheme which shows that active work is required for the definition of engagement to apply. The thrust of this part of the argument was that a locum practitioner only contributes to the Scheme in respect of hours actually worked. It therefore follows that the non-working days cannot be days on which members are deemed to be in NHS employment *in respect of which* the member contributes to the Scheme.

52. As I have already foreshadowed, it was also submitted by NHS BSA that some assistance was to be derived from the employment law cases on whether a casual worker is subject to an umbrella or global contract of employment. For a contract of employment to subsist in such circumstances there must be an irreducible minimum of mutual obligations during the breaks in actual work i.e. between the separate engagements: *Clark v Oxfordshire Health Authority* [1998] IRLR 125 at paragraph 41. It was said by NHS BSA that, in the present case, there is no basis for inferring an irreducible minimum of mutual obligations between Dr Sanderson and each practice during the periods between sessions.

53. It was said that, even if there was a single contract covering multiple sessions, there were insufficient mutual obligations to mean that Dr Sanderson was engaged (within the meaning of Schedule 2 to the 1995 Regulations) during those periods in which she was not actually working. As I understood the submission, it was said that it would be wrong, or in any event unprincipled, to treat a self-employed locum as if he or she was in pensionable employment for the purposes of the 1995 Regulations if a casual worker would not in a like situation be treated as then party to an umbrella or global contract of employment.

54. I should also add that NHS BSA referred to some preparatory materials in the form of communications between the British Medical Association and the Department of Health, which were said to reflect a common understanding that the 2002 Regulations would not introduce in service death benefits for GP locums unless they died in contributory service, nor for periods when locums were between jobs or during gaps between posts. I am very doubtful that these materials are an admissible aid to construction, but even if they are, I agree with Mr Cheetham that they do not assist on the points I am required to decide.

Discussion and Conclusions

55. In my view, Mr Cheetham was right to accept that a locum is not engaged under a relevant contract for services simply because he or she has one or more bookings for sessions at some stage in the future. Where the word *engage* is used in Schedule 2 to the 1995 Regulations, it means more than just being under a contractual obligation to do something hereafter.

56. The reason for this is partly the practical ramifications I have referred to above, which point to it being outside the legislative intent. It is also because the structure of the unmodified 1995 Regulations provides for the relevant death in service benefits to flow from the inherent nature of the current relationship between the member and the person for whom they are working. The existence and terms of the contract under which that relationship is constituted are only relevant to the extent that they are the source from which the consequence (i.e. employment) flows.

57. Put another way, the original entitlement to death in service benefit arises from the status of a member at a specific moment in time, i.e. whether the member is or is not in pensionable employment at the time of death. Pensionable employment is a particular current state of affairs under and by reason of which employer and employee owe each other current mutual obligations. That current status of a member as an employee at the time of death is the way in which the draftsman identified the determining factor for entitlement, without regard to the terms or duration of the contract under which that status arose.

58. When the 2002 Regulations introduced death in service benefits for locums, the draftsman adopted an approach which was still based on the current status of a category of Scheme member but sought to apply it to a member who was not in any form of employment. This is apparent from the use of the deeming provisions that I have already described (regulations R1 and paragraph 2(1) of Schedule 2) which treat self-employment as if it were employment for the specific purpose of conferring pension entitlements. This drafting technique demonstrates an intent to replicate so far as possible the current status of the member, by identifying the equivalent current characteristics required of a member to enable them to be deemed to be an officer employed by the relevant authority.

59. The question then is what are the required characteristics of a self-employed member that are sufficient to enable him or her to be treated as a locum practitioner in deemed pensionable employment? To what extent does this include the current existence of an obligation to do something in the future or indeed the residual consequences of something done in the past, or is it simply limited to the current existence of an obligation to do something now, which is the essence of the way in which the case is put by NHS BSA?

60. In my view the starting point is the drafting of the definition of "*locum practitioner*". The engagement referred to is expressed in the present tense "*who is engaged*" and to that extent the drafting confirms an intention that the relevant characteristics should relate to a current state of affairs intended to be the equivalent of current employment for an employee.

61. The reference in the definition to a particular form of contract for services identifies the type of relationship which must exist between locum and practice before the required status can be achieved but does not seem to me to go further than that. The contract for services is treated as the source of the engagement in the same way that the contract of employment is treated as the source of the employment.

62. In the context of employment, employees are under continuing current obligations (such as fidelity and limitations on working for another employer) which are inherent in the relationship. There are continuing current restrictions on what they can and cannot do without regard to the question of whether they are engaged in any particular form of work or activity at any particular point in time. That is all part of the status of being in employment with an employing authority in consideration for which employees are remunerated and in respect of which they make their contributions to the Scheme.

63. In the context of self-employment, however, it is much more likely that the self-employed contractor will only come under current obligations to the person for whom

he or she is working during the course of or as part of the actual process of providing the service. That will not always be the case, however because much will depend on the nature of the contract itself, and there may be some contracts for services in which there are express or implied restrictions on the present ability of the contractor to make free use of their time so as to ensure that the services they provide to the person by whom they are engaged are properly carried out. Where that is the case, different considerations may apply, but the underlying point is that the existence of current obligations is at the root of the deemed pensionable employment constituted by the type of engagement with which these proceedings are concerned.

64. The existence of a current obligation to do something now is to be contrasted with an undertaking now to do something in the future. In the same way that an agreement to become an employee at some stage in the future will not be employment with an employing authority, so agreement to do something in the future under a contract for services will not in my view be engagement under that contract.

65. The deeming provisions also have the consequence that the circumstances in which employment would itself be *pensionable employment* are relevant to an assessment of whether there is a sufficient engagement under a contract for services for those same pensionable employment provisions to apply to a self-employed locum. One of those circumstances is that it must be employment *in respect of which* the member contributes to the Scheme. It seems to me that it follows from this that there ought only to be an engagement capable of being treated as if it were pensionable employment so as to give rise to an entitlement to death in service benefits, if whatever is said to constitute that engagement is something which can be linked in an appropriate manner to Scheme contributions.

66. Applying those principles, I consider that a locum GP will be engaged under a contract for services so as to be a *locum practitioner* during any period in which it can be said that he or she is bound by an obligation to perform service now under a contract for services of the required type. What amounts to being bound to perform services now is the critical question.

67. This will not be difficult to identify where the locum GP is working in the sense that he or she is seeing patients, prescribing medicines, writing reports or carrying out other activities within the normal course of a GP's duties.

68. It seems to me that the period of deemed pensionable employment also extends to any time at which a locum GP is engaged in any form of activity which is incidental or ancillary to their obligations under the relevant contract for services in the sense that they would not be doing that thing if they were not bound by duties to provide the relevant service. It also extends to any period of time during which a locum is not doing something that he or she would otherwise be doing because they are bound by a relevant contract for services. Acts or even omissions of such a character ought properly to be regarded as part of the locum's engagement in providing services under that contract.

69. In applying that test it is necessary to identify some link between the obligation or restriction on the one hand and the making of a contribution to the Scheme on the other. However, I do not see why the link should not be established during periods in which the member is doing things that they would not be doing were it not for the performance of their duties under the relevant contract for services, even though the quantification

of the remuneration is by reference to the hours in actual rather than ancillary performance. The reason for this is that all elements of performance of those duties are linked to the practice's obligation to remunerate, and that remuneration is the source of the obligation to contribute to the Scheme.

70. Put another way, the phrase *in respect of*, where it links the status of the member to his or her contribution to the Scheme, simply contemplates that both the direct service in which the locum GP is engaged and the activities necessary to enable the locum to provide those services can properly be regarded as the totality of the consideration for the remuneration on which contributions are payable.

71. By way of illustration of this approach, travelling between home and a practice and travelling between practices where sessions have been booked at different locations are activities which are capable of falling within a period of engagement. The travel is likely to have been a necessary part of that which the member was required to do in order to enable the services to be provided. Likewise, lunch and other breaks will also be part of the engagement to the extent that they are capable of being treated as part and parcel of the processes by which a locum GP is enabled properly to perform their duties under the relevant contract.

72. There are a number of other circumstances in which engagement under a contract for services may be more difficult to establish and which, because they do not arise on the facts of the present case, it would be wrong for me to express a concluded view. Thus, it may be the case that a single period of several days in which the locum had committed to work full time at a single practice would constitute a single continuous engagement. If that member is indeed committed to work all of their regular working hours on a single contract, such that he or she could not devote time to other work during that period, it may well be that the whole duration of the contract would constitute a single uninterrupted period of engagement. It would need to have been established that the agreement with the practice meant that there was never a cessation and re-engagement within the meaning of paragraph 9A of schedule 2.

73. The same might also be said if a locum works full time at different practices such that there is never a break between contracts and never a cessation of engagement under one contract or the other. This would require it to be said that the member was engaged on one or other of the contracts without there being a cessation for any period during which a locum is not working in the hours in which they normally hold themselves out for work. In my view that is a necessary but not necessarily sufficient condition for there not to be a break of the type contemplated by paragraph 9A of Schedule 2.

74. However, in the present case, I do not consider that it is possible to say that Dr Sanderson was still engaged under a contract for services at the time of her death. The break was for more than two weeks, albeit a period in which there were only 8 working days, and there is no finding that she was occupied at that time under any contract for services whether by doing anything that amounted to direct performance of her duties or by carrying out activities that were in any way ancillary to those duties.

75. As the critical question will always be to identify the relevant service which the member is contracted to provide and then to ask whether or not at the relevant time he or she was doing something to perform or assist in performing that service I do not consider that it is possible to characterise what was doubtless a well-earned rest for Dr Sanderson

from her labours as anything other than a break from engagement under the contracts for services to which she had been and was still committed.

76. If a pause in work had been required to enable Dr Sanderson better to perform her duties, it may have been possible to say that this rendered the pause part of the engagement. But I think that this would require at least clear evidence that this was the purpose of the pause and even then, that may not be sufficient. There is nothing to indicate that in the present case. The inference can be drawn that Dr Sanderson was hoping to enjoy a well-earned break during the holiday season, but I do not consider that a break of that quality was part of any engagement, and there is no evidence which would justify a conclusion by me that it was.

77. In these circumstances, I propose to dismiss the appeal.