

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No S/4102962/17**

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**Held in Glasgow on 15 & 16 January 2018**

**Employment Judge: Mr C Lucas (sitting alone)**

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**Ms Margaret Paton**

**Claimant  
Represented by:  
Mr G F Bathgate -  
Solicitor**

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**Greater Glasgow Health Board**

**Respondent  
Represented by:  
Mr C Reeve -  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

30 The Judgment of the Employment Tribunal is in two parts, namely –

1. At no time during the two year period which ended with the date of presentation of the Claimant`s ET1 to the Central Office of Employment Tribunals in Scotland – (25 August 2017) – had the Respondent, as the Claimant`s employer throughout that period, made any deduction from the total amount of the wages which, net of PAYE tax and employee national insurance contributions, were properly payable by it to her on that occasion and the Claimant`s claim that, contrary to Section 13 of the Employment Rights Act 1996, it did so has failed and is dismissed.

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2. The Claimant`s otherwise-expressed claim that she is owed arrears of pay by the Respondent has failed and is dismissed.

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**E.T. Z4 (WR)**

## REASONS

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### Background

1. In a claim form ET1 presented to the Central Office of Employment Tribunals in Scotland on 25 August 2017 – (hereinafter, “*the ET1*”) – the Claimant named “*NHS Greater Glasgow & Clyde*” as the employer or the person or organisation she was claiming against and disclosed the address of NHS Greater Glasgow & Clyde as being Rowanbank Clinic, 133C Balornock Road, Glasgow.  
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- 15 2. The Claimant alleged in the ET1 that her employment had begun on 14 May 2007 and that as at the date of presentation of the ET1 to the Tribunal Office she was still employed by that organisation.
- 20 3. At Section 8 of the ET1 the Claimant alleged that she was owed arrears of pay by her employer but within a Paper-Apart statement of claim annexed to – (and deemed by the Tribunal to form part of) - the ET1 she referred to her employer`s failure to pay her a “*Recruitment and Retention Premium at the stipulated level of £1,500 per annum*”, asserted that she was “*entitled to a payment of the Annual Premium of £1,500*”, contended that “*the non-payment of the said Premium is an unlawful deduction of wages contrary to Section 13 of the Employment Rights Act 1996*”, acknowledged that in terms of the Deduction from Wages (Limitation) Regulations she was “*restricted in the period over which she can claim that an unlawful deduction has taken place to a period of 2 years ending with the date of the presentation of this application*”, stated that “*she therefore seeks a declaration that she has suffered an unlawful deduction of wages over a period of 2 years on the basis that the Retention and Recruitment Premium is payable on a monthly basis*”  
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and explained that *“the amount that she seeks an Order for is therefore restricted to £3,000”*.

4. In a form ET3 received by the Employment Tribunal on 12 October 2017 –  
5 (hereinafter, “the ET3”) – *“Greater Glasgow Health Board”* with an address at JB Russell House, Gartnavel Royal Hospital, 1055 Great Western Road, Glasgow was identified as being the Organisation responding to the Claimant`s claim as set out in the ET1.
- 10 5. The Claimant now accepts that as at the date of presentation of the ET1 and as at the dates of the scheduled Final Hearing of her claim her employer was – (and still is) - Greater Glasgow Health Board, i.e. the Respondent.
- 15 6. The Respondent accepted within a paper apart headed *“Grounds of Resistance”* attached to – (and deemed by the Tribunal to form part of) - the ET3 that the Claimant`s employment had begun on 14 May 2007 and was still continuing.
- 20 7. It was made clear within the ET3 that the Respondent resisted the Claimant`s claim as set out in the ET1. Specifically, the ET3 contained a statement that, *“it is denied that the Respondent made any unlawful deduction from the Claimant`s wages, as alleged or at all”* and the explanation that the Recruitment and Retention Premium referred to by the Claimant in the ET1 – (indeed, recruitment and retention premia generally applicable to staff  
25 working in a *“Medium Secure Unit”* operated by the Respondent) - *“only applied to staff who work in designated Regional Medium Secure Units”* and that because the Claimant did not work *“within the Medium Secure Unit”* she was *“not eligible for the RRP payment flat rate”* which she had claimed in the ET1 she was entitled to receive.  
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8. The ET3 contained a submission that the Claimant`s claims as expressed within the ET1 should be dismissed.

9. A Final Hearing of the Claimant`s claim was scheduled to take place – (and did take place) - at Glasgow on 15 and 16 January 2018.

5 10. On 15 January 2018, at commencement of the Final hearing – (at a stage when preliminary discussions were taking place among the parties` respective representatives and the Tribunal but prior to any evidence being heard) – the Tribunal noted that notwithstanding that the actual amount that the Claimant might have been entitled to receive as a Recruitment and Retention Premium in respect of the two year period ended on 25 August 10 2017 might have been more than the £3,000 claimed by her in the ET1 there was agreement between the parties` respective representatives that the amount sought by the Claimant as compensation would be restricted to that £3,000 round-figure.

15 11. During the course of his making submissions to the Tribunal at a stage after all evidence had been heard the Claimant`s representative invited the Tribunal to take into account the provisions of Section 13 of the Employment Rights Act 1996 and to take guidance from the judgments issued in the cases of:-

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- Arnold -v- Britton & Others
- @Sipp Pension Trustees -v- Insight Travel Service Limited

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The Respondent`s representative invited the Tribunal to take into account that same law and those cases but also to consider the terms of the Contract (Scotland) Act 1997 and to take guidance from the judgments issued in the cases of:-

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- Bank of Credit & Commerce International SA (in compulsory liquidation) -v- Ali
- Chartbrook -v- Persimmon Homes

- Investors Compensation Scheme Limited -v- West Bromwich Building Society
- Reardon Smith Line Limited -v- Yngvar Hansen-Tangen
- Rainy Sky SA -v- Kookmin Bank
- The Fife Council -v- Royal & Sun Alliance Insurance Plc

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10 The Tribunal did so.

### **Findings in Fact**

12. During the pre-evidence preliminary discussions on 15 January there was  
15 consensus among the parties respective representatives and the Tribunal  
that the outcome of the Claimant`s claim would rely heavily on interpretation  
of law. Indeed, when discussing what witnesses would give evidence in  
support of the Claimant`s claim and explaining that the only witness to be  
called from the Claimant`s side would be the Claimant herself the Claimant`s  
20 representative suggested that the Claimant`s claim was “*all about  
interpretation of contract*”. However, despite such acknowledgment that  
determination of this case would require the Tribunal to focus on law rather  
than disputed – (or even non-disputed) – evidence, approximately one-and-  
a-half days of the Final Hearing was taken up in hearing evidence which, in  
25 the view of the Tribunal, could have been agreed in advance of the Final  
Hearing by the preparation of an agreed statement of facts on which the  
parties respective arguments in law might have been based.

13. It is partly because a great deal of the evidence that it heard was either not  
30 disputed or not relevant to the legal basis of the Claimant`s claim that when  
setting out these Findings in Fact the Tribunal has preferred brevity. A  
second reason for the Tribunal preferring not to set out these Findings in Fact

5 in unnecessary detail is that it has recognised that the premises and  
procedures referred to in evidence relate to one of Scotland's Secure Units,  
a Medium Secure Unit operated by Greater Glasgow Health Board to provide  
care for patients detained in hospital on the grounds of safety and security,  
and that it may not be in the interests of such patients for otherwise  
confidential details of Secure Unit premises and of procedures adopted by  
the Respondent within such Secure Unit premises – (or, in a narrower  
context, within the complex which contained the premise at which the  
Claimant worked) - to be recorded in this Judgment, a Judgment which, like  
10 any other Employment Tribunal Judgment, will become a matter of public  
record and readily available to anyone interested in reading it on the  
appropriate website.

14. That is not to say that evidence is in any way being redacted but simply  
15 records the reasons why the Tribunal has felt it unnecessary and  
inappropriate to record, as Findings in Fact, matters in respect of which there  
really was no dispute between the parties at the Final Hearing of the  
Claimant's claim and the significance of which was, at best, tangential  
evidence which was not directly connected with the determination to be  
20 reached in respect of the Claimant's claim as set out in the ET1.

15. Subject to that explanation, the Tribunal records that it found the following  
facts, all relevant to the Claimant's claim as set out in the ET1, to be admitted  
or proved:-

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16. The Respondent is an NHS Health Board which works within the framework  
of legislation relating to mental health and the provision of mental health  
facilities and services across Greater Glasgow and Clyde. In that context, it  
works in conjunction with and in accordance with the requirements of the  
30 Scottish Government.

17. The Scottish Government is responsible for the provision of high, medium  
and low security in-patient facilities in Scotland. A high-security facility is

provided at the State Hospital at Carstairs. Low-security in-patient facilities are provided at Leverndale and Dykebar Hospitals.

- 5 18. The complex at which the Claimant works, Rowanbank Clinic in Glasgow, contains a medium-security unit which cares for patients with mental illnesses who require to be treated in a more secure environment than a general or low-security mental health hospital can provide but who do not require to be cared for within a high-security facility.
- 10 19. The Claimant accepts that a medium-security unit – (otherwise, “*Medium Secure Unit*”) - is a place where patients are detained and subjected to a regime of medium security for such time as is appropriate to enable treatment that is necessary to ensure that all concerned, including the patient, are safe when the patient is released from hospital and returned to the community. She accepts, too, that such detention is conducted in the context of the legal framework of the Mental Health (Scotland) Act and other relevant legislation.
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20. Rowanbank Clinic is a hospital operated by the Respondent as an NHS Health Board. It is not a prison. Its purpose is to provide a service for patients in the West of Scotland, primarily patients from the Greater Glasgow and Clyde areas. Some, but not all, of those patients will have committed an offence and have been admitted directly from Court or transferred from Prison for mental health assessment or treatment. Others will be admitted directly from the community.
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21. As at the date of presentation of the ET1 – (25 August 2017) – and still as at the close of the Final Hearing of her claim the Claimant was employed by the Respondent as a medical secretary within the Respondent’s Forensic Directorate. As such, she provides secretarial services at the Rowanbank Clinic complex to the clinical staff who examine and treat patients detained within the Medium Secure Unit which is part of that hospital complex.
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22. The Claimant's work as a medical secretary providing secretarial services at the Rowanbank Clinic complex to the clinical staff who examine and treat patients detained within the Medium Secure Unit which is part of that hospital complex does not require her to have any direct, let alone interactive, contact with patients who are detained within the Medium Secure Unit there – (that Medium Secure Unit being hereinafter referred to as "*the Medium Secure Unit*").
23. The Rowanbank Clinic complex comprises buildings laid out generally in a figure-of-eight configuration. It incorporates internal landscaped courtyards and external landscaped areas, the latter including car parking and vehicle-loading facilities. In close proximity to the Rowanbank Clinic complex are houses, public roads and non-hospital buildings.
24. There is little or no security perimeter fencing around the Rowanbank Clinic complex but a section of high-security fencing runs diagonally across an internal courtyard area. At one extremity of that high-security fence is an internal corner of an L-shaped building used by the Respondent as an administration building. At the other extremity that high-security fence adjoins or is linked to the other internal corner of that same L-shaped administration building.
25. As a medical secretary employed by the Respondent to work within its Forensic Directorate at the Rowanbank Clinic complex the Claimant works within that L-shaped administration building.
26. The purpose of the section of high-security fencing is to prevent patients detained within the Medium Secure Unit which is part of the Rowanbank Clinic complex obtaining access to the internal walls and windows of the administration building. As such, that high-security fence forms part of the perimeter of the Medium Secure Unit which is part of the Rowanbank Clinic complex.



27. Other buildings within the figure-of-eight configuration of buildings at the Rowanbank Clinic complex contain wards where patients are assessed and treated when detained within the Medium Secure Unit which is part of that complex.
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28. Those wards and a community centre are part the Medium Secure Unit within the Rowanbank Clinic complex.
29. A “*reception building*” services the Medium Secure Unit within the Rowanbank Clinic complex and the administration building where the Claimant works. Effectively, that reception building has two parts. One part, a reception area as such, is “*public*”. The other part is the security-controlled access to the Medium Security Unit. The two parts are linked by what all witnesses in this case have referred to as “*Airport Security*” or as “*airport-type security*”.
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30. There is no means of access to the Medium Security Unit without passing through the high-level-of-security-checking Airport Security link.
31. The Claimant accepts that although the “*public*” part of the reception building which forms part of the Rowanbank Clinic complex is not subject to conditions of medium security the areas of that complex which are subject to conditions of medium security are accessed from that public part of the reception building but only by means of passing from that public part though the high-security-check Airport Security section and into the Medium Security Unit.
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32. The administration building where the Claimant works, although part of an overall complex of buildings laid out in a figure-of-eight configuration, is not directly accessible from any of the wards or from either of the internal courtyards or even from the reception building.
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33. The Claimant accepts that for her, as a staff member working in the administration building which forms part of the Rowanbank Clinic complex, to

get into a clinical ward or even to one of the enclosed internal courtyards at the Rowanbank Clinic complex she would have to go through the high-level system of security checking which forms the barrier between the public part of the reception building and the clinical areas beyond/behind the reception area itself. She accepts, too, that if she tried to do so without going through the high-level of security which prevails there she would be stopped by security staff and prevented from doing so.

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10 34. The Claimant accepts that although it is, in generic terms, “secure” the administration building is not equipped with – (and staff working in the administration building are not subjected to or protected by) - the high level of “Medium Secure Unit” measures which are applied by the Respondent to some other parts of the Rowanbank Clinic complex.

15 35. Specifically, the Claimant accepts that the security which exists at and within the administration building where she works “*is not the same as on the wards*”. She accepts that the administration building where she works includes built-in security features and devices but those features and devices, although providing security to staff working within the administration building, are not the same as the higher-level security features and devices which exist and apply to the wards, to the community centre, to the non-public part of the reception building and to the internal courtyard areas within the overall figure-of-eight complex. *(Note: The Tribunal considers that it is not necessary and, for previously-stated reasons, not appropriate to make further reference within this Findings in Fact section of this Judgment to the security features, devices and controls which exist and operate at the Rowanbank Clinic complex).*

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30 36. The West of Scotland Medium Secure Unit operated by the Respondent to care for patients with mental illnesses who require to be treated in a more secure environment than a general or low-security mental health hospital can provide but who do not require to be cared for within a high-security facility forms part of and is located within the Rowanbank Clinic complex.

37. The terms and conditions of the Claimant`s employment with the Respondent are prescribed by an NHS Scotland “*Agenda for Change*” Agreement, the Claimant effectively being employed on National NHS “*Agenda for Change*” terms and conditions.
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38. The Agenda for Change terms and conditions of employment applied to the Claimant are national, collectively-agreed, terms of employment applicable to all NHS staff other than doctors and dentists.
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39. Changes to Agenda for Change terms and conditions are made following negotiations between staff-side and management-side members of the Scottish terms and conditions Committee – (an entity otherwise known and referred to as “*STAC*”).
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40. STAC exists as “a partnership organisation” *whose remit it is*“ to collectively negotiate terms and conditions issues for NHS Scotland staff and “*is made up of an NHS employer side and a trades union and professional representative organisation side, who each have their own secretariat*”. All members of staff working under the Agenda for Change procedures obtain the “*benefit*” of agreements reached on their behalf by STAC, these staff members including members of staff who, like the Claimant at the time, were not members of any recognised trade union.
- 20
41. Meetings of STAC are facilitated by the Scottish Government Health Directorates who also provide an overarching administrative secretariat function.
- 25
42. Regardless of which organisation NHS Board staff members are actually employed by, agreements on changes to terms and conditions reached at STAC meetings and recommended by STAC to Scottish Government are issued as “*circulars*” by the Scottish Government.
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43. The Claimant accepts that her right to negotiate the terms and conditions of her employment was subrogated to STAC; indeed, that STAC's empowerment to negotiate terms and conditions of employment to apply to her was and is still the same empowerment that applies to all "Agenda for Change" staff including all members of the medical secretariat staff who work within the Respondent's administration building at the Rowanbank Clinic complex. She accepts that such empowerment is afforded to STAC whether or not any such member of staff was a member of a trade union at the time of any negotiation relating to terms and conditions of employment.

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44. The Claimant accepts that the members of STAC would be in a better position than she was to know whether the administration building which forms part of the Rowanbank Clinic complex was or was not part of the designated Medium Secure Unit for the West of Scotland.

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45. In August 2005 NHS Scotland published an "Agenda for Change" policy on recruitment and retention premia which had, as its foundation, the National Agenda for Change Terms and Conditions of Service Handbook.

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46. As was recorded in a letter issued to the Respondent's staff members on 25 October 2005 that policy envisaged "..... a facility to pay recruitment and retention premium in addition to the pay of an individual post or specific group of posts where market pressures would otherwise prevent the employer from being able to recruit and retain staff", the 25 October 2005 letter going on to record that:-

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"2. The Scottish Pay Reference and Implementation Group .. recommended the development of a single policy for NHS Scotland. The policy has gone through an extensive partnership process and was agreed by the Terms and Conditions Committee of the then Human Resources Forum.

3. The policy requires NHS Boards to apply to the Scottish Terms and Conditions Committee of the Scottish Partnership Forum for the application of any such premia ...

5 4. NHS Boards ... are asked to ensure that the Recruitment and Retention Premia Policy attached to this letter is implemented.”

47. The Recruitment and Retention Premia Policy referred to – (hereinafter, where the context permits, “*the RRP Policy*”) - contained the explanations that:-  
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“1. **INTRODUCTION**

15 *The Scottish Terms and Conditions Committee has developed this policy in response to the guidance on recruitment and retention premia contained within the Agenda for Change Agreement.*

20 *Where approved, the premia will be awarded to both existing and new staff.*

2. **PURPOSE**

25 *This policy is intended to ensure that posts within NHSS, which are hard to recruit to/have high levels of turnover, are reviewed in a fair manner to identify whether the application of a Recruitment and Retention Premium would encourage a greater volume of applicants/posts holders to remain with the organisation and would represent value for money.*

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4. **SCOPE**

*This policy applies to all posts with the specific exception of:*

- 5
- *Medical and Dental Staff*
  - *Senior managers who do not fall within the Agenda for Change agreement.”*

10 48. Under the heading “*Responsibilities*” the RRP Policy recorded that it was the responsibility of STAC to:-

- 15
- *“Determine the recommendation for each application for RRP made by NHS Boards/Special Health Boards.*
  - *Assess each application according to the criteria set out within the policy bearing in mind the wider context affecting the NHS workforce.*
  - *Complete regular and timely reviews of Long-Term and Short-Term RRPs in line with the recommendation made on the original application.*
  - *The award, monitoring and review of all premia will be in partnership through the Scottish Terms and Conditions Committee who will make recommendations to the Scottish Partnership Forum.”*
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30 49. The Claimant was one of the Respondent`s employees whose terms and conditions of employment were set by and contained within the structure that was the National NHS Agenda for Change.

50. The Claimant accepts that decisions as to the criteria to be applied when deciding whether any particular employee or group of employees was entitled to receive a Recruitment and Retention Premium – (“RRP”) - was – (and is still) – subrogated to the STAC whose responsibility it was “*to monitor the use and application of RRP across NHSS*”.

51. Put simply, the right to negotiate eligibility for, and therefore effectively entitlement to, such an RRP had been taken away from the Claimant, as an individual employee, and had been vested in STAC.

52. On 9 September 2008 the Scottish Government issued a letter to some members of the Respondent’s staff, including the Claimant, which referred to the implementation of RRP. That letter explained that how the RRP Policy was to be applied had been entrusted to STAC which was the Scottish Terms and Conditions Committee working under the terms of the National Agenda for Change Agreement. Under the heading “*Relationship of STAC to wider NHS management and staff*”, an annex to that 9 September 2008 letter stated that:-

“*Part of STAC’s function will be to disseminate the correct procedure for addressing queries on terms and conditions to the wider health service. As a general principle, queries should be addressed locally if possible, with questions being fed up the appropriate management line and only reaching STAC if no satisfactory answer can be arrived at through this process. So, for example, questions from payroll personnel about the application of pay circulars should be addressed, in the first instance, to the Director Finance who will, if necessary, refer the matter to the Management Steering Group who may, if no resolution can be reached, refer the issue on to STAC.*”

53. A second version of the NHS Scotland Agenda for Change RRP Policy was issued in August 2008. So far as it impacted on the Claimant, in particular on the Claimant’s claim as made in the ET1, that updated version is not of

significance in that it and any alterations implicit within it is and are not material to the factual or legal bases of the Claimant`s claim.

54. On 24 February 2009, following the meeting of the then Greater Glasgow and Clyde NHS Board, a Board paper number 09/06 was released which referred to *“in-patient services in conditions of medium security”* being *“provided at”* Rowanbank Clinic, the same Board paper referring to *“significant activity for Forensic Services”* for *“Medium Secure beds at Rowanbank”*. It is significant that it referred to services being provided and Medium Secure beds being located *“at”* Rowanbank Clinic or *“at”* Rowanbank.

55. At all times relevant to the Claimant`s claim the membership of the *“staff side”* of STAC includes a Mr James Colin Poolman who sits on STAC in his capacity as a professional officer with the Royal College of Nursing; indeed he is the current *“trade union chair”* of STAC. Mr Poolman is a Senior Officer with the Royal College of Nursing whose responsibility is to *“manage the area”* for that College and to represent the Royal College of Nursing as and when required. He is not employed by the Respondent.

56. Sometime prior to 25 March 2009 a working group within STAC produced a paper entitled *“Proposals for recruitment and retention premium – medium secure units”* which, under the heading *“Qualifying Rationale”* referred to the *“RRP payment”* being *“linked to the patient group and environmental factors”* and to *“the payment of the medium Secure RRP payment”*. It made it clear that the envisaged RRP payments would only be made to staff who *“work in designated regional Medium Secure Units”* and, even then, only *“provided that 50% or more of their contracted hours are worked in the Medium Secure Unit”*. Provision was made for payment on a pro-rata basis to staff who worked less than 50% of their contracted hours *“in the medium secure unit.”* Mr Poolman had sat as part of the working group.

57. Following a meeting of STAC on 25 March 2009, a meeting at which Mr Poolman was present as a staff-side representative, a Minute was issued



which, under the heading "*Medium Secure Unit Allowance*" recorded that, "*the Committee noted that an agreement had now been reached on a £1,500 recruitment and retention premium for all eligible staff working in Medium Secure Units in Scotland ...*". That wording did not refer to "*all*" staff working in Medium Secure Units in Scotland but to all "*eligible*" staff working in Medium Secure Units in Scotland.

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58. On 31 March 2009 the Scottish Government issued a circular – (hereinafter, "*the 31 March 2009 Circular*") - to some members of the Respondent's staff, including the Claimant, which was headed "*Recruitment and Retention Premia for staff in Medium Secure Units*". Because of the structure within which the Claimant's terms and conditions of employment are contained and by which they are regulated, the Agenda for Change document, the issuing of such circulars is effectively the means by which members of staff employed by the Respondent, including the Claimant, are advised of changes to their terms and conditions of employment.

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59. The 31 March 2009 Circular advised that:-

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"1. *The Scottish Terms and Conditions Committee (STAC) recognises the need to recruit and retain staff in Scotland's Regional Medium Secure Units. .. The Working Group has made recommendations and these have been accepted by STAC. The Annex to this circular sets out what has been agreed and replaces any previous arrangements for Medium Secure Units.*

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2. *This circular has been approved by the Cabinet Secretary under regulations 2 and 3 of the National Health Service (Remuneration and Conditions of Service) (Scotland) Regulations 1991.*

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3. *NHS Boards, ... should ensure that staff in Medium Secure Units are paid in accordance with this circular from 1 April 2009.*"

5 60. The 31 March 2009 Circular referred to "a copy of the formal approval" given by the Cabinet Secretary as being attached. That document was headed "National Health Service" and "Approval of Remuneration and Conditions of Service" and stated that "*.. the remuneration and conditions of service set out in the attached Scottish Government Health Workforce Directorate circular of 31 March 2009 .. in respect of the recruitment and retention premium payable to staff in Medium Secure Units are hereby approved ...*"

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61. The annex referred to in the 31 March 2009 Circular, under the sub-heading "background", referred to those "Agenda for Change staff" who were "working in" any of the NHS Scotland Regional Medium Secure Units. Under the sub-heading "Qualifying Rationale and Level of Payment" the annex made it clear that the recruitment and retention premium would be paid only to staff who "work in" designated Regional Medium Secure Units.

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20 62. The Claimant accepts that any member of the Respondent`s staff who works "outside" a Medium Secure Unit is not entitled to receive any RRP payment.

63. The Claimant accepts that she does not work directly with patients detained or being examined or treated at the Medium Secure Unit which is part of the Rowanbank Clinic complex.

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64. The Claimant accepts that it would "be very much of an exception" for a member of the Respondent`s secretarial staff who was based in the administration building which forms part of the Rowanbank Clinic complex to go into a clinical ward or even into the courtyards which form part of the Medium Secure Unit. She cannot recall ever having done so herself within the two year period which ended with the presentation of the ET1 to the Tribunal Office.

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65. No member of the Respondent's secretarial staff working within the administration building which forms part of the Rowanbank Clinic complex and who has no direct contact with patients detained within the Medium Secure Unit which forms part of that complex receives an RRP payment.
- 5 There are other members of the Respondent's staff – (e.g. Consultant Psychiatrists, Psychologists, Occupational Therapists and Pharmacists) - who are based in the administration building but whose duties require them to enter the Medium Secure Unit and to have direct contact with detained patients. Such other members of staff do receive RRP payments but they
- 10 receive them because their duties require them to enter the Medium Secure Unit and to have direct contact with detained patients.
66. The staff who work within the reception building which forms part of the Rowanbank Clinic complex receive RRP payments but the staff members
- 15 working there also serve as security staff within the Medium Security Unit which forms part of that complex and the reason why those staff members do receive RRP payments is that they are in direct contact on a day to day basis with patients detained within the Medium Secure Unit environment.
- 20 67. When she received the 31 March 2009 Circular the Claimant believed that she was a member of the Respondent's staff who worked "in" a Medium Secure Unit, the Rowanbank Clinic complex, and that with effect from 1 April 2009 she would be paid an RRP. She believed that when the Scottish Government sent the 31 March 2009 Circular to her the Respondent itself
- 25 was effectively advising her of a change to the terms and conditions of her employment with it.
68. The Claimant was not paid an RRP following the issue of the 31 March 2009 Circular.
- 30 69. Realising very quickly after 1 April 2009 that she was not in receipt of an RRP payment, the Claimant, acting along with other medical secretaries who worked in the administration building at the Rowanbank Clinic complex,

5 raised the issue with staff representatives who in turn consulted with the STAC whose view, as expressed in or around early July 2010, was that the Claimant and the other staff members who worked within the administration building at the Rowanbank Clinic complex did not “*meet the criteria as laid out in the guidance*”.

70. The Claimant did not receive any RRP payment for any period prior to 12 February 2013 and sometime after 11 February 2013 the Claimant and a Mr McCafferty – (another medical secretary working for the Respondent in the administration building at the Rowanbank Clinic complex) – wrote to their line manager, Mr Stephen Smith, referring to the Scottish Government’s 31 March 2009 circular. That letter contained the explanation, comment and questions:-

15 *“As medical secretaries who are employed for 37.5 hours per week and whose base is Rowanbank Clinic, we are currently excluded from receiving this payment because of the logistics of the `Admin Building`. Our office is situated in the adjoining `Admin Building` which is secure and we believe, is part of Rowanbank Clinic. We cannot see anything in either circular which stipulates that the Admin Building should be*  
20 *classed as a discrete part of Rowanbank Clinic and those based in the building should not receive the RRP payment. We also cannot see anything about the need to have direct patient contact in order to receive the payment. We therefore seek clarification on this.*

25 *We consider we meet the above criteria because:*

- 30
1. *All work carried out within Rowanbank Clinic Medium Secure Unit (admin building and wards/clinic) is for this patient group.*
  2. *We are linked to the patient group because we process correspondence relating to the patient group on a daily basis. We also have telephone contact with relatives, professional*

*bodies i.e Solicitor, Scottish Government and MHOs etc on a daily basis.*

5 3. *We are frequently in close proximity to the patients i.e. when we/they are entering and leaving the building via reception and the grounds going on outings etc.*

10 4. *We do in fact work in a designated Regional Medium Secure Unit (Rowanbank Clinic)."*

15 71. On 4 March 2013 the Claimant`s line manager, Mr Smith, who was at that time the Operational Safety Co-Ordinator at Rowanbank Clinic, sent a letter to Mr McCafferty replying to the letter from him and the Claimant. That letter included the responses that:-

20 *"The Mental Health Act ... defines medium secure services as being subject to Safety and security measures, rather than the individual patient as is the case in lower levels of security. As such the national circular ... is implemented on the basis that those staff who work in the admin building at Rowanbank Clinic will not be eligible to the RRP payment. This is based on the rationale that only the clinical areas are subject to the medium secure environment and involve direct patient contact.*

25 *The admin building is a separate building that is accessed independently from the clinic. This building does not have access to clinical or patient areas. Patients have no access to this building. Staff when working in the admin building are subject to the same level of security and the same environment as other similar admin buildings on District General and Mental Health Hospital sites. The admin building does not form part of the designated Regional Medium Secure Unit.*

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.... Whilst I acknowledge that the majority of your work is generated by the clinicians who have direct patient contact you are not eligible for Medium Secure Unit RRP payment as you do not work in the medium secure environment, as defined above.

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... Patient contact for Administration staff is limited to brief periods where patients may be in the reception areas of the Clinic at the same time as a member of the admin staff. Any contact with patients is incidental and minimal as patients in the reception area are always supervised, and any risks associated with patients are managed within this environment.

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... the development and implementation of the National Circulars was the result of several months of meetings with full time officers and members of the Scottish Terms and Conditions Committee (STAC). These discussions were also held at a local level and involved the Forensic Management team and Staff side partnership representatives.”

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20 72. The Claimant did not receive any RRP payment before 24 August 2015 and on 24 August 2015, prompted by a repeated questioning by, amongst others, the Claimant, the then Interim Forensic Services Manager at Rowanbank Clinic, Mr James Meade, began an exchange of emails with a Ms Millar, the then Pay and Terms and Conditions Lead at NHS Greater Glasgow and Clyde.

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73. Mr Meade is the General Manager, Forensic Services, for the Respondent's hospitals in Glasgow and Strathclyde, these including Rowanbank Clinic. He has held that position for some 8 months but prior to that was the Respondent's Forensic Services manager from 2014 to 2017 and prior to was a Lead Nurse for Medium Secure Services and, earlier, a Senior Charge Nurse, his service with the Respondent totalling some 19 years.

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74. The email exchange referred to began on 24 August 2015, with Mr Meade emailing Ms Millar to say:-

5 *"I am looking run an issue past you in relation to STAC, sometime ago there the recruitment and retention payment was raised at STAC and they came back as said this was a local issue.*

10 *However I have recently had a grievance in relation to the interpretation of the RRP circular and was wondering if there would be any further guidance or if the previous guidance would apply."*

75. That email exchange chain included an email from Mr Meade to Ms Millar on 18 September 2015 in which he explained that:-

15 *"... I am currently preparing my response to the grievance and was wondering if you could provide a short response to the interpretation of the circular.*

20 *The grievance is based on staff being based within Rowanbank Clinic (admin building) should be paid the RRP even though they do not work within the medium secure clinical area.*

25 *You may recall this issue was raised in 2010 and at the time the view from STAC was that the medium secure areas with Rowanbank Clinic excluded the admin building, however, this is not clear within the circular and is open to interpretation. Therefore STAC had said that this was a local issue that should be sorted locally."*

- 30 76. Following further emails and discussion between Ms Millar and STAC officials, Ms Millar replied on 30 September 2015 to state that *"... our view remains that staff who are not required to work in the actual Clinical Setting are not entitled to the RRP."*

77. On 1 October 2015 Ms Millar sent a further email to Mr Meade which, in apparent repetition of what she had said on 30 September 2015, stated that “... *our view remains that the RRP should only be paid to staff who actually work within the clinical area.*”

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78. Mr Meade`s understanding as expressed to the Tribunal is that no category of Respondent`s Forensic Directorate staff is automatically excluded from qualifying to receive RRP payments but that so far as eligibility within any particular category of staff is concerned individual staff members have to work within the medical secure environment to qualify for payment of an RRP payment. He explained that members of staff who typically work within such environment – (and therefore are eligible) - are nurses, psychiatrists and catering staff and security staff who, as part of their normal duties, are required to be in contact with detained patients within the Medium Secure Unit. But he was adamant that secretarial staff would not be eligible to receive an RRP payment unless the Medical Secretary concerned actually worked “*beyond airport security*” within the medium secure clinical environment. He could not recall any member of the Medical Secretariat based in the administration building at the Rowanbank Clinic complex ever having qualified to receive, or ever having received payment of, an RRP payment.

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79. When asked what the Medium Secure Unit at Rowanbank Clinic comprised Mr Meade was clear in his evidence that the Medium Secure Unit was the “*part beyond Airport Security*”, “*Airport Security*” in that context being explained by him as being the security-checking-area which links the public part of the reception building at the Rowanbank Clinic complex to the secure wards and courtyards beyond the public part of the reception building.

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80. Mr Meade confirmed that the public part of the reception building, the external landscaped areas, the car parks and the loading areas are not part of the Medium Secure Unit at the Rowanbank Clinic complex but, like the administration building, lie outside the Medium Secure Unit even although, in a wider context, they are part of the Rowanbank Clinic complex.



- 5 81. Mr Meade explained in detail the restrictions and rules which apply to the Medium Secure Unit within the Rowanbank Clinic complex but which do not apply to the administration building. He referred to the administration building as, "*basically it is an office*" and as being "*like any other office*" premise "*on a general hospital site*".
- 10 82. Mr Poolman defines a Medium Secure Unit as a Unit which exists to look after individuals who require a medium level of security when in care and that within any hospital and identifies the Medium Secure Unit at the Rowanbank Clinic complex as being the area beyond the "*airport level of security*" which, in the case of the Rowanbank Clinic complex, is the area of security lying beyond the public part of the reception building and which gives access to the secure wards and other secure areas within that complex.
- 15 83. Mr Poolman confirms that different restrictions are applied within the Medium Secure Unit which forms part of the Rowanbank Clinic complex when compared with those that are applied outwith that Unit. Describing the Medium Secure Unit, he referred to it as. "*effectively, it is a locked area with a wall round it ..* "
- 20 84. When asked where members of the Respondent's staff who were entitled to receive an RRP payment would have to work to be eligible to receive such a premium Mr Poolman was clear and unequivocal that the staff member concerned would have to work within the clinical area, i.e. would have to go into that clinical area through airport-type security to work there. When asked to apply that explanation to the circumstances prevailing at the Rowanbank Clinic complex Mr Poolman explained that only staff who work within the clinical area at the Rowanbank Clinic complex would be eligible, i.e. staff who were "*working within the confines of the Medium Secure Unit clinical area who had gone through Airport Security to work there*", that eligibility criterion applying "*regardless of whether doctors or nurses or porters or whatever*" provided the work that they did was work carried out within the Medium Secure Unit and work which required them to enter the Medium Secure Unit
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by going through the airport security type system that exists in any hospital operated by the Respondent which contains a Medium Secure Unit.

5 85. When referred to the Minutes of the 25 March 2009 STAC meeting – (a meeting at which he had been present as one of the staff-side representatives) - , particularly to the reference to “*Medium Secure Unit Allowance*” which noted that agreement had been reached on a £1,500 Recruitment and Retention Premium as being payable to all eligible staff working in Medium Secure Units in Scotland, Mr Poolman explained that he  
10 could not remember anyone on either the management or staff-sides of STAC having had any doubt about what was meant by the eligibility criteria stated.

15 86. In this context Mr Poolman explained that “*to me, the people on the working group understood*” that the qualifying rationale for payment and that the reference to “*eligible*” staff reflected the difficulty of working within a medium secure environment, hence the application of Recruitment and Retention Premiums to all “*eligible*” staff, i.e. those working within the secure unit environment, the environment which he went on to describe as being “*the clinical environment within the wall*”. He was equally clear in his explanation  
20 that the premium would not be paid to members of staff who worked out-with such clinical area even if those staff worked in proximity to that area.

25 87. When cross-examined about the definition of eligibility and asked to explain why he did not accept that the administration building at the Rowanbank Clinic complex was part of the designated Medium Secure Unit for the West of Scotland Mr Poolman insisted that the Medium Secure Unit for the West of Scotland is within and part of that complex but that “*Rowanbank Clinic*”, as a whole, is not the Regional Medium Secure Unit but the complex within which the Regional Medium Secure Unit is located.  
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88. When asked to describe where the administration building at the Rowanbank Clinic complex is located and how it fits into that complex as a whole Mr Poolman was clear in his evidence that the administration buildings “*are part*

*of the entire building” but that “the Medium Secure element lies beyond the airport type security”.*

5 89. Mr Poolman described the administration buildings and the staff who work there as being *“part of the service that supports the Medium Secure Unit”* and compared it to *“any hospital which has support services”*.

10 90. Mr Poolman insisted that his views as expressed to the Tribunal represent his views as a staff-side member of STAC and explained that at the time that Recruitment and Retention Premia were being introduced – (and since then at 3 yearly intervals when Recruitment and Retention Premia were being reviewed) - there was no doubt in the minds of any member of STAC, whether management-side or staff-side, as to the eligibility criteria, i.e. the eligibility criteria as explained by Mr Poolman to the Tribunal.

15 91. An NHS Greater Glasgow and Clyde Mental Health Partnership job description of the job of *“Medical Secretary (Forensic)”* – (a job description which the Claimant accepts applied equally to her and all other Medical Secretaries within the Respondent`s Forensic Directorate) - specified that the department within which the Claimant worked was *“administration”* – (i.e., rather than, e.g., *“clinical”*).

25 92. The job description referred to makes no reference to any required contact with patients who were detained within or were being examined at or were being treated within the Medium Secure Unit at the Rowanbank Clinic complex.

30 93. The job description, although referring to *“daily exposure to disturbing material e.g. related to child sexual offences, serious violent crimes including murder and rape”* and envisaging *“telephone and in person communication with anxious, disturbed, demanding and abusive patients .. “* and *“potential exposure to aggressive behaviour”* requires no physical skills of the type

which might reasonably be expected of any member of staff working within a secure unit where patients are detained against their will.

5 94. The section of the job description relating to training and experience refers to a “*requirement to attend Breakaway Training because of client group*” but does not make any reference to additional skills or qualification or training of the type which might reasonably be expected of staff members working within a secure unit where patients are detained against their will, for example restraint techniques or even physical fitness or any past experience as  
10 someone working within a clinical setting inside a secure unit or similar environment.

15 95. Mr Meade explained that staff who are required to work within the Medium Secure Unit which forms part of the Rowanbank Clinic complex are subject not only to “*breakaway*” training of the type given to the Claimant and other members of the Medical Secretariat working in the administration building but also to periodically-repeated training and training updates relating to response, to de-escalation and to restraint of patients.

20 **The Issues**

96. The issues identified by the Tribunal as being relevant to the determination of the Claimant`s claims were:-

25 (a) Whether the Respondent had made deductions from the Claimant`s wages at any time during the 2 year period which ended on 25 August 2017, this being a question which requires the Tribunal to determine whether any Recruitment and Retention Premium or any combination of Recruitment and Retention Premia alleged by the Claimant as being  
30 a premium or premia to which she was entitled constituted part of the wages which, net of PAYE tax and employee national insurance contributions, were properly payable by the Respondent to the Claimant on the occasion of such deduction.

- 5 (b) Whether, if the Respondent did make deductions from the wages properly payable to the Claimant on any occasion, such a deduction was required or authorised to be made by virtue of a statutory provision or by the Claimant`s contract or whether the Claimant had previously signified, in writing, her agreement or consent to the making of such deduction.
- 10 (c) If there is doubt as to whether the Recruitment and Retention Premia to which the Claimant has referred were on any occasion part of the wages which were properly payable to her, how the Tribunal should set about resolving such doubt, in particular what the effect of the Contract (Scotland) Act 1997 and the case law which followed on from the abolition of the previously-existing "*parole evidence rule*" under which it was normally competent to lead evidence of contract terms other than those contained in any writing embodying a contractual agreement is.
- 15 (d) If there is uncertainty as to whether the Recruitment and Retention Premia to which the Claimant has referred were on any occasion part of the wages which were properly payable to her, whether it is appropriate for the Tribunal to apply the *contra proferentem* rule as an aid to construction of any ambiguous contract term.
- 20 (e) If the Tribunal is satisfied that there has been or have been a series of unauthorised deductions from wages properly payable to the Claimant what compensation it is appropriate to award to the Claimant.
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**The Relevant Law**

30 97. The Law:-

- (a) Legislation –

- The Deduction from Wages (Limitation) Regulations 2014.
- The Employment Rights Act 1996 particularly Section 13.
- 5 • The Contract (Scotland) Act 1997.

(b) Case Law –

- 10 • Dean & Dean Solicitors (a firm) -v- Dionissiou-Moussaoui [2011] EWCA Civ 1331, CA.
- Carmichael & Another -v- National Power Plc [1999] ICR 1226, HL.
- 15 • Investors Compensation Scheme Limited -v- West Bromwich Building Society [1998] 1 WLR 896 (HL).
- Reardon Smith Line Limited -v- Yngvar Hansen-Tangen [1976] 1 WLR 989 (HL).
- 20 • Bank of Credit & Commerce International SA (in compulsory liquidation) -v- Ali [2001] UKHL 8.
- Chartbrook -v- Persimmon Homes [2009] UKHL 38.
- 25 • Rainy Sky SA -v- Kookmin Bank [2011] UKSC 50.
- Arnold -v- Britton & Others [2015] UKSC36.
- 30 • The Fife Council -v- Royal & Sun Alliance Insurance Plc [2017] CSOH 28.

- @Sipp Pension Trustees -v- Insight Travel Service Limited [2015] CISH 91.

**Discussion**

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98. The monetary award sought by the Claimant in this case is relatively low. She accepts, as a matter of law, the implications of the Deduction from Wages (Limitation) Regulations 2014 by seeking compensation only in respect of alleged unauthorised deductions from wages properly payable to her where the alleged unauthorised deductions took place during the period of two years ending with the date of presentation of the ET1. Moreover, notwithstanding that the RRP Policy scheme to which reference has been made has an inflation-increase element built into it the amount that she seeks as compensation has been restricted to £3,000 as opposed to the £3,055.17 which the Respondent`s representative has calculated might have been her true entitlement had she succeeded in demonstrating that she had been subjected to unauthorised deductions from wages properly payable to her during the 2 year period in question.

20 99. But although the monetary award sought is relatively low and the head of claim involved, Section 13 of the Employment Rights Act 1996, is well understood determination of the issues involved requires the Tribunal to consider whether the sums referred to by the Claimant formed part of wages properly payable to her.

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100. It is that aspect of this case which was always going to be complex, far more difficult than determining what sums the Claimant had or had not received from the Respondent and, generally, the Respondent`s compliance with its obligation to pay the Claimant wages to which she was properly entitled on any occasion.

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101. The Tribunal wishes to assure both the Claimant and the Respondent's witnesses that credibility is not an issue which has been significant to its determination of the Claimant's claim.
- 5 102. The Tribunal accepts that having seen the 31 March 2009 Circular the Claimant was happy to believe that, with effect from 1 April 2009, she would become entitled to receive payment of an RRP payment from the Respondent. However, the Tribunal was not so satisfied that as time went on and the Claimant and her fellow medical secretary, Mr McCafferty, again  
10 raised – (and later re-raised) - the issue with management, and ultimately with STAC itself, she – (or they) – continued to have the same reasonable belief. That said, however, the Tribunal has no difficulty in accepting that the Claimant was a credible witness.
- 15 103. Similarly, the Tribunal has no difficulty in accepting that each of Mr Meade and Mr Poolman was a credible witness.
104. Mr Meade was clear in his explanation of the circumstances which prevail at the Rowanbank Clinic complex and why, in a position of senior management  
20 there, he had always understood that unless she came into contact on a working basis with patients detained within the Medium Secure Unit there the Claimant would not qualify to receive payment of an RRP.
105. The evidence of Mr Poolman was perhaps the most objective evidence. Not  
25 only was he someone who was not employed by the Respondent but he sat on STAC and the relevant STAC working group as a staff representative conducting negotiations with management representatives before STAC ultimately made its recommendations to the Scottish Government, recommendations which, in 2009, resulted in the issue of the 31 March 2009  
30 Circular.
106. The Tribunal has set out as Findings in Fact that the administration building which forms part of the overall Rowanbank Clinic complex is not part of the



West of Scotland Regional Medium Secure Unit. It should be apparent from the Findings in Fact so set out why that conclusion has been reached.

5 107. If the Tribunal is convinced that, although part of the Rowanbank Clinic complex, the administration building was not part of the Medium Secure Unit at that complex it may well be asked why it, the Tribunal, was equally persuaded that when she read the 31 March 2009 Circular the Claimant could have believed that she was eligible to receive payment of an RRP. Put simply, the answer is that the Claimant is not a lawyer. Her skill-set is that of a medical secretary, albeit a medical secretary working within a Forensic Directorate which services medical staff and other members of clinical teams who care for patients detained within the Medium Secure Unit which formed part of the Rowanbank Clinic complex. In the view of the Tribunal she cannot reasonably be expected to be fully aware of the implications implicit within the fact that  
10 as a medical secretary working for the Respondent at the Rowanbank Clinic complex she is a member of a class of employees whose negotiating rights are removed from them and subrogated to a “*partnership*” committee, STAC, which negotiates terms and conditions of employment to be applied to all members of the Respondent`s staff – (indeed to all members of NHS  
15 Scotland staff) - other than doctors and dentists.  
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25 108. Although, in the view of the Tribunal, it might reasonably be expected that STAC or/and the Scottish Government would take care to ensure that staff members are kept fully advised and not confused by ambiguous wording in, or sloppy drafting of, documents such as the 31 March 2009 Circular it is nevertheless the case that the Claimant might not have understood even a better-drafted intimation of RRP Policy and might not have fully appreciated the nuances of that subrogation of her personal right to negotiate the terms and conditions of her employment with the Respondent.  
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109. As was anticipated by the Claimant`s representative very early on the first day of the Final Hearing of the Claimant`s claim – (i.e. at a stage prior to any evidence being heard when preliminary matters were being discussed among

her, the Respondent`s representative and the Tribunal) - the Claimant`s case is really all about interpretation of contract in that the Tribunal cannot determine whether there has been any unauthorised deduction from wages properly payable to the Claimant – (i.e. cannot determine whether the Respondent breached its obligations to pay the Claimant the wages to which she was properly entitled on any occasion) - without establishing what wages were properly payable to the Claimant on that occasion.

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110. In this case that means that the Tribunal has to determine whether the RRs referred to, the premia which the Claimant believes she was entitled to receive during the two year period ended with the date of presentation of the ET1, were part of the wages properly payable to her by the Respondent at any time during that period.

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111. In this case the Tribunal has been afforded the luxury of being provided with a copy of the Respondent`s representative`s submissions “*script*”, i.e. the skeletal version of submissions prepared by the Respondent`s representative prior to oral submissions being made after all evidence had been heard in this case. It has also benefited from the insightful arguments put forward by the Claimant`s representative in his oral submissions and his comments on the Respondent`s representative`s submissions.

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112. The Tribunal accepts as a basic premise that contracts of employment are made up of a variety of terms and conditions which set out the respective obligations of the parties, for example what an employee is employed to do and what she or he will be paid for doing it. However, it also accepts as a basic premise that although, ideally, the contract would be a comprehensive document which is acknowledged by both parties and which sets out all the significant terms of the employment relationship clearly that is a rule more breached than honoured in practice.

113. The Tribunal began its consideration of the construction of the Claimant`s contract of employment, particularly in so far as it may have been altered by

the 31 March 2009 Circular, by seeking to interpret that Circular. It has found, on the one hand, that there was lack of understanding or consensus between the Claimant, as an individual staff member, and the Scottish Government who promulgated the document and in so doing bound the Respondent to its terms. It has reached the conclusion that the wording of the 31 March 2009 Circular, when read as an entity, is ambiguous, certainly less than clear. It is in the context of those conclusions reached by it that the Tribunal has found the guidance given by the House of Lords or by the UK Supreme Court and even by the Court of Session in Scotland in the cases to which the Respondent's representative referred in his closing submissions to be particularly helpful.

114. The Tribunal has borne in mind that the Court of Appeal in England gave guidance in the case of **Dean & Dean Solicitors (a firm) -v- Dionissiou-Moussaoui** that if a contractual document is clear in its wording and there is no argument put forward that it contains a mistake that should be rectified it is impermissible for a Court to depart from the clear wording of a contractual document. However, the Tribunal has reached the conclusion in this case that the 31 March 2009 Circular, the Circular on which the Claimant puts so much reliance, is unclear, is ambiguous and may not, in itself, cover all the matters on which the parties could otherwise be presumed to have agreed, in which case it is open to a Tribunal to take into account the surrounding circumstances when construing the terms of that circular.

115. Similarly, the Tribunal believes that it is open to it to take the view that the circular in question contains only a basic outline of what had been agreed by the committee before it made its joint submission to the Scottish Government in which case the guidance given very long ago by the House of Lords in the case of **Carmichael & Another -v- National Power Plc** is as relevant now as it was then, i.e. the guidance that it is open to a Tribunal or Court to flesh out the details based upon what it, the Tribunal, determines the intention of the parties was when they respectively entered into the contract.

116. In that case of **Carmichael & Another -v- National Power Plc** the House of Lords explained that it was only appropriate to determine the issue of employment status solely by reference to the contractual documentation, such as it may be, if it appeared from the written terms and/or from what the parties said or did subsequently that such documents were intended to constitute an exclusive record of their agreement.

117. Applying that doctrine to the circumstances of the present case, the Tribunal was satisfied that it is open to it to infer the true intentions of, on the one hand, the Respondent – (represented by the Scottish Government) – and the organisation to whom the Claimant’s negotiation rights had been subrogated, STAC, not just from the terms of the 31 March 2009 Circular on its own but also by means of objective inferences reasonably drawn from what those parties had said and done at the time the joint submissions were being made to the Scottish Government who subsequently promulgated the change of terms and conditions applicable to eligible members of the Respondent’s staff.

118. Explanation has already been given about the subrogation by the Claimant of her negotiation rights. The converse of her rights to negotiate having been vested in STAC so that it could achieve contract terms on her behalf by means of collective bargaining and with the negotiating power that such collective bargaining rights impart is that whatever was negotiated by STAC on her behalf, recommended by STAC to the Scottish Government and intimated within a circular by the Scottish Government to her as effecting a change – (even conditional change, i.e. conditional on eligibility criteria being met) - to the terms and conditions of her employment amounts to a decision which would be binding both on the Respondent and, notwithstanding that she had not had an opportunity of direct negotiation of terms, even on the Claimant herself.

119. The law of contract envisages and sometimes applies a “rule”, the *contra proferentem* rule, which, states that any clause in a contract which is

considered to be ambiguous should be interpreted against the interests of the party that requested that the clause be included. In essence, and as it is put in the Respondent's representative's submissions, that rule means that the meaning least favourable to the party who or which included the contractual term in her or his or its argument was to be preferred. However, as the Respondent's presentative conceded in his closing submissions that rule does not apply in the present case because the parties to the contract negotiations, negotiations which resulted in recommendations being made to the Scottish Government and which led to the 31 March 2009 Circular being issued, were negotiations where there was no dispute between those STAC members representing staff – (including the Claimant) - and those STAC members who represented management – (including the Respondent as an employer).

120. The terms of the 31 March 2009 Circular had been negotiated and agreed both by STAC's staff representatives and by STAC's management representatives. Since it contained jointly-agreed terms there is, as the Respondent's representative has put it in his closing submissions, simply "*no place in the current circumstances for the application of contra proferentem*" rules. Indeed, when submissions were being made after all evidence had been heard in this case the Claimant's representative accepted that the *contra proferentem* rule could not be applied in the present case.

121. There is no doubt in the mind of the Tribunal that the Claimant, as a lay-person and the affected employee reading it, interpreted the 31 March 2009 Circular as meaning that she was eligible to receive RRP payments, or at least would be so entitled after 1 April 2009. On the other hand, Mr Meade and Mr Poolman are both emphatic that, as a member of the Respondent's Medical Secretariat working in the administration building which did not form part of the Medium Secure Unit which was encompassed within the Rowanbank Clinic complex, the Claimant was not eligible to receive payment of RRP's unless – (a very big unless) – her work required her to be in contact

with detained patients within the Medium Secure Unit which was part of the overall Rowanbank Clinic complex.

5 122. So how should the Tribunal set about interpreting what the 31 March 2009 Circular actually meant and how, in law, it impacted on the Claimant's entitlement or lack of entitlement to receive RRP payments?

10 123. The Respondent's representative has referred to the Contract (Scotland) Act 1997 as having abolished what was known as "*the parole evidence rule*" under which it had previously been (normally) incompetent to lead evidence of contract terms other than those contained in any writing which comprised part of an alleged contractual agreement. He has reminded the Tribunal that since the coming into effect of the provisions of Contract (Scotland) Act 1997 it is permissible, indeed appropriate, to take extrinsic evidence into account  
15 as an aid to interpretation of an ambiguous contract.

20 124. The Tribunal has been referred by the Respondent's representative to what has been identified as "the "*Hoffman approach*" as expounded by Lord Hoffman in the case of **Investors Compensation Scheme Limited -v- West Bromwich Building Society**, that guidance being that:-

25 *"Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."*

30 125. In the view of the Tribunal, that guidance so given is relevant to the circumstances of the present case, i.e. bearing in mind that in the present case the Claimant did not, directly, play any part in the negotiations which led to the RRP-contract-consensus between staff-side representatives and management-side representatives on STAC and, after joint submission, to the issue by the Scottish Government of the 31 March 2009 Circular. When

conducting those negotiations STAC was, in a way acting, almost *in loco parentis* to the Claimant by stepping into her shoes. It was the organisation to whom her negotiating rights had been subrogated and it was an organisation which, in the circumstances of the negotiations taking place, had all the background knowledge which would reasonably have been available at the time of the negotiations which led to terms and conditions, including eligibility criteria, being agreed between STAC and the Scottish Government.

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126. When giving evidence Mr Poolman had no doubt that he understood the eligibility criteria to be applied to staff working within the Rowanbank Clinic complex, particularly to those members of the Medical Secretariat team working in the administration building which was part of that complex. And he made it clear that he had no reason to doubt that any of his fellow STAC members did not share his level of full understanding. He was clear in his recollection that that level of understanding was based on the background knowledge available to all members of STAC at the time when they were reaching agreement and putting forward proposals to the Scottish Government on a joint-submission basis. He was adamant that it was clearly understood by STAC, and was part of STAC's recommendation to the Scottish Government, that only members of staff working within a Medium Secure Unit would be eligible to receive the RRP.

127. It was equally clear from Mr Poolman's evidence that he, as a staff-side representative on STAC, did not regard the Claimant – (someone working in the administration building at the Rowanbank Clinic complex who had no need on any work related basis to have contact with patients detained within the Medium Secure Unit which was part of that complex) – as being a staff member eligible for payment of an RRP payment unless, as part of her duties, she had a working need to be in such contact with such patients detained there.

128. To revert to the guidance given by Lord Hoffman in the case of **Investors Compensation Scheme Limited -v- West Bromwich Building Society** the

Tribunal had no doubt that when making its joint submission to the Scottish Government STAC understood the recommendations promulgated by the Scottish Government in the form of the 31 March 2009 Circular as meaning that only eligible members of staff working within the clinical environment of a Medium Secure Unit would receive RRP payments.

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129. In reaching that conclusion the Tribunal did so accepting that STAC or/and the Scottish Government incorporated possibly “*sloppy*” drafting into its paperwork and in so doing created ambiguity, but ambiguity caused by no more than what Lord Hoffman referred to in his Judgment in the case of **Investors Compensation Scheme Limited -v- West Bromwich Building Society** as using “the wrong words or syntax” in a way which, as he put it, “occasionally happens in ordinary life”.

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130. As Lord Hoffman explained in that case of **Investors Compensation Scheme Limited -v- West Bromwich Building Society** “... *the law does not require judges to attribute to the parties an intention which they plainly could not have had*”, Lord Hoffman going on to allude to a reference previously made by Lord Diplock who had stated:-

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*“If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield the business common sense.”*

131. In this context the Tribunal has also taken into account the guidance given by the House of Lords, in each of **Reardon Smith Line Limited -v- Yngvar Hansen-Tangen** and **Bank of Credit & Commerce International SA (in compulsory liquidation) -v- Ali and Chartbrook -v- Persimmon Homes**.

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132. In that last-mentioned case, **Chartbrook -v- Persimmon Homes**, Lord Hoffman gave specific guidance that although “*the law of contract is designed to enforce promises with a high degree of predictability*” and although “*the more conventional meanings or syntax are allowed to be displaced by*

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reference drawn from background, the less predictable the outcome is likely to be” a rule which “excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract means” should and “does not exclude the use of such evidence for other purposes, for example to establish that a fact which may be relevant as background is known to the parties”.

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134. The Tribunal has also taken into account the guidance given more recently by the UK Supreme Court in the case of **Rainy Sky SA -v- Kookmin Bank** to the effect that where a term of a contract is open to two possible interpretations it is appropriate for the Court to adopt the interpretation which is more consistent with business common sense in resolving the question of what a reasonable person, i.e. a person who had all the background knowledge which would reasonably have been available to the parties in a situation in which they were at, at the time of the contract, would have understood the parties to have meant.

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135. In the view of the Tribunal that guidance so given by the UK Supreme Court in **Rainy Sky SA -v- Kookmin Bank** is relevant to the circumstances of the present case, a case in which the organisation to whom the Claimant had subrogated her negotiation rights, STAC, applied a background of “*business common sense*” to the interpretation of, indeed the imposition of, criteria relating to eligibility of any staff member to receive payment of a Recruitment and Retention Premium.

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136. When providing the Tribunal with a synopsis of legal principles the Respondent’s representative referred it to the overview provided by the UK Supreme Court very recently in the case of **Arnold -v- Britton & Others**, an overview from which the UK Supreme Court distilled seven factors as needing emphasis.

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137. The Tribunal has taken account of that guidance given by the UK Supreme Court in that case of **Arnold -v- Britton & Others** and has also respected the

guidance given within the past year by the Court of Session in the case of **The Fife Council -v- Royal & Sun Alliance Insurance Plc** in which the Court of Session both stated that the principles enunciated by the UK Supreme Court have been accepted and applied, in Scotland, by the Inner House and referred to “*the normal principles that apply to the construction of contracts*” as well as stating that “*the provisions of the party’s contract must be construed in context and in accordance with the purposes that the contract is intended to achieve*”, that “*the context includes the circumstances at the time of contracting so far as they were known to the parties or ought to have been known to reasonable persons in the position of the parties at that time*” and that “*the approach to construction is objective*”.

138. The Tribunal considers that the phraseology used by the Court of Session in that case of **The Fife Council -v- Royal & Sun Alliance Insurance Plc**, the phraseology used in reference to reasonable persons who are “*in the position of the parties*”, is significant so far as the circumstances of the present case are concerned.

139. The Tribunal has taken into account both the Claimant’s representative’s argument that Mr Poolman’s evidence as to the level of understanding of the STAC members was “*inconclusive*” and his contention that it could not be said that all the parties in STAC understood that the only area within the Rowanbank Clinic complex that was a Medium Secure Unit was the clinical area beyond the airport security facility. But having taken that point of view into account the Tribunal has nevertheless maintained its belief, a belief based on the evidence that it heard not just from Mr Poolman but from Mr Meade, that it was reasonable to conclude that the committee that was STAC, certainly at the stage of making its joint recommendations to the Scottish Government, did understand the eligibility criteria that would be imposed.

140. Although he made no submission with regard to the guidance given by the Court of Session in the case of **The Fife Council -v- Royal & Sun Alliance Insurance Plc** the Claimant’s representative accepted in his closing

submissions that the law to which the Tribunal must give respect when reaching its determination is the law relating to construction of contract, the law most recently revisited in the cases of **Arnold -v- Britton & Others** and **@Sipp Pension Trustees -v- Insight Travel Service Limited**.

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141. When doing so, he relied heavily on the by-then-still-maintained contention on the part of the Claimant that it was Rowanbank Clinic as a whole, i.e. all of the Rowanbank Clinic complex other, perhaps, than the landscaped car parking and loading areas to the front of the buildings, that comprised the West of Scotland Regional Medium Secure Unit and not, as the Respondent's witnesses had contended, only the part of the Rowanbank Clinic complex which lay beyond the airport security type facility and comprised the wards, the community centre and the internal courtyards.

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142 The Claimant's representative argued that if the Respondent had intended to omit the administration building where the Claimant worked from the West of Scotland Medium Secure Unit it should expressly have done so both when issuing circulars describing the Rowanbank Clinic complex and – (albeit at second-hand or at-one-stage-removed) – when becoming party to the 31 March 2009 Circular.

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143. But the Tribunal considers that those arguments put forward by the Claimant's representative are which do not hold up to scrutiny when, as in this case, the Tribunal has found as a matter of fact that the administration building which formed part of the overall Rowanbank Clinic complex did not form part of the West of Scotland Regional Medium Secure Unit, a Unit incorporated into and which formed only part of that complex.

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145. Having considered the evidence that it heard and having taken guidance from the law both as it was invited to do by the parties respective representatives and as found from its own research, the Tribunal has concluded that the RRP payments to which the Claimant has referred in the context of being payments that should, in her opinion, have been paid to her during the two year period

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which ended on the date of presentation of the ET1 did not form part of wages to which the Claimant was properly entitled in that period and therefore that although the Respondent did not pay any sum in respect of such RRP's to the Claimant at any time during the two year period which ended on the date of presentation of the ET1 to the Tribunal Office that failure did not constitute an act of unauthorised deduction by the Respondent from wages properly payable by the Respondent to the Claimant on any occasion.

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146. For those reasons, the Tribunal has determined that the Claimant`s claim has failed and should be dismissed.

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<b>Employment Judge:</b>	<b>Mr C Lucas</b>
<b>Date of Judgment:</b>	<b>05 February 2018</b>
<b>Entered in register:</b>	<b>13 February 2018</b>
<b>and copied to parties</b>	

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