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Case No: KB-2023-001043

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

4 July 2023

Before:

Mrs Justice Lambert DBE

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In the Part 8 Claim

Re ASHE 6115 and the Second Reclassification

National Health Service Litigation Authority **Claimant**

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Paul Rees KC (instructed by **Kennedys Law LLP**) for the **Claimant**
Robin Oppenheim KC – Advocate to the Court

Hearing date: 4 July 2023

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JUDGMENT

Mrs Justice Lambert DBE:

1. This is an application by the Claimant, the National Health Service Litigation Authority, for a declaratory judgment permitting clarification to paragraph 6.1.3 of the schedule to the Claimant's template/model periodical payments order ("the model PPO") for care and case management. The need for clarification arises from the second reclassification by the Office of National Statistics ("the ONS") of the data set used for the purposes of indexation of awards for care and case management.

2. The application has been made under CPR Part 8, the alternative procedure for claims for the reasons explained in the witness statement of Mr Christopher Malla of 15 February 2023. The Claimant had initially approached the solicitors of one of the claimants, RH, involved in the litigation in which the first iteration of the model PPO had been approved. It was hoped that it might be possible to restore that claim before the court. For understandable reasons however RH's litigation friend declined the invitation to use his claim as the vehicle for the application and this fact, together with the likelihood that further reclassifications by the ONS may generate the need for other small amendments, led to the decision to issue Part 8 proceedings.

3. On 8 March 2023, being satisfied that the application did not involve any dispute of fact, I gave interim directions permitting the Claimant: to use Part 8 as a vehicle for the application; not to name or to serve the claim on any other person pursuant to CPR r.8.2A and to appoint Robin Oppenheim KC as Advocate to the Court, on terms that he "*assist the court on the merits and wording of the declaration sought from the perspective of the recipients of the relevant periodical payments order and generally pursuant to the overriding objective*."

4. The disposal hearing came before me on 4 July 2023. The Claimant was represented by Paul Rees KC and Robin Oppenheim was present as Advocate to the Court. In his Note to the Court, Mr Oppenheim informed me of his involvement in the various stages of the evolution of the current version of the model PPO, having been instructed by Barcan Kirby on behalf of RH one of the original claimants. He assured me that neither RH's parents, nor the solicitor who instructed him in the *RH* claim objected to his acting as an advocate to the court in relation to this matter. He informed me that he was satisfied that there was no conflict of interest and that his

observations were consistent with the terms of his appointment as advocate to the court.

5. I am grateful to Mr Rees and Mr Oppenheim for their considerable assistance. Both have been involved in the development of the model PPO since its origin and I doubt that any member of the Bar has a deeper understanding of the mechanics of the model PPO or of the issues raised during its development. I am also grateful to Mr Malla whose witness statement was a comprehensive guide to the history of the development of periodical payments orders and the current problems.

6. At the conclusion of the hearing, I granted the declaration sought for the reasons which had been advanced by Mr Rees. I now confirm those reasons.

Background

7. The broad history of the model periodical payments order will be well known to those who practise in the field of high value personal injury work. The power of the court to impose periodical payments orders came into effect on 1 April 2005 with the activation of the power in the Damages Act 1996 (which took place via the Courts Act 2003). Initially the care and case management components of a periodical payments order were index linked to the Retail Prices Index ("RPI") rather than an earnings-related index. However, the use of the RPI was soon challenged.

8. In June 2007, Mackay J handed down judgment in *RH* in which he held that future damages for care and case management should be paid by way of periodical payments order. He accepted the claimant's argument that the periodical payments should be index-linked not by reference to the RPI but instead by reference to the Annual Survey of Hours and Earnings ("ASHE") 6115 published by the ONS. Mackay J granted the defendant in *RH* permission to appeal. Meanwhile other cases involving the issue of indexation of periodical payments had been decided at first instance. All were claims against health authorities and were being dealt with by the NHSLA. In each case, the judge held that indexation should be by reference to ASHE 6115, rather than RPI. Leave to appeal had been granted in those cases also. These cases became test cases.

9. In November 2007, the Court of Appeal dismissed the defendants' appeals in the test cases and although the House of Lords granted leave to appeal, the Petition was withdrawn in May 2008. The test cases were then referred back to Mackay J for the purpose of his approval of the model PPO. The object of a model PPO was to avoid the necessity for orders to be drafted individually from scratch in each case. It was recognised that the model order would have to contain a Schedule incorporating various formulae based on ASHE 6115 to be used to calculate the annual increases in periodical payments for care and case management. A hearing took place before Mackay J in July 2008 when the model PPO was approved. Mackay J remarked that he anticipated that the order would be followed in all cases in which the NHSLA was the paying party.

10. As practitioners began to use the model order, it became clear that certain modifications to it were required. The case of *RH* was brought back before the court when Sir Christopher Holland approved minor modifications in December 2008. Sir Christopher Holland expressed doubt as to whether any drafting could anticipate and cater for every change in circumstance that might occur during the currency of a periodical payments order which could be in place for decades. Since 2008 all periodical payments which comprise care and case managed have been index linked in accordance with ASHE 6115.

ASHE 6115

11. ASHE 6115 tracks the earnings of the category of workers described as "care assistants and home carers".

12. Each year forms are sent out to a random sample of employers across the UK This exercise was started in 2004 with the objective of improving the availability of economic data to the labour market. The survey reports earning levels across a distribution and by reference to a set of disaggregated groups. The economy is divided into 9 major groups which are: Managers; Professions: Technical occupations; Administrative and secretarial; Skilled Trades; Personal Service; Salespersons and retail;, Factory operatives and Elementary occupations.. Major group 6 (personal service) is then sub-divided as follows: 61 being the Caring Personal Services Occupations and 611 being the Healthcare Related Personal

Services. At the time when the cases were litigated the then most relevant group was 6115 the classification relating to Care Assistants and Home Carers.

13. The "first release" data (the initial results produced from survey returns) are published annually in October/November each year, followed by the publication of "revised" data taking into account late returns and errors the following year. The model PPO provides formulae by which the calculation of each year's indexation of periodical payments can take account of any change between the "first release" data and the "revised data." The relevant formulae are contained in paragraph 3 of Part 3 of the Schedule.

14. As Mr Rees identifies in his written note there are a number of features of ASHE which carry the potential to render the consistent and continued application of the data concerning care and case management problematic. One such problem arises from the fact that the ASHE data set which is the closest match for indexation is reviewed every 10 years. This review includes analysing the labour market to assess whether the sub-divisions of work remained appropriate. Recent experience suggests that with each such review, the sub-divisions of work are likely to shift.

The First Reclassification

15. In 2010 the ONS reclassified ASHE 6115 by splitting it into two separate Standard Occupational Codes ("SOCs"). ASHE 6115 was split into ASHE 6145 "Care Workers and Home Carers" and ASHE 6146 "Senior Care Workers". Neither of those SOCs was considered suitable for use as an alternative to ASHE 6115 and so, given the importance of ASHE 6115 to periodical payments and personal injury claims generally, the ONS continued to publish ASHE 6115 notwithstanding the 2010 reclassification. However, this did not resolve the problem.

16. In 2010, as well as the reclassification, there had been a change in methodology used by the ONS. Whereas the "first release" ASHE 6115 data published in November 2011 had been based upon a weighted average of the SOC 2000 classifications, the "revised" 2011 data were derived from a weighted average of the new SOC 2010 classifications. This was demonstrated to have a significant impact. As a result of the change in methodology the revised 2011 gross hourly rate was 11 pence less than the first release rate which had been published in November 2011. This size of

discrepancy was new: between 2006 and 2011 there had been only modest variation at all between the first release and revised gross hourly rates at the 80th centile.

17. Paragraph 5 of Part 3 of the Schedule to the model PPO sets out the method of calculation to be used when the ONS has revised its classification of the relevant occupational group. The calculations require the use of a value "AF" where "AF" is the "revised" hourly gross wage rate for the previously applied SOC. The SOC applied by the ONS up to 2011 was SOC 2000. However, the ONS did not publish the revised 2011 data based upon that methodology and indicated that it was unable to do so.

18. In February 2013, the case of *RH* was, once again, restored before the court. Mr Oppenheim and Mr Rees represented the claimant and defendant respectively in proceedings before Swift J. Mr Richard Cropper, an independent financial advisor who had given evidence on behalf of RH and two other claimants in the test cases and who had been involved at all stages of the development of the model order provided the solution to the problem.

19. It was proposed that that, at paragraphs 6 and 7 of Part 3 of the Schedule to the model order, the value "AF" (the final published revised hourly gross wage rate for the relevant percentile) should be replaced by the value "OPF" the final first release hourly gross wage rate published for the relevant percentile of the previously applied SOC for "all" employees.

20. Swift J approved the requisite amendments to the schedule of the model PPO. She remarked that the process of formulating the proposed amendments to the order in *RH* had been a collaborative process and that the wording of the proposed amendments has been the subject of careful consideration by experts and lawyers. She was satisfied that the proposed amendments were necessary. The issue applied to 642 cases. She did not consider it proportionate to amend each of the orders in those cases. What was required was the acceptance by a claimant or a Deputy that the amended provisions were applicable to his/her case. She strongly recommended all claimants and Deputies to accept the amended provisions of the model order.

The Second Reclassification

21. The Schedule to the model PPO remained unchanged for the following decade. However, in 2020 the ONS undertook a further reclassification of ASHE. It is this further reclassification which is the impetus for this application.

22. The ASHE data was published on 26 October 2022 and the ONS has, once again, continued to publish ASHE 6115 given its importance to indemnifiers in personal injury claims. As with the reclassification in 2010 however, the ONS did not publish "AF" based on SOC 2010. Paragraph 6.1.2 of the Schedule provides a solution with the use of "OPF as approved by Swift J. However, an issue arises in those cases which are now subject to a second reclassification in 2020. It will also affect those cases currently subject to a first reclassification when there is a subsequent reclassification in 2030.

23. In a letter exhibited to Mr Malla's statement, John Mead, Technical Claims Director, states that the Claimant has 375 orders which are index linked to ASHE that are currently the subject of a second reclassification following reclassification by the ONS in 2020, all of those cases were subject to the first reclassification in 2010. However, the Claimant has 1579 orders subject to the first reclassification in 2020 which will therefore be subject to a second reclassification in 2030.

24. The problem, if it can be described as such, is one of lack of clarity. Following a first reclassification any subsequent reclassification formula applies "A" which is the gross hourly wage rate for ASHE 6115 at the time of settlement as opposed to "AR" which is the gross wage rate applied following reclassification in 2010. The use of the original "A" at the time of resolution rather than "AR" at the time of reclassification in 2010 creates an overpayment, which is then compounded each time there is a reclassification.

25. Mr Richard Cropper has provided a report for this Court in which he illustrates graphically the effect of applying "A" rather than "AR" to the formula. By rebuilding the growth of ASHE 6115, growth which has already been used to calculate the previous CR (or new reclassified relevant annual sum), the formula leads to an increase which vastly overstates the actual growth in earnings of ASHE 6115. As Mr Cropper demonstrates, the clear intent was to apply the previously applied "AR" in place of "A" in any future reclassification.

26. This is not what was intended in 2013 when the model PPO was revised. Mr Oppenheim (who represented the claimant in *RH*) in his note to the court says this: "*The intention of the drafters (including myself) of the revised model PPO before Swift J on 11 February 2013 and then endorsed by the Court in its judgment was always that, upon a second reclassification, that rebasing of a periodical payment would be calculated using "AR" and not "A"….It will be seen if A is used it would result in a windfall that was not intended and introduce significant distortion*"

27. Mr Cropper proposes that some few words of clarification are added to paragraph 6.1.3 of the model PPO. Those additional few words remove any doubt or ambiguity. Those few words which are proposed should be inserted are: "*and A will be the numerical value of AR calculated when reclassification last occurred*." The amendment is supported by Mr Oppenheim and Mr Rees.

28. Mr Malla informs me that other compensators, including insurers and the Motor Insurers' Bureau, adopt the same formulae as the Claimant and adopt the formulae within the Schedule of the model PPO. Those other insurers agree that the Schedule can only sensibly be interpreted by applying "AR" rather than "A" when calculating the annual increase in the payment to be made.

29. By way of example, Mr Malla exhibits letters from Mr Richard Stallard of DAC Beachcroft dated 10 January 2023 and from Mr Steve Chilvers Head of Technical and Major Loss at the MIB of 21 December 2022. Both have a large portfolio of PPOs. Both support the Claimant's interpretation of the formula. Mr Stallard writes: "*I have approached the recalculation of payments due under the PPOs which have been subject to two reclassifications by basing the rebasing of the annual amount on the previously rebased annual amount and the previously rebased baseline hourly rate by using the "AR" adopted when the previous reclassification occurred rather than "A." Any other approach would be inconsistent with the other recalculation provisions which…. effectively apply one additional year's indexation on each annual recalculation*." Mr Chilvers writes: "*whilst the wording of the order does not specify that you should use "AR as well as "CR" when reclassifying the PPO, that is the logical way of carrying out the reclassification and must have been the intention when the "model order" was drafted….. by using "A" rather than "AR" you are adding*

additional inflation and this will create an overpayment and this overpayment will be compounded each time the PPO is reclassified."

Conclusion

30. For all of these reasons, I have concluded that the declaration should be made and have directed that the following words should be added to paragraph 6.1.3: "*and A will be the numerical value of AR calculated when reclassification last occurred."*

31. I make the following additional observations:

i) it might be said that the declaration is, in the circumstances, not strictly necessary taking into account the unanimity of views expressed by all those involved in this application and those involved in the litigation before Swift J in 2013 and the compelling logic which underpins the interpretation advanced by Mr Cropper and others. However, I accept Mr Oppenheim's submission that the additional proposed words remove any possible doubt about the matter which can only be desirable. Taking everything into account, I find that the amendment will give unambiguous effect to the intention of those involved in drafting the model PPO and as such it is fair and reasonable to grant the application for a declaration.

ii) Like Swift J, I do not propose that all orders in existence should be the subject of formal amendment. To undertake this exercise would be costly, disproportionate, and unnecessary. All that is required is acceptance by the claimant or Deputy that the amendment is applicable in his/her case. I do not propose that claimants or Deputies should register positive acceptance; rather that if the claimant or Deputy does not accept that the amendment applies to his/her case then that objection should be registered.

iii) In the vanishingly unlikely event that any claimant or Deputy wishes to challenge the declaration made, he or she can do so under CPR r 40.9 providing that they are able to establish that he/she is directly affected by this ruling.

iv) All involved in this litigation are realistic that procedural issues relating to the model PPO may arise in the future. The words of Sir Christopher Holland in December 2008 have proved to be apposite. If and when such generic procedural issues arise in the future then I agree with Mr Rees and Mr Oppenheim that the use of the Part 8 procedure is particularly apt. Part 8 proceedings provide an efficient vehicle for the ventilation and resolution of these issues; they will permit the Claimant to instruct Mr Cropper (or his "successor") directly and permit the Claimant to invite the court to appoint an Advocate to the Court. Further, the use of Part 8 proceedings for issues which are generic rather than case specific is a desirable and indeed preferable alternative to inviting a litigation friend to use his/her case as a vehicle with all the attendant stress and unhappiness which may be caused.