THE INDUSTRIAL TRIBUNALS

CASE REF: 23316/19

CLAIMANT: **A**

RESPONDENT: **Department of Justice**

JUDGMENT

The unanimous judgment of the tribunal is that the claim of unauthorised deductions from wages contrary to the Employment Rights (Northern Ireland) Order 1996 is dismissed.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mr I O'Hea**
Mr M McKeown

APPEARANCES:

The claimant appeared in person and was unrepresented.

The respondent was represented by Ms N Murnaghan QC, Ms L Gillen, Barrister-at-Law, instructed by the Departmental Solicitor's Office.

SUMMARY

1. At the relevant times, the claimant had been employed as a Custody Prison Officer by the Northern Ireland Prison Service (NIPS).

2. The NIPS is part of the respondent Department.

3. The claimant alleges that the respondent had made unauthorised deductions from his wages contrary to Part IV of the Employment Rights (Northern Ireland) Order 1996 (the 1996 Order) in that he had not been paid for a period of approximately 30 minutes on each rostered day of duty, during which period the claimant alleged that he had been required to be on the premises of the respondent and that during this period, he had been subject to the direction and control of the respondent.

4. The respondent denied that there had been any unauthorised deductions contrary to the 1996 Order.

PROCEDURE

5. The claimant's claim was lodged on 17 October 2019. The claimant stated that he was *"claiming for illegal deduction of wages".*

6. The response was received on 10 December 2019. It stated that:

> *"(i) The respondent denies that the claimant had to be on the respondent's premises for 30 minutes before the commencement of his shift each day.*
>
> *(ii) The contract stated, in any event, that his shift only commenced when he was "on post" at his designated place of work within the prison complex.*
>
> *(iii) In the alternative, if there had been a "deduction", the claimant had consented to that deduction."*

7. The claim was case managed on four occasions but, given the Covid restrictions, the hearing was delayed on several occasions. It was confirmed in these Case Management Preliminary Hearings that the claim brought by the claimant was a claim for unauthorised deductions from wages.

8. Directions were given for the interlocutory stage of proceedings and for the exchange of witness statements. The witness statement procedure was used in the full hearing. Each witness, including the claimant, swore or affirmed to tell the truth, adopted their previously exchanged witness statement(s) as their evidence in chief and moved immediately into cross-examination and brief re-examination.

9. The claimant gave evidence on his own behalf and called one witness.

10. 'B', a civil servant in the respondent Department who was the Head of Pay, Grading and Industrial Relations in the NIPS, and a Governor 'C' both gave evidence on behalf of the respondent.

    'D', a civil servant in the respondent Department, who had heard the claimant's internal appeal against the dismissal of his grievance had provided a witness statement but the claimant indicated that he did not intend to cross-examine him and on that basis he was not called to give evidence.

11. The evidence was heard over the first three days of the hearing. The respondent undertook to provide a skeleton argument in relation to the legal issues by 5.00 pm on that third day, copied to the claimant and to the tribunal. The tribunal did not sit on the fourth day to allow the claimant time to consider the legal issues before oral submissions were heard on the fifth day.

RELEVANT LAW

12. Article 45(1) of the Employment Rights (Northern Ireland) Order 1996 (the 1996 Order) provides that:

"45—(1) An employer shall not make a deduction from wages of a worker employed by him unless —

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

13. Article 45(3) of the 1996 provides that:

"*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."*

14. Article 55(1)(a) of the 1996 Order provides:

"*5.—(1) A worker may present a complaint to an industrial tribunal —*

(a) that his employer has made a deduction from his wages in contravention of Article 45 —"

15. Article 56(1)(a) of the 1996 Order provides:

"(1) Where an employer finds a complaint under Article 55 well-founded, it shall make a declaration to that effect and shall order the employer —

(a) in the case of a complaint under Article 55(1)(a), to pay to the worker the amount of any deduction made in contravention of Article 45."

16. The Court of Appeal (GB) decided in the cases of ***Agarwal v Cardiff University*** and ***Tyne and Wear Passenger Transport Executive v Anderson [2019] IRLR 657*** that an Employment Tribunal can, if necessary, construe the claimant's contract of employment to determine whether or not a deduction has been made within the terms of the contract and, if so, whether that deduction was unauthorised.

17. Further, the Court of Appeal (NI) in ***Caterpillar (NI) Limited v Derek Marshall [2019] NICA 50*** considered the wording of a policy document which had been incorporated in the employment contract. McCloskey LJ stated:

"I consider that the real issue both at first instance and on appeal was, and is, one of construction of the policy. The question of whether the policy applied – depends upon how its terms are construed. The exercise of construction must, logically, precede that of application. The construction of any document is a question of law for the court or tribunal concerned; Re ***McFarland [2004] UKHL 17 -"***

18. There was no claim in the present case in relation to the National Minimum Wage Act 1998 and no circumstances in which such a claim could have been made. The claimant referred to a dispute in Sports Direct in relation to the calculation of the minimum wage, which had no relevance to the present case.

19. There was no claim in the present case under the Working Time Regulations (NI) 2016 and no circumstances in which such a claim could have been made. The claimant referred to a decision of the Spanish Supreme Court in relation to Spanish law and the Working Time Directive, which again had no relevance to the present case.

Anonymisation

20. Rule 44 of the 2020 Rules provides:

> (1) A tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting a public disclosure of any aspect of those proceedings. Such an order may be made in any of the following circumstances –
>
> (a) where the tribunal considers it necessary in the interests of justice;
>
> (b) in order to protect the Convention rights of any person; -
>
> (2) In considering whether to make an order under this rule, the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
>
> (3) Such Orders may include –
>
> (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the register or otherwise forming part of the public record;
>
> (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public.

21. The tribunal in the case of ***McCabe v Northern Ireland Public Services Ombudsman 12368/18 and 24561/19*** held that:

> *"62. At 1.30 pm, the tribunal first heard the claimant's application for the anonymisation of the judgment. The claimant relied on her Article 8 Rights and sought the removal of her name from any judgment together with the removal of the details of any reasonable adjustment sought by the claimant and of any reasonable adjustment provided by the respondent. She also sought the removal of all information which would provide what she described as a "jigsaw identification" of the claimant.*

63. *The respondent objected to any such order. There was nothing unusual about this case and nothing to set it aside from the general principle of open and public justice. The claimant had made very serious allegations against individuals which needed to be ventilated in a public forum and determined in a public forum.*

64. *Rule 44 of the Schedule to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 provides:*

> *"44-(1) A tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings. Such an order may be made in any of the following circumstances*
>
> *(b) in order to protect the Convention Rights of any person;*
>
> *(2) In considering whether to make an order under this rule the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.*
>
> *(3) Such orders may include –*
>
> *(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the register or otherwise forming part of the public record;"*

65. *As the EAT determined in the recent decision of* ***British Broadcasting Corporation v Roden UKEAT0358/14/DA:***

> *"An order under Rule 50 [the equivalent GB provision interferes both with the principle of open justice and the right to freedom of expression."*

66. *The EAT referred to the recent decision of the Supreme Court in* ***A v British Broadcasting Corporation [2014] 2 WLR 1243*** *which concluded:*

> *"It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy."*

The EAT determined that:

> *"The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice."*
>
> *"Where anonymity orders are made, three Convention Rights are engaged and have to be reconciled. First, Article 6 which guarantees the right to a fair hearing in public with a publicly pronounced judgment except where to the extent strictly necessary publicity would prejudice the interest of justice. Secondly, Article 8 which provides the qualified right to respect for private and family life. Thirdly, Article 10 which provides the right to freedom of expression and again is qualified."*

67. *While much of the case law in this area concerns criminal law proceedings or orders issued under anti-terrorism legislation, the principles expounded apply equally to employment law. The EAT in* ***Roden*** *stated:*

> *"So far as the interests of open justice are concerned, I do not accept Mr Bowers' submission in reliance on* ***A v B*** *that in the present case there is no public interest in full publication of what is essentially a private employment claim (particularly given the potentially devastating consequences for* ***G*** *in being identified). This was addressed by Underhill P in* ***F v G [2012] ICR 246 at 49*** *as follows:*
>
> > *"I turn therefore, to the second question, namely whether the injury to the Article 8 rights of the students and staff outweighed the interests of open justice. I do not find that easy. As Tugendat J makes clear in* ***Gray v UVW [2012] EWHC 2367 (QB),*** *the default position in English law is and should be that it is in the public interest that the full decisions of courts and tribunals, including the names of the parties, should be published. I need not elaborate the reasons for that view, which simply reflects what has been said by numerous courts and tribunals ever since the decision of the House of Lords in* ***Scott v Scott [1913] AC 417,*** *and indeed before. It is not a right specifically of the press but reflects the public interest generally. It applies irrespective of the subject matter of the case. (I do not suppose that the Judge's observation at paragraph 19 of the reasons that this was an "individual employment claim" which did not "raise issues of public interest in the wider sense" meant that she believed there was only a public interest in full publication in cases where the subject matter of the claim itself happened to involve issues of general public importance; but I should make it clear that if that is what she meant, I cannot agree). In*

> *addition to that public interest, weight must also be given to the claimant's wish for the Judgment to be published in a form which names herself and the college. It is entirely legitimate that someone who has had their rights vindicated after a hard fought piece of litigation should wish to be able to report, and produce the evidence of, that victory without constraint."*

That legitimate wish, to report that their particular position had been upheld in tribunal, applies equally to whichever party succeeds and therefore applies equally to the claimant and to the respondent. In the present case, serious allegations have been made against the respondent and against particular individuals employed by the respondent, including the then Ombudsman.

68. *The tribunal in the present case determined that it had to undertake a balancing exercise between the Convention Rights contained in Article 6, 8 and indeed Article 10. It was however vital for the tribunal to recognise that a principle of constitutional law is the provision of public justice administered publicly. The Court of Appeal (NI) in* ***Anakaa v First Source Solutions Limited [2014] ICA 57; stated:***

> *"The interest of the public in knowing what is alleged in Tribunals and what decisions Tribunals reach is a substantial one."*

69. *The tribunal accepted that in this case the litigation had been no doubt stressful for the claimant. However the tribunal also had to recognise that the litigation had been stressful for those employed by the respondent organisation and in particular for those individuals who had been accused of unlawful activity and indeed accused of lying in sworn testimony. That included in particular Mrs Anderson and the interview panel members. Serious allegations had been made which needed to be either upheld or dismissed in open tribunal and in a public judgment. Such allegations could not be made in private, and determined in private without very good reason. That is not how justice operates.*

The claimant referred to a report from Mr Dunlop, a cognitive behavioural psychotherapist dated 30 November 2019. That report opined that a reasonable adjustment for the tribunal would have been to anonymise the judgment as suggested by the claimant. However, with respect to Mr Dunlop, it is not for him to determine what a reasonable adjustment would be in these circumstances. That is a matter for the tribunal conducting the appropriate balancing exercise between Article 6, 8 and 10, in accordance with Rule 44 and the case law set out above.

The tribunal must also remember that it is always the case for all parties in litigation that proceedings are stressful and the provision of a public judgment, in particular in disability discrimination proceedings, can also be stressful. However the nature of the

conditions relied on by the claimant, ie dyslexia and, to a lesser extent, depression, are not the sort of conditions which in 2020 could reasonably be expected to attract public opprobrium or criticism, or indeed professional difficulties.

It is also clear that the claimant had, quite properly, been open about her dyslexia in her professional life. It had been, in no sense, a secret.

70. *In the balancing exercise to be conducted by the panel, the tribunal must give due weight to each of the competing Articles and Convention rights but must also recognise the signal importance of public and open justice in a democracy. The tribunal, in conducting that exercise, determined that there was nothing unusual in this case which would justify departure from the principle of open and public justice, and the judgment would not be anonymised to the extraordinary extent suggested by the claimant, or at all.*

71. *In any event, the application for anonymisation by the claimant was entirely misconceived in practical as well as in legal terms. The claims were, to a large extent, an allegation of a failure to make reasonable adjustments in an interview process for a particular post in a particular organisation. It is surprising that the claimant thought it would be in any way feasible for the tribunal, when issuing a judgment, to not just anonymise the claimant but to avoid mentioning the reasonable adjustments sought and granted, to avoid mentioning the nature of the relevant disability, and to avoid mentioning anything which would permit a "jigsaw identification", in a small jurisdiction and in an even smaller legal profession. The nature of work undertaken by the claimant in the course of her career and in particular the nature of the work undertaken as an Investigation Officer and indeed the adjustment sought in relation to the interview process for Senior Investigating Officer were of crucial importance and could not be ignored in any judgment. Similarly, the work and nature of the respondent organisation was important to the allegations made by the claimant and again could not be ignored and in some way left out of the judgment. Even if it had been appropriate for the tribunal to resolve the balancing exercise by giving, for some reason not apparent to this tribunal, more weight to the claimant's stated Article 8 Rights than to the Article 6 need for open and public justice, there was no practical way in which the claimant's requests could have effectively been fulfilled. It would have either resulted in a judgment which would have made no sense to either party or indeed to anyone who chose to read that judgment, or it would have resulted in a judgement where the parties would have been readily identified in any event."*

22. The Court of Appeal issued a decision in respect of parts of that vexed litigation in ***[2021] NICA 39*** and did not set aside the tribunal decision. The Court stated at paragraph 16:

"The Court notes that the same application was made by the appellant at first instance and refused by the Tribunal. The Court takes into account the reasoning of the Vice President which it considers clear and cogent, while recognising that any application must be determined by it de novo. Notwithstanding, the legal principles to be applied are the same in both contexts and the factual framework of the renewed anonymity application is essentially unchanged. The court takes into account in particular that the whole of the proceedings before the tribunal, which included five days of evidence from both parties, were conducted in public. Furthermore, the judgment of the tribunal is in the public domain. Given these factors the Court considers that an Anonymity Order at this stage would be of little or no practical utility to the appellant. Figuratively the horse has already bolted."

23. In the case of ***McNicholl v 1. Bank of Ireland 2. F 1871/16 and 2/17,*** the Court of Appeal had remitted the question of anonymisation to the tribunal *"for the purpose of reconsidering the contentious anonymisation decisions and, if considered appropriate, rescinding same and making fresh decisions".* On remittal, the tribunal stated that:

"The tribunal is satisfied that, when considering whether it is appropriate to make any Anonymity Orders, pursuant to the said rule, it is necessary to have regard to the basis under which any such Order should be made and, in particular, the importance of the principle of open justice, giving full weight to it and the right of freedom of expression. It is clear, under the said rule, the restriction on public disclosure can only be imposed insofar as the tribunal considers it necessary (1) in the interests of justice or (2) to protect the convention rights of any person. – A tribunal is therefore required, when determining this issue, to consider the competing rights and balance one against the other before reaching a decision."

The tribunal in that case lifted the Anonymisation Order in respect of the first named respondent.

24. In ***A Police Officer's Application [2012] NIQB 3,*** an applicant for judicial review sought anonymity on the basis of his occupation as a police officer.

McCloskey J (as he then was) stated:

"15. In my opinion, the advent of Convention rights in domestic law during the past decade, through the vehicle of the Human Rights Act 1998, has served to place a sharper focus on issues relating to hearings in camera, hearings in chambers, protection of the identities of litigants and witnesses and the promulgation of judgments. I consider that if a Court adopts as its starting point the principle of open justice and, having done so, then explores rigorously – without resort to burden or standard of proof – the question of whether sufficient justification for any encroachment on this principle has been demonstrated and, if so, in what manner and to what extent, the court is unlikely to fall into error. Adherence to this approach has the additional merit of minimising the risk of misuse of the court's process.

16. *In the present case, the affidavit sworn belatedly by the applicant in support of his application for suppression of his identity advances grounds which raise certain questions. In particular, there is scant particularity in his assertions about previous terrorist threat. Furthermore, the nexus between fully open proceedings and any extant threat asserted by him is far from clear. While the applicant's assertions potentially engaged the court's duty under Section 6 of the Human Rights Act, the evidential picture is unsatisfactory and incomplete. On the basis of the present evidence – which, I acknowledge, could conceivably be augmented – the Court could not be satisfied of the existence of an objectively verified, present and continuing risk to the applicant's life. The high Osman threshold is not overcome."*

For other reasons, the High Court granted anonymisation in that particular case.

RELEVANT FINDINGS OF FACT

25. There are three types of Prison Officer: a Main Grade Officer (MGO), a Night Guard Officer (NGO) and a Custody Prison Officer (CPO). Each type has different terms and conditions of service.

26. The claimant was offered an appointment as a CPO on 9 November 2012. He accepted that offer.

27. The Terms and Conditions of Employment for a CPO stated:

*"**Paragraph 8 Hours of Work***

Hours of work on post are based on a 39 hour week. However the actual hours worked per week will vary as they will be calculated across your assigned shift cycle. You are required to be on post at your designated place of work within the prison at the start time of the shift. Your shift cycle will include working one weekend in every two, evening and night shifts and public and privilege holidays. No additional payment or premiums will be paid for working weekends or public and privilege holidays. It is a condition of the contract that shift patterns may change from time to time."

*"**Paragraph 9 Overtime***

Overtime will normally be voluntary but it is a condition of the contract that you will be required to work overtime, which may include the extension to your normal shift or work on a normal rest day if operational needs require it. Hours worked over the requirement of the shift cycle will attract overtime payments at the normal hourly rate."

28. The Terms and Conditions of Employment further state:

*"**Paragraph 24 Job Specification***

Attached at Annex B is the job specification for the Custody Officer. The job specification is an initial outline of the tasks you will perform and the personal

competences/skills you require to do the job. These may be changed in the future and any such changes will be notified to you."

29. Annex B of the Terms and Conditions of Employment set out in detail the main duties and responsibilities of a CPO under various headings such as *"providing safe and secure custody", "promoting decent custody", "prisoner engagement" etc.*

30. Annex A to the Terms and Conditions of Employment set out those terms and conditions in chart form. In relation to *"shifts"*, Annex A provides:

> *"(i) Shift system to be designed to meet local needs, and a variety of shift types will apply.*
>
> *(ii) Shift patterns may be changed to meet operational needs.*
>
> *(iii) At least two days per week will be rest days.*
>
> *(iv) 72 hours' notice will be provided where it is necessary to convert scheduled shifts in order to meet the needs of the group.*
>
> *(v) Custody Officers are permitted to exchange shifts with the agreement of Group Managers, and reasonable requests will not be refused.*
>
> *(vi) Before deciding to convert shifts, Group Managers will first –*
>
> - *ask for volunteers*
> - *find out if staff on scheduled duty elsewhere in the establishment can be obtained."*

31. Annex A provides in relation to *"hours of work"*:

> *"(i) Conditioned hours are on average 39 hour week, which will include evenings, nights, weekends and public/privilege holidays. However, the actual hours worked each week will vary as they will be calculated across your assigned shift cycle.*
>
> *(ii) It is a requirement of the job that Custody Officers work one weekend in every two.*
>
> *(iii) <u>Custody Officers shift start time will commence on post at the designated place of work within the prison</u>. [Tribunal emphasis]"*

32. Annex A provides in relation to *"additional hours":*

> *"(i) It is a requirement of the job that Custody Officers are prepared to work additional hours.*
>
> *(ii) In the event of a delay in returning from a bed watch, or an actual or potential incident taking place, Custody Officers may without notice be required to work additional hours at the end of a shift or on rest days.*

(iii) The Governor in charge will determine an actual or potential incident and identify the resources required to manage the situation. An emergency situation will only be declared by the Director of Prisons or his Deputy. Additional hours may need to be worked by staff deployed to duties at their own or another station, or by staff required to provide for their release.

(iv) Other than the circumstances outlined above, where additional hours are required to be worked, Group Managers will

- *ask for volunteers*
- *find out if staff on scheduled duty elsewhere in the establishment can be obtained*
- *if none of the above options are possible give at least 72 hours' notice.*

(v) Additional hours will be paid at plain time rate".

33. On 19 March 2019, the claimant raised a grievance choosing the internal grievance system. He stated:

> *"Following recent enquiries into working practices in Sports Direct I believe that as with their workers have (sic) I am also being treated unfairly as I have been expected to work, for free for up to 30 minutes a day. I am not permitted to travel to work in uniform which means reporting 15 minutes early for search at the external gate and to change from my civilian clothes. I am then expected to be on post at my start time which means another 15 minutes unpaid to go through staff search and walk to my residential post. Staff are not permitted to leave their post until the prison roll is returned, which means there is no flexibility for this to be balanced out and often it is well past my finish time before I even have reached the changing rooms, let alone be approaching leaving my place of work. This was found to be illegal in the Sports Direct case and was classified as being an unlawful deduction of wages. On these grounds I am lodging this grievance to have all unpaid hours accredited to me. I also require my future start times adjusted accordingly. I recognise the need of a proper written down procedure for start time on post that falls within a legal remit and look forward to your reply."*

A grievance meeting took place on 5 April 2019 between the claimant represented by a colleague and, on behalf of the respondent 'B'. The claimant outlined his complaint in further detail and stated that he required to be at the external gate 30 minutes before the start of his shift time to allow him time to travel through the site, change into uniform, show identification and walk to his post. He also referred to difficulties in relation to lunch time and finish time although the present tribunal case relates solely to his starting time and to his claim that he should be entitled to 30 minutes pay for each rostered day in respect of the period before his shift time commenced at his designated place of work within the prison site.

The claimant referred to the TUC website and quoted from that website to state that an employee should be paid for every hour the employee is required to work, including time spent at the employer's premises and at the employer's disposal, even when the employee had not started on his/her employment tasks because they were getting ready for their working day.

'B' advised the claimant that he would have to speak to the Governors and take legal advice.

The minutes of the meeting were agreed.

34. On 9 August 2019, 'B' wrote to the claimant to state that he did not uphold the grievance.

Although it is important to remember that the present case before the tribunal is a claim under the 1996 Order in respect of an alleged unauthorised deduction from wages, 'B' stated:

> *"**Legal Position***
>
> *I have now received legal advice from the DSO. In the Working Time Regulations (Northern Ireland) 2016, working time refers to "any period during which the worker is working, at the employer's disposal and carrying out the worker's activities or duties, any period during which the worker is receiving relevant training, and any additional period which is to be treated as working time for the purposes of these Regulations under a relevant agreement; and "work" shall be construed accordingly".*
>
> *"This interpretation of working time was clarified by the reasoning of the European Court of Justice to be subject to three criteria for the application of "working time". These are to be at the workplace; be at the disposal of the employer; and to carry out the duties required of the employer. Your contract states "a shift shall start when you are in post and will end when you leave your post. Time spent travelling to and from the post while inside or outside the prison perimeter will not be included". The terms of your contract are clear and specific, have not been varied and therefore you have been paid correctly."*

35. In the letter of 9 August 2019 'B' queried the claimant's assertion that he had attended work 30 minutes early to start shifts and had lost those 30 minutes. He stated that:

> *"The gate book entries indicate that you are arriving early and leaving early so that the times even out."*

'B' referred to three dates on which he had concluded that the claimant had arrived eight or nine minutes early and had left in respect of each shift either ten minutes, seven minutes or 16 minutes early.

The claimant was advised of his right of appeal.

36. The claimant lodged an appeal on 20 August 2019. He disputed 'B''s legal advice. He stated that as a *"uniformed Prison Officer"* he was under a command structure and was open to disciplinary action as soon as he entered the prison estate. He was also obliged to intervene in certain circumstances and to be vigilant throughout his presence on the prison estate. He stated that he could not refuse a legal instruction given to him by superior officers while he was on the prison estate.

Furthermore the claimant disputed the evidence presented by 'B' in relation to his attendance times.

37. The grievance appeal was heard on 20 November 2019. The claimant attended and was represented by a colleague. The appeal was heard by 'D'.

38. 'D' recorded that the claimant had stated that once he had entered the prison estate at the external gate, he was bound by Prison Rules and could be redirected by senior management. If his start time on shift at his designated post had been 8.00 am that required him to be at the external gate for 7.30 am. He disputed the factual evidence in relation to attendance times collated by 'B'. 'B' stated that he would need time to research the background and that the points raised could take some time. The minutes were agreed.

39. On 20 December 2019, 'D' wrote to the claimant rejecting his appeal. He confirmed the position taken by 'D' that the journey made by the claimant from his home to his normal place of work was ordinary commuting and that it was not paid.

40. The tribunal was taken through multiple spreadsheets in tiny print which set out a sample of days on which the claimant had not worked overtime and had worked only his rostered shift. While this obviously did not present a complete picture, the pattern established by this evidence was of the claimant arriving, in general, a few minutes early for the start of his shift and leaving, again in general, a few minutes early before the end of that shift. No evidence was produced in rebuttal by the claimant other than a generalised statement that he tended to arrive 30 minutes early in the morning.

41. The claimant alleged that he had been obliged to submit to the control of the respondent once he had entered the external gate of the prison site. The evidence disclosed that he had, on a few occasions, been offered overtime at the point where he had either entered the external gate or the main gate. On those few occasions, if he had accepted the overtime, the overtime was paid from that point. Furthermore the situation was not, as the claimant alleged, that he had been obliged to accept overtime offered to him in these circumstances. It was clear from the provisions of his contract (see paragraph 32 above) that overtime in these circumstances, ie without notice, was entirely voluntary. The manager in those circumstances was required to firstly ask for volunteers, secondly find out if other staff within the prison complex were available and only if the first two options were not available give at least 72 hours' notice of any compulsory overtime.

The claimant also alleged that he was obliged to be *"vigilant"* once he was on the prison premises, that he was obliged to intervene if an incident occurred and that he should be paid on that basis. The evidence from the respondent was that an individual prison officer who turned up early for his rostered shift was free to go to the canteen, have a cup of tea, read the paper etc and that they were not regarded

as being on duty. The tribunal accepts that evidence which was not rebutted by the claimant. Furthermore, the requirement to be *"vigilant"* and to intervene if an incident occurred could only have any real impact on the claimant in extremely rare circumstances. It is in any event indistinguishable for the situation that might occur if the claimant, when approaching the external gate, observed a prison break taking place or observed some form of disturbance taking place. It is not the case that such rare and theoretical circumstances give rise to a commencement of contractual working time, particularly given the absolutely clear and specific terms of the contract.

42. The claimant has not established that he attended regularly 30 minutes early before the start of each rostered shift and furthermore he has not established that he had been required to either attend 30 minutes early or to work for 30 minutes in advance of the start of each rostered shift. If the claimant had, very occasionally, been asked to undertake overtime before the commencement of his rostered shift, he had been paid for doing so.

43. In any event, given the decision of the tribunal in this matter, the issue of the alleged early attendance at the prison is not relevant.

DECISION

Anonymity

44. The tribunal has decided, in accordance of Rule 44(3)(b) that the names of the parties and witnesses (other than the respondent), should not be identified in this judgment. It has done so for the following reasons:

(i) This is not the standard case which involves a balancing exercise between rights conferred under Articles 6, 8 and 10 of the Convention. In this case, the respondent produced unrebutted evidence of a current threat level indicating a *"serious"* risk of attack on prison staff. Unlike the position in ***A Police Officer's Application,*** (see paragraph 24, above) evidence is clear and convincing. That evidence raises an obvious issue of compliance with Article 2 of the Convention. That Article needs to be considered together with Articles 6, 8 and 10.

(ii) The claim in this matter was largely technical and contractual in nature. Neither party made allegations of unlawful discrimination or of any personal impropriety on the part of any individual. The present case is not the sort of case where allegations of a serious or personal nature have been made against an individual who then wishes to be able to demonstrate that the allegations have been dismissed or, conversely, where the individual making those allegations wishes to be able to demonstrate that those allegations have been upheld.

(iii) The nature of this claim, the response and the decision of the tribunal can be adequately explained in an anonymised fashion without significantly detracting from the principle of open and public justice.

Unauthorised Deductions from Wages

45. This is a claim under Article 45 of the 1996 Order which, in the circumstances of this case is a simple contractual claim alleging that the claimant had been paid less than the sum to which he had been contractually entitled.

46. The claimant has conflated such a claim with the entirely separate issues of the requirements of the Working Time Directive and the Working Time Regulations and the requirements of the minimum wage legislation. The claimant referred to reports of cases where either working time or the minimum wage had been discussed. None of this is relevant to the present case. The usual context in which a claim under the Working Time Regulations and a claim under Article 45 of the 1996 Order can overlap is where there is a claim for unpaid holiday pay under the Working Time Regulations; in those circumstances, a claim under the Working Time Regulations can run in parallel with a claim for unpaid holiday pay under Article 45 of the 1996 Order. However the present case is entirely different. It is a claim only under Article 45 of the 1996 Order. No claim has been made under the Working Time Regulations or under the Minimum Wage Act and there are no grounds for any such claim.

47. The claimant alleges that he was not paid for 30 minutes work before the start of each rostered shift. Leaving aside the fact the claimant has not established that he either worked or even that he had been required to be present in the prison for 30 minutes before the start of each rostered shift, the contract which the claimant signed was clear and specific. Shift times started only when the claimant was present at his designated workstation within the prison; not when he was present at the external gate or the main gate.

48. Furthermore the claimant had worked for at least six years under that contractual arrangement without complaint, before he raised a grievance and lodged these tribunal proceedings. Even if there had been any doubt about the clear contractual terms in this case, (and there is not) it is clear that the claimant had affirmed those contractual terms by working without complaint for a period of at least six years.

49. While the claimant is clearly aggrieved at the fact that he is not paid by the respondent until he reaches his designated workstation within the prison complex, and the tribunal can sympathise with that position, the contract is clear and the claimant has been paid in accordance with that contract. It is not the tribunal's role to amend a clear and unambiguous contract which has been negotiated between parties and to substitute what one party may regard as a more equitable or fair arrangement; a tribunal can only intervene under Article 45 of the 1996 Order if the claimant had not been paid in accordance with his contractual terms, and that is not the case here.

50. The claim is therefore dismissed.

Vice President:

Date and place of hearing: 27, 28 and 29 September and 1 October 2021 Belfast.

This judgment was entered in the register and issued to the parties on: