IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2018] EWHC 3672 (QB)

No. TLQ18/1112

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 14 December 2018

Before:

MR JUSTICE KERR

B E T W E E N :

(1) PRISON OFFICERS' ASSOCIATION
(2) CHRISTOPHER WOODFORD

Claimants

- and -

SECRETARY OF STATE FOR JUSTICE

Defendant

MR O. SEGAL QC and MR S. BRITTENDEN and (for judgment) MR D. CUNNINGTON (instructed by Thompsons Solicitors) appeared on behalf of the Claimants.

MR D. STILITZ QC, MR E. CAPEWELL (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

THE HON. MR JUSTICE KERR:

Introduction:

1 In this speedy trial, the first claimant trade union (the POA), and the second claimant, a prison officer, seek declarations and injunctions to establish that the defendant minister (the Secretary of State), through the agency of Her Majesty's Prison and Probation Service (HMPPS), has acted unlawfully in breach of prison officers' employment contracts by introducing proposed changes to the job roles, terms and conditions of prison officers (the proposals).

2 In interim relief proceedings on 16 October 2018, the Secretary of State gave temporary undertakings not to implement the proposals pending the outcome of a speedy trial. That trial took place before me this week, less than two months later. I had the benefit of written and oral evidence and of submissions from leading and junior counsel, for which I am very grateful.

3 The claimants say the proposals cannot be implemented without breaching contractual obligations directly owed to individual prison officers, not to implement the proposals unless and until HMPPS has first negotiated on the changes with the POA, the union recognised for collective bargaining purposes, in accordance with a provision in a collective agreement.

4 The POA also relies on a statement to the same effect contained in a document issued to staff which, the POA contends, creates or sets out a contractual obligation of the HMPPS, again directly owed to prison officers individually under their contracts of employment.

5 The Secretary of State submits that the introduction and implementation of the proposals do not involve any breach of prison officers' employment contracts. He says the proposals fall outside the scope of the collective agreement and the document issued to staff; and that, in any case, the procedural obligation relied on by the claimants is not contractual; it is machinery for collective bargaining purposes and as such, on established authority, not apt to generate individual contractual rights.

6 There is a further disagreement over whether, if I find the claim good on its merits, I should grant or withhold relief to either claimant. The claimants say damages are not an adequate remedy and the court should grant relief to require the Secretary of State to behave lawfully; while the Secretary of State submits that the court should withhold relief in the exercise of its discretion.

Facts:

7 The Secretary of State is responsible, through HMPPS, for prisons in England and Wales. The POA is an independent trade union representing prison officers and is the recognised union for the purposes of collective bargaining.

8 The second claimant is a prison officer based at HM Young Offenders Institution Wetherby, in Yorkshire. His job title is "band 4 prison officer specialist". His terms and conditions of employment could eventually be affected by the proposed changes if he chooses to apply for one of the new job roles.

9 HMPPS is a successor body which, among its other responsibilities, carries out those formerly undertaken by HM Prison Service and by the National Offender Management Service (NOMS). I shall refer below to HMPPS, though some of the documents I will refer to go back to NOMS's time and so bear its name, or that of HM Prison Service. Nothing turns on these distinctions for the purposes of this case.

10 At present, a person does not require any particular qualification to become a prison officer. They are employed under contracts of employment. As Jay J pointed out in *Ministry of Justice v Prison Officers' Association* [2018] ICR 181, at [21], their terms and conditions of employment can be found in several places, including their letters of appointment, written statements of terms and conditions, an employee handbook, the Civil Service Management Code, a document called "Bulletin no. 8", various "prison service instructions" (PSIs), various "prison service orders" (PSOs) and various "notices to staff" (NTSs).

11 That is not an exhaustive list of the sources of prison officers' terms and conditions; nor are the contents of those documents all contract terms. Some are, others are not. Whether they are or not depends, broadly, on whether they are apt to be individual contract terms.

12 Job descriptions may also describe a prison officers' duties in a particular role, and those duties are likely to be contractual obligations, or (which is not quite the same thing) a statement of instructions a prison officer is required to carry out pursuant to the general duty of an employee to obey reasonable instructions.

13 I have been provided with an array of documents falling within the above categories, some relating to named individual prison officers including the second claimant; others applying to particular job roles or proposed new job roles and applicable to prison officers generally, or to prison officers currently employed, or in future to be employed, in particular job roles.

14 The letters of appointment I have seen do not all expressly incorporate job descriptions into the contract of employment, though the most recent *pro forma* dating from August 2018 does. However, as I have already said, statements of duties in job descriptions are often contractual anyway because they set out what the employee is instructed to do, and the employee must generally obey reasonable instructions.

15 Bulletin no. 8, also entitled, "A Fresh Start", is a collective agreement dated 3 April 1987 consisting of an exchange of correspondence recording the agreed "Fresh Start" terms. It is common ground that some, not all, of its contents have become individual contract terms subject to any later variation; for example, provisions about the length of the working week and rest days. Other parts are not suitable to be contract terms; for example, guidance to prison governors about management structures.

16 Bulletin 8 contains a statement (Appendix 3, paragraph 2) that governors "will be invited to ensure that job descriptions describe the relevant work activities and exact responsibilities of the job holder"; that they be "agreed for all staff" and "held centrally in a library of job descriptions". There is now an intranet where they can, I am told, be found.

17 A person may be restrained by injunction, on the application of the Secretary of State, from inducing a prison officer to take industrial action or commit a breach of discipline: Criminal Justice and Public Order Act 1994, section 127. This legal restraint is specific to prison officers and does not apply to workers generally or public service workers generally.

18 In 2005, the POA and HMPPS entered into an agreement called, "Joint Industrial Relations Procedural Agreement", (JIRPA). Unusually, it was legally binding on both parties: see paragraph 5(1), rebutting the otherwise conclusive presumption against legal enforceability in section 179(1) of the Trade Union and Labour Relationship (Consolidation) Act 1992 (the 1992 Act).

19 The JIRPA provided for consultation and negotiation on terms and conditions, subject to exclusions including questions of pay. It was terminable on 12 months' notice by either party. In 2006, the POA served notice to terminate the JIRPA which accordingly came to an end 12 months later, in 2007.

20 After that, there was no overarching or general collective agreement in place for about the next four years. However, there was at least one *ad hoc* collective agreement. I was shown one, PSI 24/2008, dated 14 July 2008 and still effective now. It began by describing itself as a "collective agreement" and I was told by Mr Philip Copple, HMPPS's Executive Director, Prisons, that it was negotiated and agreed with the POA.

21 It dealt with "payment plus", i.e. additional remuneration for extra hours worked from which prison officers could opt out (and later opt back in again) if, for example, domestic issues made them unable to work extra hours; though, as recorded in paragraph 5 of PSI 24/2008, Bulletin 8 contained a provision whereby staff could on occasion be asked to work more than their average weekly hours.

22 Then, after discussion between HMPPS and the POA in 2010, a new national level collective agreement was concluded on 18 February 2011, this time not legally binding. It is still in place and is called the "National Disputes Resolution Procedure for Changes to Specified Terms and Conditions" (the NDRP). Like many such agreements, it is quite loosely drafted.

23 Its purpose is "to resolve disputes about proposed changes to specific terms and conditions" (paragraph 2.1). The parties agreed to seek to avoid the need to enter into a formal dispute process through "effective engagement and consultation" (paragraph 2.3). Its scope was defined in paragraph 3, which, so far as material, states as follows:

> "3.1. This agreement only covers change proposals from NOMS that may impact on terms and conditions in regard to leave, ill-health, grievance procedures, disciplinary procedures and procedures and working arrangements if they are capable of constituting terms and conditions where they are set out in 'Bulletin 8'. These conditions are set out in the schedule of letters of appointment, relevant up-to-date PSIs and PSOs and other statute and case law that amount to terms and condition.
>
> 3.2. For the avoidance of doubt, the specific sources that contain references to these terms and conditions of service are, at present:- annual leave policy is set out in the staff handbook; ill health policy is covered by 'Management of Attendance' policy; grievance policy is covered by 'Staff Grievances' policy and disciplinary procedures are covered by 'Conduct and Discipline' Processes."

24 Paragraph 3.3 then set out exclusions from the scope of the NDRP. The procedure laid down in it does not apply to pay, individual issues, local issues, operational issues or other policy issues.

25 Paragraph 4 is then headed "General". Paragraph 4.3 states:

> "When a dispute is registered on a proposed change falling within the criteria specified in paragraphs 3.1 and 3.2 above, the existing policy must be maintained until conclusion of the disputes process. However, in compelling circumstances, the Director of Public Sector Prisons, or equivalent role should the Director be unavailable, may authorise a temporary management override to permit all or part of the requested change to be applied whilst the disputes process is concluded. This will be time bound for a maximum of 28 days … ."

26 By paragraph 5 the NDRP is terminable on six months' notice by either party.

27 Schedule 1 then sets out the procedure to be followed where there is a dispute. It provides, among other things, for negotiations to be conducted at the appropriate level, i.e. the level at which the decision rests (paragraph 2.2). Where agreement is not reached, an "FTA" (i.e. failure to agree) may be registered by either side. That triggers automatically a conciliation process, unless either party puts in a reasoned objection to conciliation (paragraphs 4.2 and 5.1).

28 If conciliation through ACAS fails to resolve the dispute, it is then referred to arbitration only if that is agreed; or, either party can withdraw from the dispute (paragraphs 5.9.4 and 5.9.5 of Schedule 1). Any arbitration is conducted according to the procedures set out in Schedule 1 paragraph 6, culminating in an arbitration award which by paragraph 6.10 "will be implemented as if it was an agreement,…. ."

29 In April 2012, new collectively agreed terms of employment for new starters were introduced and set out in a document called "Fair and Sustainable" (F & S). Those currently employed could choose to remain on their existing terms and conditions referred to as "closed grades".

30 In September 2015, the Secretary of State asked Mr Charlie Taylor to undertake a review of the Youth Justice System in England and Wales (the Taylor Review). The report resulting from the Taylor Review was published in or about December 2016. The recommendations in the report did not touch specifically on prison officers' terms and conditions, but did say much about the need to improve the quality of the Youth Justice System, including youth custody systems and institutions.

31 At about the same time, the government published a White Paper on Prison Safety and Reform. I am told it emphasised the need for "upskilling", i.e. the development of more highly skilled prison staff. HMPPS was clearly concerned to achieve improvements in staffing of the prison system and in particular where young offenders are held in custody.

32 In February 2017, a body of experts called "The Youth Custody Improvement Board" published findings and recommendations. It reported that the youth custody estate was in a poor condition, "on the edge of coping with the young people it was charged with holding". Lack of skilled staff was a major part of the problem.

33 During the period of just over a year, from February 2017 through to April 2018, discussions and meetings took place between HMPPS and the POA about how best to respond to the recommendations in the Taylor Review and the findings of the Youth Custody Improvement Board.

34 In August 2017, HMPPS informed the POA that it was proposing the establishment of a new position called "Youth Justice Officer". There was correspondence about that in November 2017.

35 The POA expressed concern that it was being bypassed; it had an "absolute right to be consulted" (to quote from its letter of 16 November 2017) which right was not being respected. An urgent meeting was proposed. HMPPS responded later that month, agreeing to a meeting "in the near future". A meeting did indeed take place in late January or early February 2018.

36 Then, on 13 April 2018, HMPPS wrote to the POA proposing "early single table discussion and consultation" on four areas: the Youth Custody Service (YCS), new band 4 Advanced Prison Officer (APO) roles, future promotion policy and variations to permanent contractual hours. Two working groups, with HMPPS and POA representation on both, were proposed for this purpose.

37 Also on 13 April 2018, HMPPS issued NTS 16/2018 (the NTS), signed by Mr Martin Beechcroft, HMPPS's director of human resources. The NTS replaced and superseded an earlier NTS dating from May 2016. There are two versions of the NTS before me; one with the annexes left blank, to be filled in; the other with the annexes filled in to describe proposed new job roles.

38 Although it is not entirely clear whether the proposed new job roles were included within the annexes from April 2018 or only later, probably from early September 2018, I do not think this matters; what is clear is that the NTS announced the proposed introduction of new job roles following disclosure of information in consultation with the recognised unions including, but not limited to, the POA.

39 The NTS stated in part as follows (bold type in original):

> "2. This notice outlines the process to be used to confirm that consultation on **changes to staff grades and numbers has taken place** and that information requested by union representatives is provided within the required timescales. For this purpose, two forms are attached at Annex A and Annex B.
>
> 3. Governors, Heads of Group (HoG) and NPS Divisional Directors should initially consult at the lowest level with the local trade union representatives.
>
> 4. A contact list for consultation with national trade union officials is also provided for HQ use when consulting trade unions on changes of policy. This is attached at Annex C. For the purposes of this notice, the following trade unions are recognised by HMPPS:
>
> - The POA … [and other unions]."

40 The NTS then gave to governors further directions on consultation and disclosure of information in paragraphs 5 and 6 of the NTS, which I need not set out. Above paragraph 8 was the heading, "Consultation with National Trade Union Representatives". This heading refers not just to representatives of the POA; at least five other recognised unions were to be consulted.

41 Paragraph 8 of the NTS, beneath that heading, stated:

> "NB: Changes to employees' terms and conditions of employment require prior negotiation with the relevant trade unions."

42 There were then various further meetings and quite a bit of correspondence, in which the POA complained that HMPPS was not complying with its obligations under the NDRP, a proposition from which HMPPS begged to differ. Various arguments were rehearsed in the correspondence, some of which resembled parts of the arguments addressed to me in court earlier this week.

43 HMPPS decided to press ahead with its workforce reforms. Under cover of an email of 4 September 2018 if not earlier, HMPPS rolled out the new proposed job roles, for discussion and implementation. They were, briefly, as follows.

44 First, a group of proposals was advanced, together referred to as "the YCS workforce reform proposals". They were summarised thus:

> "
>
> - The introduction of two new job descriptions for the YCS at Band 3 and Band 4
> - Amendment of the Band 5 Custodial Manager job description in the YCS
> - Expansion of the frontline workforce in YCS YOIs by 20%, including increasing the number of Custodial Managers by 50%
> - Provision of new Youth Justice qualification to all new and existing Band 3 & 4 staff
> - Introduce new learning and development roles to oversee delivery of new qualification
> - Introduce direct-entry recruitment at Band 4".

45 The rationale was explained at length, beginning with the observation that "there is currently an HMPPS-wide strategy to professionalise the workforce". A new workforce structure for youth justice was proposed in the following terms:

> "4.1. A new organisational structure has been developed with two key new roles and an updated custodial manager role. These new roles have been evaluated by the Job Evaluation Scheme and have been branded as follows: the two frontline roles consist of a Band 3 Youth Justice Worker (YJW) and a Band 4 Youth Justice Worker Specialist (YJWS), whereas the Custodial Manager will remain a Band 5 role. The Band 3 role will be a developmental role tied to on-the-job training, with the intention to prepare the worker for progression to the Band 4 role after a year of training."

46 For the new Band 3 Youth Justice Worker role, there is a course training requirement that must be fulfilled not later than 2023. A foundation degree qualification in youth justice must be obtained. It is agreed that those who do not apply or do not fulfil that requirement will not be able to get a job in that role and are likely to be moved to an adult prison. There is a mobility clause in current contracts to facilitate such a move. The mobility clause must, of course, be used reasonably.

47 The training requirement is described in the same document as follows, at paragraphs 5.1 and 5.2, under the heading, "Learner Provision":

> "5.1 Each Band 3 YJW will be required to complete a 13-month training programme which is an accredited Level 4 qualification in youth justice

delivered by UNITAS. There are 250 training places for both public and private prisons each year …

5.2 It is intended that staff completing this training will be able to access study leave - the application and management of this leave will be managed within each site. This study time will be profiled as a flexible task for Band 3 YJWs when the Youth Custody Service re-profile in the Autumn of 2018. The additional staff required to provide study time have been added to the target staffing level. Learners are also supported by the Development and Practice Manager and the Learner Development Board ….”

48 There is a dispute, which I cannot resolve, about whether study leave will be available when asked for. The POA is sceptical about this.

49 For those who already hold appropriate qualifications there will be a possibility of direct entry into the new band 4 roles. There are written job descriptions for the various roles, which can be taken approximately to correspond to the duties that will have to be performed by those doing them. The parties have referred me to these and I have considered them.

50 The new roles are as follows. The first is band 3 Youth Justice Worker. The second is band 4 Youth Justice Specialist Worker. These are posts for which the foundation degree requirement is a pre-condition. Existing staff on band 3 and existing band 4 Supervisory Officers will be eligible for the band 4 role if they undertake and attain the foundation degree qualification, also called a “level 4 qualification”.

51 Those already in specialist roles, including the second claimant, Mr Woodford (who has a specialist role called “Use of Force Young People”), Dog Handlers, Physical Education Instructors and those in a post called “Instructor Young People” will have the option of remaining in their current jobs and need only apply for and attain a foundation degree qualification (by 2023) if they wish to become one of the new band 4 Youth Justice Specialist Workers.

52 There are also two proposed new Band 5 (i.e. more senior) roles. The first is called a “Custodial Manager Youth Custody Service”. Existing holders of the current band 5 job called “Custodial Manager” are eligible without further training to fill the new role. It is supervisory, requiring the job-holder to oversee the work of Band 3 and 4 Youth Justice Workers.

53 The other new band 5 role is called Development Practice Manager. As its name implies, the job involves supporting the professional development of others within the Youth Custody Service, including responsibility for providing support to staff undertaking the level 4 qualification and ensuring that the learning from that qualification is applied in operational work at youth custody establishments. Existing band 5 officers are eligible without further training to apply for this role.

54 Two further changes were also among the proposals. These are not specific to the Youth Custody Service. The first is the intention to introduce a new band 4 role called “Advanced Prison Officer” or APO. This combines ordinary band 3 prison officer work with what was described as “a combination of additional specialist skills acquired through recognised training courses and availability for deployment to the specialist tasks in response to operational needs”.

55 Examples given include first aid and support for prisoners at risk of self-harm or suicide. There are to be recognised routes to becoming an APO: you have to undertake compulsory modules in first aid and mentoring, and then take one of three alternative additional models (sic) (for example one is hostage negotiation; another, not for the faint hearted, an "incident at height" module) followed by success in a selection process.

56 Finally, there is a proposal to introduce something called "Additional Committed Hours Pensionable" or ACHP. This, as I understand it, is to sit alongside the "payment plus" system already mentioned. It is a proposal to encourage those who wish to enhance their pensionable earnings by applying to work longer contracted hours, subject to availability. There is no obligation to work such additional hours - you have to apply - and no guarantee of availability of additional hours for those who choose to apply.

57 Such, in summary, were and are the proposals of HMPPS to reform the workforce job roles and working practices. After they were announced, the matter became litigious and pre-action correspondence was exchanged. It is unnecessary to trawl through the detail of that correspondence, which is quite voluminous. These proceedings were then issued, pleadings exchanged and an application for interim relief made to this court.

58 In parallel with the litigation, on 8 October 2018, the POA registered a "failure to agree" under the NDRP. The POA referred to the proposals and complained that HMPPS "wished to impose these new terms and conditions on staff in the youth custody estate without negotiating with the POA. This dispute is clearly within scope because it clearly affects the terms and conditions of POA members." The POA therefore "register this dispute and invoke the status quo ante until HMPPS agree to negotiate these proposed changes to terms and conditions with the POA".

Issues, Reasoning and Conclusions:

59 The issues are, first, whether the claimants can show the existence of individual contract terms that are being, or would be, violated if the proposals were implemented; and if so, what if any relief should be granted. The first issue depends, in turn, on whether the proposals, or some of them, fall within the scope of the NDRP, the NTS or both; and, if so, whether provisions of the NDRP (not itself legally binding) or any part of the NTS have become contract terms of individual prison officers.

60 I can summarise the main arguments of Mr Oliver Segal QC, for the claimants, in the following way:

(1) The announcement of the new Youth Custody Service ("YCS") roles, the new APO role and the introduction of ACHP (i.e. the proposals) all involve the introduction of changes to terms and conditions within the meaning of the NTS and the NDRP. HMPP's attempts to argue otherwise are mere sophistry.

(2) The new roles all involve changes to duties; some involve additional qualifications and training, and the ACHP provision involves a change to the length of the working week for those who do it. These are changes to terms and conditions and that conclusion is not altered by the point that they are, for the most part, "voluntary" in the sense that a prison officer is not compelled to apply for them.

(3) In so far as some duties might be capable of alteration without breaching employment contracts, i.e. by changing instructions to employees but within the parameters of their

existing contractual obligations, the changed duties are still changes to working arrangements and as such within the scope of the NDRP and the NTS. It is not correct that the NDRP and NTS only apply to changes that, absent agreement of the POA, would be a breach by HMPPS of prison officers' employment contracts.

(4) Mr Segal submitted that it was unnecessary to engage in a line by line comparison of the duties in existing roles with those planned for the new roles, as set out in job descriptions and answers to frequently asked questions (FAQs). He relied in particular on a comparative table produced by HMPPS itself, presented to the POA in June 2018, which he put to Mr Copple. The table shows the changes clearly.

(5) Mr Segal submitted that it was not surprising Mr Copple had accepted in oral evidence what was evident from that table, namely that at least in some cases the new duties and the new roles there set out are substantially different from, and more onerous than, the counterpart duties in the old current roles of the same band level (3, 4 or 5). In some cases, there is no counterpart duty at all in the current role.

(6) It is hardly surprising that the changes are substantial; in some cases, there is a change of band, from 3 to 4, which could not occur unless the duties were different, and thus the terms and conditions different, from those applicable in the old role at the lower band.

(7) Paragraph 8 of the NTS and para.4.3 of the NDRP both form part of individual prison officers' terms and conditions of employment. The authorities relied on by HMPPS (*NCB v NUM* [1996] ICR 736, *Alexander v Standard Telephones & Cables Ltd (No.2)* [1991] IRLR 286 and *Kaur v MG Rover Group Ltd* [2005] ICR 625) turn on their facts, are distinguishable on the facts and do not point against those terms being unsuitable for incorporation into individual contracts; see *Malone v British Airways plc* [2011] ICR 125 per Smith LJ at [52]-[55] and [61]-[62].

(8) Incorporation of these provisions into individual employment contracts is a natural counterweight to the non-enforceability of the NDRP as between the POA and HMPPS, especially in the light of section 127 of the 1994 Act, preventing the POA from calling industrial action, and in the light of the guarantee of freedom of association enshrined in article 11 of the European Convention on Human Rights.

(9) Paragraph 4.3 of the NDRP and paragraph 8 of the NTS are not merely "machinery"; they protect the right of an individual prison officer to secure observance of a substantive obligation to negotiate before imposing fresh terms. While that right could not outlive the NDRP if it were terminated (unlike a term conferring a right to financial benefit, as in *Robertson v British Gas Corporation* [1983] ICR 351), there is no reason why the right cannot subsist as long as the NDRP does; just as a procedure for investigating sexual harassment allegations was held enforceable at the suit of an individual accused in *Bristol City Council v Deadman* [2007] EWCA Civ 822.

(10) That conclusion is not unjust or surprising. The obligation to negotiate is not the same as an obligation to reach agreement. If agreement is not reached after negotiation, HMPPS is free to impose additional obligations or duties on prison officers or to change their duties to the extent that individual employment contracts permit; or even to invite acceptance of fresh terms and dismiss (with or without re-engagement) those unwilling to accept them.

(11) Damages would plainly not be an adequate remedy; a declaration, at least, should be granted, even if not an injunction. A declaration would suffice since HMPPS could be counted upon to act in accordance with it.

61 For the Secretary of State, Mr Daniel Stilitz QC responded with arguments which I summarise as follows:

(1) The case fails at the first hurdle because, while the NTS and NDRP are collective agreements, they deal with process not individual entitlement. Neither paragraph 8 of the NTS nor paragraph 4.3 of the NDRP gives rise to a contractual right enforceable at the suit of an individual prison officer, that HMPPS will engage in collective negotiations with the POA before introducing changes to prison officers' terms and conditions, or before doing so prior to the conclusion of the process provided for in the NDRP.

(2) The line of authorities going back to *NCB v NUM* and including, most recently, Rimer LJ's judgment in *George v Ministry of Justice* [2013] EWCA Civ 324, establish that it is normally impossible to infer an intention of the part of the employee and employer to incorporate a term into an individual employment contract if the obligation on the employer is procedural and consists of machinery for collective bargaining, not applicable specifically to a particular individual worker.

(3) A useful test of whether the term is apt for incorporation into an individual employment contract is to consider what would be left of the term if the collective agreement were to terminate. Where, as in this case, the obligation is to negotiate (and not, for example, to confer a financial benefit), there would be nothing left of the obligation which demonstrates its unsuitability for incorporation.

(4) Even if that were wrong, HMPPS has not breached paragraph 4.3 of the NDRP (or any parallel obligation in paragraph 8 of the NTS) by stating that it would press ahead with implementation of the proposals rather than maintaining the *status quo* pending conclusion of the NDRP process. The proposals are outside the scope of paragraphs 3.1 and 3.2 of the NDRP; therefore the requirement to negotiate under paragraph 4.3 does not arise.

(5) The proposals do not involve any changes to terms and conditions that are compulsory or outside existing duties; they merely provide opportunities for prison officers to apply for new roles if they wish to do so. A prison officer who chooses to stay on "closed grade" terms or "fair and sustainable" terms will not be required to work under any new terms when the proposals are implemented. If that leads to transfer from youth custody establishments to an adult prison, that is not a breach of contract; it is permitted by the mobility clause.

(6) The obligation to negotiation under paragraph 4.3 of the NDRP only bites on change proposals falling within the scope of paragraphs 3.1 and 3.2 (and that are not among the exclusions in 3.3). The NDRP should not be construed as if it were a statute. The correct reading of paragraph 3.1 and 3.2 is that the NDRP does not apply to possible future voluntary changes to terms and conditions. It would apply to, say, a proposal to reduce holiday entitlement compulsorily.

(7) The proposed changes to duties, in so far as not voluntary and where set out in the new job descriptions, are not so significant as to amount to alterations to terms and

conditions; they are comparable to the obligation to use new computer equipment to perform the same tax collecting tasks in *Cresswell v Inland Revenue Board* [1984] ICR 508, held by Walton J to be part of the employees' existing duties.

(8) HMPPS can make "reasonable alterations and [add] additional tasks of a similar level", as Jay J put it in *Ministry of Justice v Prison Officers' Association* (cited above) at paragraphs 25 and 26, quoting from a band 3 prison officer's job description. The changes to duties fall into that category in the present case.

(9) It would be surprising if the present proposals fell within the NDRP, for it would mean HMPPS would be required to take part in a process culminating in binding arbitration which would hamper its ability to implement the "upskilling" reforms recognised in a broad consensus as necessary and urgent.

(10) Even if any of the claimants' arguments were good on their merits, the court should withhold relief in the exercise of its discretion to do so arising under sections 19 and 37 of the Senior Courts Act and CPR rule 40.20. Furthermore, the Secretary of State personifies the Crown and as such an injunction cannot go against him (Crown Proceedings Act 1947 section 21(1)(b)). At the most, a declaration could be granted.

62 Having considered carefully the parties' rival contentions, the oral evidence and the documents, especially those relating to current contract terms and job content, as compared to the likely contract terms and job content of the proposed new job roles, I have come to my reasoning and conclusions.

63 For completeness and although it was not controversial, I will start by addressing the standing of the POA to bring the claim. The standing of the second claimant is self-evident. The POA brings the claim in its capacity as the prison officers' trade union recognised for collective bargaining purposes. It asserts no cause of action in private law, unlike the second claimant.

64 It asks the court, as a party directly affected by the issues in the case, to grant at least a "bare declaration", unaccompanied by any claim that the Secretary of State has acted unlawfully towards it, the POA. Such a claim is justiciable in these proceedings, as the Secretary of State rightly accepted; see e.g. *Mullins v Macfarlane* [2006] EWHC 986 (QB), per Stanley Burnton J, as he then was, at [39]; *Rolls Royce plc v Unite the Union* [2010] ICR 1, per Aikens LJ, at [120(4)].

65 Next, I consider the contractual position of prison officers. I respectfully agree with the parties, and with Jay J, that they are to be found in a variety of documents as already noted; supplemented, in the usual way, by the terms that are implied into the contract, some say by law, others, by the parties themselves: the duties of service, competence, use of reasonable care, loyalty, fidelity, cooperation and the duties of both sides to uphold and maintain trust and confidence.

66 From 2005 to 2007 there was, most unusually, a legally binding collective agreement between the POA and HMPPS. That is no longer the position. Instead, collective bargaining is regulated by the non-binding NDRP. It is, in the time-honoured phrase "binding in honour only". The NDRP is clearly a collective agreement, for it falls within the words: "any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations": see section 178(1) of the 1992 Act.

67 The agreement must relate to one or more of the matters in s.178(2). The NDRP does. Those matters include terms and conditions of employment, and much more: among other things, they also include the physical conditions in which work is done; engagement or non-engagement, termination or suspension, allocation of work duties, matters of discipline, machinery for negotiation and consultation and other procedures relating to those matters.

68 Thus far, what I have said is, as I understand it, common ground and not controversial. What approach should I take to the interpretation of the NDRP? That is not controversial either. The approach must be that stated by Sir Thomas Bingham, Master of the Rolls, in *Adams v British Airways plc* [1996] IRLR, 574, at [21]-[22]. It is worth setting out here:

> "21. The court is not concerned to investigate the subjective intentions of the parties to an argument (which may not have coincided anyway). Its task is to elicit the parties' objective intentions from the language which they used. The starting point is that the parties meant what they said and said what they meant. But an agreement is not made in a vacuum and should not be construed as if it had been. Just as the true meaning and effect of a mediaeval charter may be heavily dependent on understanding the historical, geographical, social and legal background known to the parties at the time, so must a more modern instrument be construed in its factual setting as known to the parties at the time. Where the meaning of an agreement is clear beyond argument, the factual setting will have little or no bearing on construction; but to construe an agreement in its factual setting is a proper, because a common-sense, approach to construction, and it is not necessary to find an agreement ambiguous before following it.
>
> 22. …. A collective agreement has special characteristics, being made between an employer or employers' organisation on one side and a trade union or trade unions representative of employees on the other, usually following a negotiation. Thus it represents an industrial bargain, and probably represents a compromise between the conflicting aims of the parties, or 'sides' as in this context they are revealingly called. But despite these special characteristics, a collective agreement must be construed like any other, giving a fair meaning to the words used in the factual context (known to the parties) which gave rise to the agreement."

69 With that introduction, I turn to matters that are not agreed. What is the scope of the NDRP? It operates on the following principles. Its purpose is to resolve disputes about proposed changes to specific terms and conditions (paragraph 2.1). The parties will seek informal resolution through effective engagement and consultation to avoid the formal process if possible (paragraph 2.3).

70 The NDRP covers, and covers only, certain kinds of "change proposals" from HMPPS (paragraph 3.1). They must be change proposals that "may impact on terms and conditions" of certain kinds. The terms and conditions covered must be "in regard to" leave, ill health, grievance and disciplinary procedures and "procedures and working arrangements if they are capable of constituting terms and conditions where they are set out in 'Bulletin 8'".

71 Stopping there for a moment, it is plain that the terms and conditions covered by paragraph 3.1, or the kind of terms of conditions covered, need not actually be found in Bulletin 8. The next sentence makes that clear. They are set out in other places. They are found, as the next sentence states, in schedules to letters of appointment, PSIs, PSOs and "other statute and case law that amount to terms and conditions".

72 The next paragraph, 3.2, attempts to promote "the avoidance of doubt". It cites "specific sources" which are documents that "at present" contain references to terms and conditions on four subjects: annual leave, ill health, grievances and disciplinary procedures. It is obvious that those four types of terms and conditions are not the only ones that can be the subject of collective bargaining under the NDRP. Working arrangements are also mentioned in paragraph 3.1; these could include, for example, shift patterns, holiday leave, time off in lieu and so on.

73 Take shift patterns as an example. These might be found in Bulletin 8 or in a staff handbook, or scheduled to a letter of appointment or in a PSI or PSO. It does not matter where the shift patterns are found, they are clearly "working arrangements". They would fall within paragraph 3.1, wherever the existing shift patterns subject to a change proposal are to be found.

74 Then there are specific exclusions from the scope of the NDRP. These are in paragraph 3.3. Pay is excluded. Issues relating to an individual are excluded. Local issues are to be dealt with at local, not national, level. Operational issues are excluded, as are "other policy issues". An example of an excluded operational issue might be, say, how to respond to a violent incident in a prison. An example of an excluded policy issue might be, say, cell sizes, segregation, solitary confinement, and the like.

75 As both parties submit, the NDRP applies to a dispute only when it is registered "on a proposed change, falling within the criteria specified in paragraphs 3.1 and 3.2 …" The Secretary of State submits, first, that those criteria are confined to proposed changes that could be called coercive, that is to say changes that are to be imposed on prison officers compulsorily. The Secretary of State argues, through Mr Stilitz, that the changes currently proposed do not fall into that category.

76 I have no difficulty in rejecting that interpretation of paragraphs 3.1 and 3.2. The NDRP contains no provision, in those paragraphs or anywhere else, confining its scope to changes imposed under compulsion rather than voluntarily. A proposed change "may impact on terms and conditions in regard to … working arrangements" whether the change comes about (reluctantly or otherwise) voluntarily, or is imposed without agreement, in circumstances that would breach employment contracts unless the change were first agreed - and through that agreement, incorporated into individual officers' contracts.

77 Next, the Secretary of State submits that proposed changes to prison officers' duties, which they can under their existing contract terms lawfully be instructed to carry out, do not fall within the scope of the NDRP. Again, I see no such restriction in the words of the NDRP itself.

78 I accept entirely that some tasks can be altered by amending instructions to prison officers, which they are contractually obliged to obey without any change to the terms of the contract of employment. Others that are more substantial cannot. I accept also that proposed minor or trivial changes to duties might not be substantial enough to meet the requirement that they "may impact on terms and conditions … in regard to … working arrangements …" I think the duties of a prison officer are "working arrangements".

79 If proposed changes are so minor that they are not capable of impacting on terms and conditions, they are outside the scope of the NDRP. If they are capable of impacting on terms and conditions, they are within its scope. Thus, I can see an argument (although I do not need to decide) that, for example, a new requirement to "clock in" using a swipe card

might be considered outside the scope of the NDRP, being a very minor instruction. On the other hand, it could be said that such a requirement is capable of impacting on terms and conditions. There might be an intention to write the requirement into contracts so as to make it a term of employment; or, if not, the union might argue that it is capable of impacting on disciplinary procedures, if breached.

80 For reasons that will soon become apparent, I need not, for present purposes, carry the discussion of such examples any further. I content myself with the observation that a proposed change which does not require an immediate amendment to contract terms may yet have the *potential* to impact ("may impact") on contract terms and can thus fall within the scope of the NDRP, if on the facts it meets the test in paragraph 3.1.

81 The above reading of the NDRP seems to me to accord with the elicited objective intentions of the parties, applying the approach ordained by Sir Thomas Bingham MR in *Adams v British Airways plc*. It also accords with the industrial context, including the statutory prohibition against the calling of industrial action, a point which, as Mr Segal observed, was publicly mentioned by HMPPS when the NDRP was announced in 2011.

82 I then have to consider the content of the proposed changes. The first is the raft of reforms together referred to as the YCS workforce proposals. They proceed from a stated "HMPPS-wide strategy to professionalise the workforce". The new band 3 Youth Justice Worker role entails a proposed new training and qualification requirement to be fulfilled by 2023. Those wanting to work in the new role will need study leave to complete the course.

83 For those who complete the requirements and obtain a job in the new role, their duties will change significantly, even radically. That is the whole point of the new role. The new Youth Justice Officers will be deploying the skills learned on their foundation degree course. For example, they will be involved in multi-disciplinary meetings and in progressing personalised support plans for young people in custody. The reforms would be a resounding failure if their duties remained merely different ways of doing the same thing.

84 I consider that attaining a foundation degree course and taking study leave to do so are matters that may impact on terms and conditions in regard to the working arrangements of those who do so. It does not matter, as I have said, that the activities are voluntary. I also consider that the proposed creation of the new Band 3 Youth Justice Worker post is a matter that, likewise, may impact on the terms and conditions in regard to the working arrangements of those who apply for, or may apply for, that post.

85 The same is true in the case of the new band 4 Youth Justice Specialist Worker, by the same reasoning. They too must undergo the training and attain the qualification needed. The same is true of the new band 5 roles, Custodial Manager Youth Custody Service and Development Practice Manager. At the risk of stating the obvious, those applying for and undertaking those new jobs are at least potentially going to do so under changed terms and conditions and performing duties significantly different from those they currently perform.

86 I conclude that the YCS workforce proposals are within the scope of the NDRP. That is hardly surprising, since they are major national reforms in response to the Taylor Review and other wide ranging discussions, aimed at professionalising the workforce and changing the culture within the Youth Custody Service.

87 I reach the same conclusion in relation to the proposed new APO role. Those who undertake that role will first have to take part in training in first aid and mentoring. They

will then have to become skilled in the third, variable component of the role in order to become qualified to do it. Those who then work in the new APO role will perform the more highly skilled duties that one would expect from the use of the word "advanced" in the title of the job. It is at least likely that they will do so under fresh terms and conditions and that the changes to their duties will go beyond what can currently be required of them, as described in their existing job descriptions.

88 Finally, I have to consider whether the proposal for ACHP falls within the scope of the NDRP. I conclude that it does. If it only affected pay, it would be excluded by paragraph 3.3, but it also affects the length of a prison officer's working week. For those that apply for ACHP (and, again, it does not matter that they choose whether to do so), their weekly contracted hours will increase as well as their pay. The increase in contracted hours is a change in terms and conditions and a change in working arrangements. It is within paragraph 3.1 of the NDRP.

89 I find the Secretary of State's construction of the NDRP strained, unnatural and out of tune with Sir Thomas Bingham MR's approach to the interpretation of collective agreements. I reject Mr Stilitz's argument that the POA's interpretation is contrary to what one would expect. The NDRP does not tie the hands of HMPPS. Arbitration is not compulsory. Even conciliation is not compulsory if a reasoned objection is made to it. Under the terms of the NDRP, the employer can (under paragraph 5.9.5) simply walk away from a dispute by formally withdrawing from it after the conciliation process, if one takes place.

90 Any risk of industrial action can be stopped by injunction, as has already happened. Collective bargaining involving negotiation is to be expected where there is no right to take industrial action. Furthermore, if the NDRP is thought not fit for its purpose it can be terminated on six months' notice, or even ignored, since it is not legally binding. The Secretary of State would have to answer for that only in the political and industrial arena, not in a court of law.

91 Next, I turn to consider whether the NDRP, and specifically paragraph 4.3, is capable of generating individual contractual rights, as Mr Segal submits. The answer, in my judgment, is clearly no. I cannot accept his submission that the contents of paragraph 4.3 of the NDRP is suitable for incorporation into individual contracts of employment.

92 The obligation on HMPPS under paragraph 4.3 is to preserve the *status quo* and not to implement the proposed changes until the conclusion of the disputes process (other than in compelling circumstances, for up to 28 days). In my judgment, the true character of that obligation is that it is an understanding between the parties to the collective agreement deliberately not made legally binding as between them. I do not infer from the context and circumstances that it is in the nature of a contractual undertaking by HMPPS to individual prison officers.

93 I say that for the following reasons. First, the content of paragraph 4.3 does not address itself to the circumstances of any individual prison officer. It is an "across the board" provision applying to whatever classes of prison officer would be affected by a proposed change. As such, it differs qualitatively from the sexual harassment investigation procedure specifically designed to protect individual employees such as the claimant in the *Deadman* case.

94 The second and related point is this. I accept the submission of Mr Stilitz that the obligation in paragraph 4.3 to preserve the *status quo* is part of the machinery put in place by the

NDRP in order to reach agreement. In collective negotiations, it is easier to reach agreement before a change has taken place than if the change is a *fait accompli* and would have to be undone to go back to the *status quo ante*. As such, the obligation in paragraph 4.3 falls into the second category of provisions identified by Scott J (as he then was) in *NCB v NUM*, not the first.

95 Paragraph 4.3 is not a term like the bonus scheme term in *Robertson v British Gas Corporation*, which is worth money to individual workers and should be taken to have been agreed with them as part of the work bargain and not taken away where the collective agreement is terminated. Mr Segal accepted that if the NDRP were terminated, the protection of paragraph 4.3 for individual prison officers would fall away. In my judgment, Mr Stilitz is correct to say that if termination of the provision in question would leave nothing for the worker claiming its protection, then the provision is unlikely to be apt for inclusion in an individual employment contract. That is the case here.

96 It follows that the POA and the second claimant have not, so far, established any unlawful conduct by HMPPS, even though I have disagreed with the latter's interpretation of the NDRP. Breach of the NDRP is not actionable.

97 The claimants also rely on the NTS, which, I remind myself, includes, in para.8, the words:

> "NB: Changes to employees' terms and conditions of employment require prior negotiation with the relevant trade unions."

98 What is the NTS? In my judgment, one thing it clearly is not is a collective agreement. There is no evidence that it was agreed between HMPPS and any of the trade unions mentioned in it. A collective agreement must be a bilateral document, at least; it must be an "agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations" (section 178(1) of the 1992 Act). The NTS bears the hallmarks of a unilateral document. Mr Copple did not say otherwise in his evidence.

99 In my judgment, the NTS is simply a statement of what actions HMPPS intends to take and why, informing all staff what the actions are and why they are being undertaken; and instructing senior management staff to do what is necessary to implement them. The instruction they contain is addressed to management. It requires managers to consult the recognised unions on the proposed changes and sets the procedure for doing so, using *pro forma* documents.

100 Read in that context, it seems to me obvious that paragraph 8 is no more than a reminder or repetition of what the NDRP by its terms provides. It is not a contractual undertaking by HMPPS to any individual prison officer.

101 I was told that the wording was a repetition of the same words used in previous notices to staff. I was shown one such previous notice. I do not think that makes any difference. It would not surprise me if changes to terms and conditions have, historically, been negotiated at a collective level between HMPPS and its forerunners on the one side, and the recognised unions on the other. That is quite normal in the public service.

102 It follows that, in my judgment, paragraph 8 of the NTS merely mirrors the contents of the NDRP to which it refers and cannot enlarge or supplement the terms of the NDRP or create

individual contractual rights where the NDRP does not do so. I conclude for that reason that the NTS does not assist the claimants.

103 By the end of the hearing before me, no other form of alleged unlawful conduct was relied on by the claimants. They are therefore unable to show that HMPPS has committed any actionable conduct that breaches or would breach the second claimant's employment contract or that of any other prison officer.

104 For those reasons, the action must fail. The question of relief therefore does not arise. I would not have been prepared to grant an injunction but I might, depending on how I had decided the case differently, have been prepared to grant a declaration. In the event, I need not address that question further. The claim is dismissed.

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