Case Nos: 507796/1995 and 2602992/1998

EMPLOYMENT TRIBUNALS

at: Nottingham

BETWEEN:

Claimant	**and**	**Respondent**	
Mrs S C Chan		Southmead Health Services NHS Trust	**(1)**
		Secretary of State for Health	**(2)**
Mrs P Fanthorpe		Queens Medical Centre Nottingham University Hospital NHS Trust	**(1)**
		Secretary of State for Health	**(2)**

Representations:

For the Claimant:
Mrs Chan: Mr Andrew Allan of Counsel
Mrs Fanthorpe: Ms Betsan Criddle of Counsel

For the First Respondent: Mr Daniel Oudkerk of Counsel
For the Second Respondent: Mr Raymond Hill of Counsel

REASONS

The issues

1. Mrs Chan and Mrs Fanthorpe complain that because of their part-time status they were unlawfully excluded from membership of the NHS Pension Scheme for various periods of time. They are representative of a small number of claimants within the overall part-time worker pension litigation [***Preston & others -v- Wolverhampton Healthcare NHS Trust & others (No. 3)***] in respect of whom the point which I am asked to consider also arises. That small sub-set of claimants can be further divided; Mrs Chan is representative of those employees who, apparently by choice for childcare reasons, chose to work during term-time only and Mrs Fanthorpe is representative of those who worked on the basis of a rota which required them to work different hours in different weeks such that in only one or some of

those weeks did the hours exceed the qualifying threshold for membership of the NHS Pension Scheme.

2. Both claims are before me today on the application of the Respondents under rule 18(7)(b) of the Employment Tribunals Rules of Procedure 2004 to strike them out on the grounds that they have no reasonable prospect of success. The basis of the Respondents' contention is that contrary to the premise which underpins the complaints, by virtue of the working patterns of both sets of Claimants, they had at all material times been entitled to join the Pension Scheme. In order to determine the Respondent's application I am required to interpret a provision of the National Health Service (Superannuation) Regulations 1961 (SI 1961/1441) as amended by Regulation 7 of the 1973 Amendment Regulations (SI 1973/242).

3. I have heard no evidence but I have been invited to read and to assume, for the purposes of this Pre-Hearing Review only, the truth of, witness statements from both Claimants and from Mr Kevin Spencer, an Assistant Human Resources Manager with the North Bristol NHS Trust which is the successor Trust to the South Mead Health Services NHS Trust; from Rachael Lambourne the Divisional Human Resources Manager for the Nottingham University Hospital NHS Trust, and from Ms Angie Walsh, a Policy Advisor to the NHS Business Services Authority Pension Division. I have also had the benefit of skeleton arguments from Mr Hill, Mr Allan and Ms Criddle. I am very grateful to all Counsel for their helpful additional oral submissions on what, if only at first sight, appeared to be a difficult and obscure point of interpretation.

Background

4. Before I turn to the facts of Mrs Chan and Mrs Fanthorpe's cases and to the relevant parts of the 1961 and 1973 Regulations respectively, it might be helpful if I was to say just a few words to put the Respondents' application into its proper context. The part-time worker pension cases are complaints, brought under the Equal Pay Act 1970, that the rules in various pension schemes which required employees to be either full-time or working above a certain minimum hours threshold in order to qualify for membership of the scheme, were indirectly indiscriminatory against women, and thus unlawful sex discrimination, it being more difficult for women than men, because of their child rearing and other family care responsibilities, to work sufficient hours to cross that threshold.

5. The focus of the enquiry is therefore whether the rules of a scheme at any point in time did so discriminate against, or more precisely in this context had the effect of excluding, a claimant and if they did not it does not avail that claimant to say that she did not know that she was not excluded from membership of the scheme either because of a misunderstanding or lack of knowledge of the Scheme rules or because of misinformation or lack of information from her employers, unless she can point to the existence of a policy of her employers, aimed at part-time employees, of misinformation or other disincentive to join the pension scheme. This point was established by ***Preston (No.3)*** [2004] IRLR 96 EAT and neither Mr Allen nor Ms Criddle submit otherwise. That explains why the sole issue before me is whether or not, as a matter of pure interpretation, the Scheme rules have the effect contended for by the Respondents in respect of the disputed periods of claim. If they do have that effect then the claims fail in respect of that period.

6. In the final paragraph of her Witness Statement, Mrs Fanthorpe did allege the existence of a discriminatory policy directed at part-time employees but not in respect of the

part of her period of claim with which I am concerned. However, that allegation is not now to be pursued.

The Facts - Mrs Chan

7. Mrs Chan is a speech and language therapist. Her employment in the Health Service began on 15 August 1977 when she worked full-time until 26 August 1983 when she went on maternity leave. She returned from maternity leave on 23 April 1984 and until 31 August 1988 worked part-time both during term-time and the school holidays. In none of the weeks in her working year did her hours exceed 40% of the hours of a full-time speech and language therapist, and she was not therefore during that time eligible to join the pension scheme, the qualifying threshold being not less than 50% of full-time hours. The Respondents have conceded that she is entitled to succeed in respect of that period of her claim although I am not today invited to make a Declaration to that effect.

8. The disputed period commenced on 1 September 1988 and ended on 31 March 1991 (she has abandoned her claim for the period from 1 April 1991 onwards). It is the Respondents' contention that because of a change in her working pattern which began on 1 September 1988, Mrs Chan became eligible to join the Scheme. Although she did not increase the total number of hours which she worked in a 12 month period, she elected (there is some uncertainty as to the precise mechanics involved but it is common ground that the arrangement suited both her and the Respondents) to compress those hours into term time only. This had the effect that during those weeks when she was working her hours were 17½ which was exactly 50% of the hours of a full-time speech and language therapist. Hence, submit the Respondents, she qualified to join the pension scheme in each of those weeks.

9. Mrs Chan had always been paid monthly and she continued to be paid monthly after 1 September 1988. She therefore continued to be paid (subject to a number of slight upward adjustments because of a small increase in hours) as though in each week of the year she was working 40% of the hours of a full-time speech and language therapist. Thus her payslip for the month of April 1988 shows (one should say perhaps, appears to show as the abbreviation used is obscure but there is no real dispute about it) that she worked and was paid for on the basis 14 hours each week. Her payslip for the month of October 1988 shows that she worked and was paid for on the basis of 14.53 hours per week.

10. Post 1 September 1988, if those hours had represented hours actually worked each week as opposed to hours notionally worked for the purpose of determining how much she would be paid each month, then, as the Respondents concede, she would have remained below the qualifying hours threshold.

11. The first contract which Mrs Chan received (which was when she was working full-time) contained at paragraph 18 of the terms and conditions under the heading Superannuation,

> *"All part-time staff working at least half the standard hours for their grade may elect at any time to join the National Heath Service Superannuation Scheme."*

The subsequent changes to her working patterns, which occurred following her return from maternity leave, in March 1984, January 1988 and September 1988 when she changed from four sessions per week throughout the year to five sessions per week term time only, were dealt with simply by way of amendments to that original contract. There is no indication that

she was informed in September 1988 that she had become eligible to join the pension scheme as a result of the compression of her hours into a smaller number of working weeks. She says that if she had known she was eligible to join the pension scheme she would of course have done so, and she points out that she joined in November 1991 *"once I had become eligible to do so once again"*. However, she had in fact become eligible on 1 April 1991 and it would appear from correspondence from her solicitors that it was this seven month delay in re-joining the scheme which led her to abandon her claim between 1 April and November 1991.

The facts - **Mrs Fanthorpe**

12. Mrs Fanthorpe began her career in the NHS at the Nottingham General Hospital as a clerical officer. There is some dispute about the date but both she and the Respondents agree that it was earlier than 8 April 1976 which, it is conceded, is the earliest date from which her claim can succeed.

13. On returning from a period of six months maternity leave she began work at the Children's Hospital as a receptionist. She was issued with a contract which is dated 29 March 1976, which at paragraph 4 states,

> *"SUPERANNUATION Subject to confirmation your appointment* (and there is then typed on to the printed form the words) *not compulsory."*

As both Mr Hill and Mr Oudkerk submit, that would appear to mean that membership of the Pensions Scheme was open to her on a voluntary basis. However, as Ms Criddle points out, the contract is wrong in an important respect. It describes her grade as clerical, which was correct, and her hours of work as 20 per week. But right from the outset that was not the case. If it had been the case the contract would have been correct in implying that she could join the Scheme.

14. Her hours were never in fact 20 per week. As a letter written to her on 1 April 1976 makes clear, she was to work on a rota and her *"first working period will be on week 3 of the rota - ie Saturday 12 noon till 5 pm and Sunday 9am till 5pm."* Although the letter does not say so, that is only 13 hours. She was provided with an amendment to her contract, presumably to clarify the position, on 27 August 1976. Although the contract says that it is a confirmation of a change in her appointment from her old designation of receptionist, 20 hours per week to receptionist, 3 week rota, and specifies the hours as *"First week 20, Second week 15, Third week 13 (4 days, 3 days, 2 days)"* it is, as I understand it, common ground that that had in fact been the pattern under which she had worked since her return from maternity leave.

15. The amendment to the contract dated 27 August also includes this sentence,

> *"Except where noted above, the terms and conditions of your employment remain the same as notified to you in your contract of employment."*

Although both Mr Hill and Ms Criddle made submissions about the efficacy of such a statement in the context of the original contract clearly being erroneous, in my judgment whether or not Mrs Fanthorpe was informed of her right to join the scheme or whether she mistakenly believed that the contract was incorrect, is wholly beside the point. The only issue is whether, as a matter of law, that is as a matter of the correct interpretation of the Regulations, she was in fact entitled to join the scheme.

16. In November 1978 the Children's Hospital closed and its services transferred to the newly opened Queens Medical Centre Nottingham University Hospital. There are two Amendment to Contract of Employment documents in the bundle which appear to have been issued at the time of this change, the first one of which gives her hours as 20 per week and her annual leave entitlement as 10 days (that version is undated but signed on behalf of the employer) while the other (which is dated 27 November 1978 and apparently signed by the same person on behalf of the employer) gives her annual leave entitlement as 8 days and her hours as *"average 16 hours per week"*. Again, as I understand it, it is common ground that the contracts do not accurately reflect her working pattern which remained the 3 shift rota of 20 hours, 15 hours and 13 hours in successive weeks.

17. Prior to the move to the Queens Medical Centre, Mrs Fanthorpe had been weekly paid, her wages reflecting the hours actually worked in each pay period. Some time after the move (she cannot now remember when) she began to be paid monthly but she cannot remember whether she was paid the same each month or whether her pay once again reflected the hours actually worked in the pay period (every third month would have two 20 hour weeks in it).

18. On 14 July 1980 it seems that her work pattern changed, although precisely how is now unclear. The changes were reflected in a further amendment to her contract which records that her average hours were to increase from 16 per week to 19 per week. It would appear that the 3 week rota remained in operation although it is clear that some, but it is not now known what, changes to it must have taken place. Either the rota then changed again or she voluntarily changed her hours again, but with effect from 15 March 1982 the average of 19 hours per week reverted to the previous average of 16 hours per week. On 8 October 1983 Mrs Fanthorpe came off the rota system altogether to work at weekends only for a fixed 16 hours per week.

19. At all times during the period with which I am concerned the hours worked by a full time clerical grade officer were 37 per week.

20. Mrs Fanthorpe took out her own private pension scheme on 27 March 1988 and eventually joined the NHS scheme on 31 October 1998, having become eligible to join on 1 April 1991. She claims that she inquired about joining the scheme as soon as she was notified by an insertion in her payslip at the time when the Scheme was opened up to all part-timers in 1991 but was told that because she had a private pension scheme she could not join the NHS scheme. All that I need to say about the period of her claim between 8 October 1983 and 31 March 1991 is that it clearly has a reasonable prospect of success and the Respondents do not submit otherwise, although there is an issue in respect of the period 6 April 1988 to 31 March 1991 because of her failure to opt into the scheme until several years later, but that is a matter which I am asked to leave to the parties to resolve. Mrs Fanthorpe no longer pursues a claim in respect of the period after 1 April 1991.

21. The Respondents' application to strike out the claim is confined to the period 8 April 1976 (although the working pattern in question commenced on 5 April 1976, as previously mentioned the claim cannot succeed for any period prior to 8 April 1976) to 7 October 1983, the period during which Mrs Fanthorpe worked the 3 week rotating shift. It is the Respondents' submission that because in one of those 3 weeks she worked 20 hours, which was more than half the full-time hours for her position, she qualified to join the scheme and because of the way the Scheme Rules work, would, in consequence, have been treated as being eligible for membership for the other two weeks of her rota as well.

The Scheme Rules

22. The National Health Service (Superannuation) Regulations 1961 (SI 1961/1441) at regulation 6 provided that,

> *"Every officer shall be entitled to participate in the superannuation benefits provided by these Regulations, subject to and in accordance with the terms and conditions thereof".*

The term 'officer' was defined by regulation 4. It included at 4(1)(a),

> *"every whole-time officer whose duties are wholly or mainly administrative professional or clerical"*

and although by virtue of sub-paragraphs (c) to (h) certain part-time officers were brought within the scheme, they were limited exceptions to the basic rule that in order to qualify for membership one had to work whole-time.

23. That position was changed by the National Health Service (Superannuation) (Amendment) Regulations 1973 (SI 1973/242) which, by regulation 4, repealed sub-paragraphs (c) to (h) of regulation 4(1) of the 1961 Regulations and substituted for them four sub-paragraphs of which sub-paragraph (f) applies to these cases,

> *"any other part-time officer whose satisfies the requirements of Schedule 7".*

24. Regulation 7 of the 1973 Regulations provided that the Schedule to those Regulations was to be included as Schedule 7 to the 1961 Regulations. The Schedule has the main cross heading 'Part-time Employments' and the subsidiary cross-heading 'Regulation 4(1)(f). It provides, so far as is material,

> *"The requirements to be satisfied in order that a person employed in a part-time capacity may be an officer by virtue of Regulation 4(1)(f) are that:-*
>
> *1. He fulfils one of the following minimum employment qualifications:-*
> *(a) he is employed by one or more employing authorities for such hours in any period as in the aggregate amount to not less than one-half of the hours which would constitute whole-time employment in his case; or*
>
> *(b) …*
> *(c) …*
>
> *Provided that any part-time officer who, whilst continuing to be employed by an employing authority, no longer satisfies a minimum employment qualification under this paragraph shall be deemed to satisfy such a qualification for a period of one month unless during that period he elects otherwise in writing to his employing authority.*
>
> *2.(1) There is in respect of him an election made in writing to his employing authority and having effect in accordance with this paragraph.*
>
> *(2)(a) …*

(b) where the employment commences on or after 1 April 1973 and the election is made within one month after such commencement, the election shall take effect as from the date of such commencement; and

(c) where the election is made one month or more after the commencement of the employment and on or after 1 May 1973, the election shall take effect as from the beginning of the next pay period following the receipt by the employing authority of that election …

25. Those provisions were re-enacted without material change by the National Health Service (Superannuation) Regulations 1980 (SI 1980/362) which revoked and replaced the 1961 Regulations and which were themselves amended by Amendment Regulations in 1989 (SI 1989/804) again without material change. Membership of the scheme was opened up to all part-time employees irrespective of hours worked with effect from 1 April 1991.

The Submissions

26. Mr Hill submits and, despite some misgivings on my part during the hearing, as I understand it Mr Oudkerk, Mr Allan and Ms Criddle concur, that the question for me boils down to what is meant by *"any period"* in paragraph 1(a) of Schedule 7. My misgivings were whether looking at just those words absent the context provided by the words which precede and/or follow them, might distort their meaning. I am now satisfied that that is not the case although I will return briefly at the end of these reasons to the words which precede them.

27. I should perhaps add at this point that there was to have been another test case in which the claimant was said by the Secretary of State to have been eligible to join the scheme where, despite the fact that her contractual hours were never at or above the level of half the hours of her full-time equivalent, because she habitually worked additional non-contractual hours the total hours worked regularly rose above that threshold. Unfortunately that claim was withdrawn by the claimant. I say unfortunately because such a scenario appears to give rise to rather different issues from those which arise in this case and in particular call for consideration of what is meant by the phrase in paragraph 1(a) of the Schedule which precedes the words I am invited to interpret; *"is employed by one or more employing authorities for such hours …"*. In the context of the cases which are before me it is common ground that at least the starting point must be the hours which the employee is contracted to work.

28. Much of Mr Hill's skeleton argument was based on a mistaken understanding of the Claimants' contentions. That is not by any means a criticism of Mr Hill. Correspondence from the Claimants' solicitors had suggested that it was to be their contention that in order to determine whether an employee had crossed the qualifying hours threshold it was necessary to take a period of a year and to look back over it at its conclusion to see what, as an average, emerged. Mr Hill, in consequence, expended much intellectual energy in demolishing a proposition which is not now pursued and which, in my judgment, for the reasons which he so succinctly sets out in his skeleton argument, was manifestly unsustainable.

29. In his skeleton argument Mr Allan, for Mrs Chan, says that there are various interpretive options open and then lists three, one of which is the option contended for by the Respondents, to which I will turn in a moment, the others are:-

"(b) the average week over a monthly or annual period is examined

(c) the notional week for which the employee is paid is examined".

In developing that submission before me, he was at pains to explain that these are merely two ways of approaching the problem and it could not be said that there were no other possibilities or that any one of these alternatives was to be preferred in all cases over any other. The correct interpretation, he submitted, and Ms Criddle also submitted, was that in order to make sense of the Regulations the phrase *"any period"* in paragraph 1(a) of the Schedule must be taken to imply that the period in question must be one which is "appropriate" not for the individual employee but for workers or employees of the type or category to which the employee in question belongs. This, Mr Allan submits, must be right given the multiplicity not merely of jobs but of working patterns across the whole of the NHS. In the case of the term-time only workers, the appropriate period is a year and, submits Ms Criddle, in the case of the rota'd workers the appropriate period is the duration of the rota.

30. Because the Claimants' position has shifted so significantly from the one which they seemed to be adopting in correspondence, I trust that Mr Hill will forgive me if I say nothing more about his submissions on why that now abandoned position must be wrong other than that I agree with them.

31. Mr Hill's principal argument is that *"any period"* must mean a week. He submits that this must follow from the way in which the general Whitley Council Handbook defines the concept of whole-time working. In the November 1973 Whitley Council Pay and Conditions of Service Handbook, section I-A defines hours of duty and section 1-B part-time staff:-

Section 1-A Hours of Duty

"73. The normal hours of duty shall be 38 hours a week (exclusive of luncheon intervals).

74. The employing authority may at their discretion spread the hours of duty over not less than five days, and not more than six days in whatever arrangement is deemed suitable for local circumstances including, if desired, the spreading of the hours of duty over five days in some weeks and over six days in others, provided that an average of 38 hours a week is actually worked.

Section I-B. Part-time Staff

75. (a) Part-time officers shall receive the proportion of the salary payable to a full-time officer of the same grade which the number of hours worked per week bear to the standard working week of 38 hours, whether or not the officer is conditioned to such a working week, and the same proportion shall apply to payments relating to acting allowances, annual increments, annual leave, …"

32. Those paragraphs, Mr Hill submits, demonstrate that the only way in which one can calculate whether the work of a part-time officer amounts to *"not less than one half of the hours which would constitute whole-time employment in his case"* is by reference to a week, that being the period of time by reference to which the concept of whole-time employment is defined. To take any other period would not be to compare like with like.

33. He also relies on a letter dated 15 January 1973 from the Department of Health and Social Security, written to employing health authorities, explaining the proposed extension of the scheme to part-timers. The letter begins thus:-

> *"As I explained in my letter of 16 August 1972, subject to the necessary Amending Regulations being made, membership of the National Health Service superannuation scheme is to be extended on an optional basis with effect from 1 April 1973 to part-time employees who work each week not less than half the number of hours which in any particular case would constitute whole-time employment."*

That, submits Mr Hill, shows that the period in contemplation was a week.

34. I do not find this part of his submission persuasive. As Ms Criddle rightly warned me, the letter pre-dates the Regulations, (although one might I think reasonably assume that they were by that time at least in draft form), and therefore cannot be taken as a reliable guide to their interpretation. Moreover, the phrase on which Mr Hill relies, *"who work each week not less than"* is at least as likely to mean *"who regularly week in and week out by virtue of their contract work not less than half the number of hours"* as to mean *"who in any given week work not less than half the number of hours"*. If anything, the letter is not helpful to the Respondents' position.

35. Thirdly, Mr Hill submits that the proviso to paragraph 1 of Schedule 7 puts beyond doubt that the period in question must be shorter than a month. If the period were any longer it would make no sense of the proviso. The proviso deems a part-time officer who has satisfied but who no longer satisfies the qualifying hours threshold to remain a member of the scheme for one month unless during that period they elect in writing to opt out. In fairness to Mr Hill, this submission was made at least in part to counter the Respondents' now abandoned position that the correct interpretation of the words *"in any period"* was one year. In the circumstances I can confine my observations on this part of his submission to saying that not only can I see no necessary connection between the one month period of grace provided for in the proviso and the length of the period contemplated in the phrase *"in any period"*, I can see no connection at all. They seem to me to be dealing with entirely different issues. It is clearly the case that the proviso applies when an employee ceases to be in qualifying employment irrespective of the length of that qualifying employment, and in consequence tells me nothing about whether that qualifying period is constructed from building blocks each representing one week, or in some other way.

36. For the employing Respondents, Mr Oudkerk took a slightly different approach. In his submission, the words *"in any period"* mean precisely what they say and they do so because of the intention underlying the amendment to the 1961 Regulations by the 1973 Regulations which was to include as many people in the scheme as possible. The letter from the Department of Health and Social Security of 15 January 1973, from which I have already quoted, referred to the fact that a leaflet had been prepared explaining about the arrangements and including an election form which employing Respondents were enjoined to give immediately to all eligible employees.

37. Mr Oudkerk submitted that I was being invited to approach the interpretation of the provision from the wrong direction. The Claimants wished to interpret it in a restrictive way to demonstrate that they had not been entitled to join yet the intention was clearly that it should not be so interpreted. Its intention was to include and not exclude, and the phrase *"in any period"* gives maximum flexibility to enable that to be achieved. It was a gateway

provision; one which a Claimant could turn to their advantage by pointing to any period (the use of those words was, he submitted, deliberate for this purpose) during which they qualified to entitle them to gain access to the scheme. That was the answer to the complaints in Mr Allan and Ms Criddle's skeleton arguments that it was no good saying that any period meant a week because that did not explain what was meant by a week. In Mr Oudkerk's submission "a week" was not intended to have a fixed meaning such as from Monday to Sunday. The Claimant could slice up time in the way which was most advantageous to her (advantageous in the sense of enabling her to join the scheme) and provided she could demonstrate that within any period that could be described as a week, or indeed within any other greater period of time, she worked more than half qualifying hours, she became eligible to join.

38. Although Mr Oudkerk did not go so far as to say that *"in any period"* meant "in any week", he submitted that it made absolute sense to look at single weeks for the reason which Mr Hill advances; that it is the context within which one judges whether an employee is whole-time or has worked qualifying part-time hours. It does not matter that the Claimants are able to demonstrate that other periods of time take them outside the scheme. The fact that, looked at over a period of 52 weeks, Mrs Chan does not qualify does not matter if within each of 35 or so of those 52 weeks she does qualify. Similarly, in Mrs Fanthorpe's case, it does not assist her by averaging out her hours across the three week rota if in one week of that rota she crosses the threshold. All that it is necessary to do (and it is counter intuitive for the Respondents to be submitting that the Claimant qualifies and the Claimant to be asserting that she does not) is that in "any period" the threshold is crossed. The words should be given their natural meaning.

39. If the Respondents are right, Mrs Fanthorpe's case is simple. She qualified on the basis of hours worked in each third week and the proviso to paragraph 1 of Schedule 7 deemed her to be a member of the scheme for the following two weeks before she once again reached a qualifying 20 hour week. The position was more complicated for Mrs Chan. The proviso would carry her across all school holidays other than the long summer vacation, at the end of which there would have been a period of some two weeks when she was not entitled to membership of the scheme. But this is no more anomalous than the position with regard to holiday pay. Because she was only working a reduced number of hours there will be some time during that long summer vacation when she was not on paid holiday but simply not working.

40. For Mrs Chan, Mr Allan submits that if it had been the draftsman's intention that the words *"in any period"* meant *"in any period of a week"* he would have said so. He accepted that because the phrase *"pay period"* was also used in Schedule 7 but in another context, the words *"in any period"* did not mean *"in any pay period"*. It was not the Claimant's position that the words in paragraph 1(a) of Schedule 7 are inadequate and need to be bolstered by the insertion of a specific period. A week may indeed be an appropriate period for many jobs but not for others. The phrase *"any period"* must mean a period which is appropriate in the case of the individual Claimant or category or type of employee in question. Mr Oudkerk's submission, Mr Allan suggests, cannot be right because taken literally *"any period"* requires neither a minimum nor a maximum. It could be as little as a day or it could be a period of two years, during the first twelve months of which the employee works at one-third of whole-time and during the second twelve months at two-thirds of whole-time. It would, Mr Allan submits, be ridiculous in that case to say with the benefit of hindsight at the end of the two years that the Claimant has qualified to join the scheme because the average over the whole period was one-half.

41. It did matter what is meant by *"a week"*. A period of time divided up in one way might produce a qualification for entry, but divided up in another might not. That would lead to absurdity in practice. Mr Hill's submission to demonstrate that the Claimant's position must be wrong assumes a retrospective calculation following a period of uncertainty in which hours seem to fluctuate randomly, but that simply doesn't arise in the case of either Mrs Chan or Mrs Fanthorpe. The only sensible explanation for the failure of the Regulations to specify a period during which eligibility is to be calculated is that the draftsman recognised that there is no universally applicable period. The correct approach was to ask what was appropriate in the case of any particular group of employees. In the case of the term-time workers this presented no difficulty. There was no uncertainty; the position could be gauged at the beginning of any particular period. The contract under which Mrs Chan was working changed only from requiring her to work four sessions each week throughout the year to five sessions in term-time only. But the contract cannot be looked at in isolation. She continued to be paid as though she was working four sessions each week. The payslips would have been the evidence on which an assessment would have been made at the material time about her eligibility to join the scheme and from that evidence she would have been ruled ineligible. There is no evidence to suggest that anyone in a similar position had become a member of the pension scheme which, notwithstanding the obvious difficulties of finding such evidence after such a long period of time, was surprising given that term-time working only was by no means unusual for speech therapists and physiotherapists working in schools. The correct conclusion in her case was that the appropriate period was a year during which her hours averaged below the 50% threshold.

42. For Mrs Fanthorpe, Ms Criddle adopted much of Mr Allan's submission. She rejected Mr Oudkerk's contention that I should interpret the Regulations on the basis that they had been designed to make as many employees as possible eligible to join the scheme as there had clearly been no intention to give universal access to the scheme. Access to the scheme for part-timers continued to be and was intended to be, limited. Nor should I accept Mr Hill's submissions. There was no warrant for saying that a week as opposed to any other period was appropriate. There was no warrant for cross-referring to the Whitley Council terms and conditions. It is simply not right to submit that it does not matter which period of time one takes to make up the week on which the Respondents rely; the Respondents would surely not have accepted that individuals could choose the period which was most advantageous to them.

43. The common sense way of interpreting the provision was rather to look at someone's employment during the period in question. The provision was very obscure but the tribunal must put a workable construction on it. Mr Oudkerk's construction simply produces the greatest uncertainty because it allows Claimants to choose whatever period they wish. The tribunal should look at the pattern which is worked consistently over a period of time. In Mrs Fanthorpe's case that pattern was the three week rota. It was therefore the three week rota which was the appropriate period in her case, and taking that period it is clear that she does not qualify as within it she works an average of only 16 hours.

Conclusions

44. In my judgment there is a fundamental and insuperable objection to the Claimants' submissions. They do not get us any closer to finding an answer to the question, which part-timers are eligible to join the Scheme? If it is the case that the phrase *"in any period"* is obscure, to interpret it as meaning *"in the appropriate period"* simply substitutes uncertainty for obscurity: I am offered no test of general application to determine appropriateness. To say that it is the period most appropriate to the class of employees in question takes us

nowhere in the direction of the universally applicable test that is clearly necessary to make the Regulations workable. I am merely told that the answer in the case of Mrs Chan and Mrs Fanthorpe is the one that means they were not eligible to join the scheme at the material time.

45. In order to arrive at this result, the phrase "*the appropriate period"* is required to be not so much flexible as capable of producing self contradictory contortions. In Mrs Chan's case it is said that in order to discover the appropriate period I must look beyond the contract to the pay slips, but the same approach would appear to be fatal to Mrs Fanthorpe's case. In Mrs Fanthorpe's case I am told that the appropriate period is the duration of the three week rota, but a similar approach to Mrs Chan's case strongly suggests that the appropriate period is the school term which would be fatal to her case. That, with respect, is the Humpty Dumpty approach to statutory interpretation: the provision means what I need it to mean in order to arrive at the result which I wish to arrive at.

46. Not only am I not offered a universally applicable test of appropriateness, I am offered no explanation for what must, given that I am searching for *"the"* appropriate period, be the centrally important issue: why is the period for which the Claimants contend the *only* appropriate period. Even if the Respondent's are wrong and *"any period"* does not necessarily mean a week, might it not still be an equally appropriate period, even in these cases? I am not told why that is not so. The Claimants' proposed solution to the interpretive dilemma is demonstarbly unworkable. But in my judgment there is no real obscurity in the first place.

47. Mr Oudkerk's principle submission was persuasively made and attractive in the simplicity of the solution which it offers. The Schedule means what it says. The purpose of the 1973 amendments to the 1961 Regulations was to admit to the scheme all those previously excluded from it who passed a certain threshold. It was meant to be interpreted flexibly and purposively hence the absence of any fixed period during which qualification must be demonstrated. One would certainly have expected, if it had been the draftsman's intention, that any period of qualification over and above the absolute minimum would have been spelled out. Some pension schemes require as a condition of entry 12 months service with the employer. Paragraph 1(a) of Schedule 7 could have been drafted to require a minimum period of above the threshold qualifying service before an employee becomes eligible to join the scheme. The fact that it does not do so is significant.

48. Mr Oudkerk, in my judgment, must therefore be right that *"in any period"* means precisely what it says, but I think Mr Hill is also right, although not necessarily for the reasons which he gives, when he submits that in practice that period must be the period of a week. It would certainly be possible to achieve the qualifying standard of not less than 50% of full-time hours in a period less than a week: two long working days would be sufficient. But two days being shorter than a week are necessarily encompassed by a week. But the opposite is not the case. If within any period of time longer than a week, there is not one week at least in which the 50% qualifying hours threshold is met, then it cannot be met for the whole of that period. A week is clearly the natural time period by which to judge qualification for the reason which Mr Hill and Mr Oudkerk submit. It is the period by reference to which whole-time employment is defined. As qualifying part-time employment is defined as a proportion of whole-time employment, whether one meets that qualification can only be determined on a week by week basis.

49. The fact that the period envisaged by paragraph 1(a) (at least for practical purposes if not strictly as a matter of interpretation) is a week, largely eliminates the somewhat artificial arguments about the problems which ensue when one considers retrospectively a lengthier period to determine whether eligibility has been achieved. But I think there is a better reason for dismissing those arguments. I offer these views tentatively because, in the absence of the one test case which would have given rise specifically to the point, I have not heard argument directly. However, it seems to me to be tolerably clear that the Regulations are predicated on the basis (and certainly the Whitley Council terms and conditions appear to be predicated on the basis) that within the Health Service, certainly within the grades covered by the Whitley Council documents to which I have been referred, the employment relationship is governed by a contract with normal working hours. That is what I think is meant by the words in paragraph 1(a) *"is employed by one or more employing authorities for such hours …"*. which precede the words *"in any period".* That being so, there is simply no place for a retrospective analysis of a past pattern of work of any duration no matter how short, to see whether qualification is demonstrated. Qualification is demonstrated by the normal hours of work under the employee's contract of employment as applied to the definition of officer in Regulation 4(1)(f) of Schedule 7 of the 1961 Regulations.

50. It must follow that the Respondents' applications succeed.

50.1 Mrs Chan's complaint that she was unlawfully excluded from the National Health Service Pension Scheme between 1 September 1988 and 31 March 1991 has no reasonable prospect of success as she was at all material times eligible to join the pension scheme. That part of her complaint is accordingly struck out.

50.2 In Mrs Fanthorpe's case, the Respondents' application succeeds in respect of the period 8 April 1976 to 7 October 1983. Mrs Fanthorpe was entitled to be a member of the pension scheme throughout that period. Her claim therefore cannot succeed and it is accordingly struck out.

Case Management Orders

51. The second respondent is required, within 56 days of the date on which these reasons are sent to the parties, to write to the Nottingham employment tribunal office indicating, where appropriate, which part of the claim is conceded and applying to strike out the remainder.

.....
Chairman

Date:

REASONS SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS