Case numbers: 2405559/04; 2602546/02; 2601304/01

EMPLOYMENT TRIBUNALS

at: London Central

BETWEEN:

Claimants		**Respondents**
Ms K M Sanderson	**and**	1. Pennine Acute Hospitals NHS Trust 2. Secretary of State for Health
Miss D I Whitworth		1. Nottingham University Hospitals NHS Trust 2. Secretary of State for Health
Mrs M Hallam		1. Nottingham City Hospital NHS Trust 2. Secretary of State for Health

Representation

For the Claimants	**Mr M Ford of Counsel** for Ms Sanderson **Mr D Grant of Counsel** **f**or Miss Whitworth Written representations for Mrs Hallam
For the Respondents:	**Mr D Oudkerk of Counsel** for Pennine Acute Hospitals NHS Trust Nottingham University Hospitals NHS Trust Nottingham City Hospital NHS Trust **Mr N Paines QC and Mr R Hill of Counsel** for Secretary of State for Health

REASONS

Background

1. These claims are a representative selection of a group of cases which form a small subset within the part-time worker pension litigation. In order to understand the significance of the points which are before me today for both case management orders and pre-hearing review, it is necessary to explain the background at some length.

2. In June and July 2002 in ***Preston and others v. Wolverhampton Healthcare NHS Trust and others (No.3)*** I heard a number of claims which gave rise to specific test issues to which the parties to the litigation required answers before the process of settling or disposing of individual claims could begin. That hearing followed the completion of the appeals process in the first round of test cases (***Preston and others v. Wolverhampton Healthcare NHS Trust and others (No. 2)*** [2001] ICR 217 HL] which had dealt with issues which applied to all of the claims. ***Preston (No. 3)*** dealt with issues which while not of universal application affected large groups of claims. One such issue (Test Issue 5) considered a number of questions arising out of the problem of claimants who had not opted into a pension scheme on becoming eligible to do so and how that failure affected their right to bring a claim.

3. Test Issue 5.2 posed this question:

"*Where [a claimant] was always eligible to join a pension scheme but did not do so, or did not do so after becoming eligible to join, can her cause of action in the employment tribunal extend beyond the date on which she became eligible to join where:*

(a) …

(b) her reason for not opting into the scheme was because of her employer's failure to alert her to the possibility of doing so;

(c) she attempted to opt into the scheme but was either discouraged from doing so, persuaded not to do so or continued to be denied the opportunity to do so."

4. I answered the question thus:

"*1. There is a continuing breach of the equality clause, and therefore [a claimant's] cause of action continues beyond the date on which she became eligible to join her employer's pension scheme, if, after the removal of any qualifying hours threshold with which she could not comply, [a claimant's] continued failure to join, or inability to gain access to, the scheme (a) is directly referable to her status as a part-time employee; (b) the circumstances do not apply to full-time employees and (c) is to her detriment.*

2. This would be the case where [a claimant], on becoming eligible to join a pension scheme, did not do so because she was unaware of her right to join because of her employer's failure to inform her of the right: or where [a claimant] who believed she might have the right to join was misled by her employer, intentionally or unintentionally into believing that she did not have the right, or whose employer denied that she had the right.

3. There would not be a breach of the equality clause if on seeking to join the scheme [a claimant] was either discouraged or dissuaded from joining, unless this was as a result of a policy of the employer, aimed at

part-timers and involved the imposition of conditions not imposed on full-timers, or a campaign of deliberate misinformation, or otherwise amounted in practice to a denial of the right to membership of the scheme."

5. The respondent's appealed the two test cases (Mrs Savage and Mrs Thomas being the claimants) from which that part of the decision derived and the appeal was upheld (***Preston and others v. Wolverhampton Healthcare NHS Trust (No. 3)*** [2004] IRLR 96 EAT). At paragraphs 77 to 79 of his judgment HH Judge McMullen said:

*"77. …In my view, when the inequality is removed, the failure to notify the [claimant] about it is not a continuing inequality in breach of the equality clause, but may well be a breach of the Scally [**Scally v. Southern Health and Social Services Board** [1991] IRLR 522 HL] implied term. In other words, the employer ceases to be in breach of the equality clause but becomes in breach of the Scally implied term.*

78. …If they are not informed of their rights to join the pension scheme, discrimination cannot be inferred unless (a) disparate impact between genders is shown; and (b) it is proved as a matter of law that the failure to inform a female employee she can join the pension scheme constitutes unequal pay at a time when she is entitled to join the pension scheme on equal terms with a man. The first of these inferences requires there to be some form of practice or policy in place: a one off mistake by an officer in an individual's case would not suffice. For the purpose of this (indirect) discrimination, the law is concerned with a discriminatory regime or policy or practice.

79. It is for that reason that the decision in respect of Mrs Savage and Mrs Thomas is unsustainable, since in their cases there is nothing more than an allegation that something went wrong…"

6. The part-time worker pension cases have followed the pattern of test case decision being followed by information bulletins sent to all claimants and respondents to explain the implications of the decision, which in turn have been followed by show cause letters sent to those whose claims appeared to fail as a result of the decision. Following the information bulletin explaining the EAT's judgment, letters sent to claimants in the health sector who had failed to opt into the NHS Pension Scheme on becoming eligible to do so began to elicit responses either expressly claiming the existence of such a policy or implying that such a policy existed. The Secretary of State's position, bluntly, is that at least the majority of such claimants (or those representing them) were merely adopting a formula of words which they knew would prevent the claim being struck out immediately having not previously made a recognisable allegation of the existence of such a policy in their claim forms. The Secretary of State was anxious that test cases be identified to enable a number of issues to be explored, namely whether in the absence of a prior allegation of policy in the claim form the

claimant required permission to amend her claim; if so whether permission should be granted; and in what circumstances such claims could be struck out under rule 18(7)(b) of the Rules of Procedure 2004 on the grounds that they had no reasonable prospect of success.

7. After some searching, a group of 22 claimants alleging the existence of such a policy was identified. The respondent was the respondent to the lead claim in these cases, the Pennine Acute Hospitals NHS Trust, and the two lead claimants were a Mrs Robinson and Mrs Sanderson, the lead claimant here. In Mrs Sanderson's case a Chairman sitting in Manchester had previously ruled (in a reserved judgment with reasons sent to the parties on the 4th May 2005) that the fresh allegation of the policy, raised for the first time by her solicitors in a letter of the 5th January 2005, was not something for which permission to amend the claim was required as it amounted to no more than an amplification of the claim. The Secretary of State was not represented at that hearing and sought to challenge the Chairman's decision by way of an application to review it under rule 10(2)(n), which application would be heard as part of the Robinson and others test cases. I made case management orders on the 13th October 2005 requiring, *inter alia,* the claimants to serve on the respondents and the tribunal full particulars of all facts and matters to be relied on to establish the existence of the policy. The compliance date was the 30th December. The order not having been complied with (save for three claimants) there was a further case management discussion on the 4th April 2006. Mrs Sanderson was one of the claimants who had complied with the earlier order and her response raised what appeared to be a new point - namely that she had been issued with a contract which erroneously stated that her employment was not superannuable when the hours which she worked meant that she was in fact entitled to join the NHS pension Scheme. By the time of the CMD on the 4th April, four of the original 22 claimants had withdrawn and an 'unless' order was made in respect of the others requiring them to comply with the order of the 13th October by not later than 5th May. A further CMD was scheduled for the 9th May. Mrs Sanderson withdrew her 'policy' allegation but not her claim.

8. By the 9th May all of the other policy allegations against Pennine Acute Hospitals NHS Trust had been withdrawn in full and the claims withdrawn in full or in material part, but the Secretary of State was still anxious to have a test case hearing on the issues of whether permission to amend to add a policy allegation was required and in what circumstances might such an allegation be struck out under rule 18(7)(b). Despite a widespread search, no new test cases have emerged, not least because it seems that there are no instances of more than a very few claimants making the allegation against any one employing NHS Trust or its predecessor or predecessors, a fact not without significance in the context of a claim that such an employer had been operating a policy.

9. Since Mrs Sanderson raised the issue of her misleading contract term, a total of 14 such cases have been identified and it was agreed that the listing slot

previously allocated to the Robinson policy cases would now be allocated to what have been described as the misleading contract term cases. The hearing would take the form of a case management discussion to consider whether the claimants required permission to amend their claims to allege that the reason for their exclusion from the scheme was the "misleading" contract term with which they had been issued, to be followed by a pre-hearing review to consider the respondent's application that the claims be struck out on the grounds that they had no reasonable prospect of success. The first issue is perhaps sufficiently similar to the issue on amendment in the policy allegation cases to be of some assistance to the parties in those cases: the second issue is not.

10. Of the six misleading contract term cases identified at the CMD on the 9th May as the test cases, three have subsequently been withdrawn. The remaining claims are those of Ms Sanderson, for whom Mr Ford appears; Miss Whitworth for whom Mr Grant appears; and Mrs Hallam who is unrepresented but whose case has been selected as a test case because the wording of her contract differs from that of the other claimants in that the term in question is misleading only to the extent that it misquotes the relevant rule of the NHS Pension Scheme so as to make it appear that she was not eligible to join, rather than expressly stating that her employment was not superannuable. Mr Oudkirk appears for the employing respondents and Mr Paines QC and Mr Hill for the Secretary of State for Health.

The nature of the new grounds of complaint

11. It is important to understand the basis on which the claimants now seek to put their case. It is not their case that they had the right to join the scheme under the relevant Regulations but were misled into believing that they did not have that right. Their case is that the term in their contract which either expressly or by necessary implication said that their employment was not superannuable had the effect of preventing them from joining the pension scheme. They expressly reject the respondents' position that by virtue of the statutory regime which creates the pension scheme, which I will turn to in detail in a moment, the 'misleading' terms were of no effect and the claimant's right to join the scheme was unaffected. Both Mr Ford and Mr Grant however, accept that if the respondents are correct then the claimants have no claim.

The need for amendment

12. Two points need to be noted about two of the test cases, those of Ms Sanderson and Mrs Hallam. In Ms Sanderson's case, she remains in the employment of the Pennine Acute Hospitals and could therefore bring fresh proceedings if I were to hold that permission to amend her original claim was required but refused to give that permission. In Mrs Hallam's case, she was very much quicker to take up the contract point than any of the other test case claimants. Having lodged her claim form on the 9th April 2001 she wrote to the tribunal on the 10th July 2001 pointing out that a term in her contract said that part time staff could only join the pension scheme if they worked more than half

full time hours whereas the true position was that they were entitled to join if they worked not less than half full time hours. She appears to have been alerted to the anomaly by a letter which she received from the Nottingham City Hospital. On 18th July 2001 I directed that her letter making those points should be treated as an amendment to her original claim.

13. Although Mr Paines quite rightly points out that the respondents were not given the opportunity to object to that order which was therefore made in breach of the rules of natural justice, Mrs Hallam was at that time still in the employment of the City Hospital and no objection to the making of the order was made after the event until today. In Mrs Hallam's case permission to amend has therefore already been given. In Ms Sanderson's case, unless I am of the opinion that the claim as now being advanced has no reasonable prospect of success, if permission to amend is required it would be futile to refuse it because she could immediately commence fresh proceedings.

14. Miss Whitworth's case raises no such difficulties. If what she is seeking to do is to amend her claim rather than, as Mr Ford and Mr Grant submit, volunteering further particulars of it or clarifying or amplifying it, permission to do so is required under rule 10(2)(q) of the Rules of Procedure 2004.

The original claims

15. Ms Sanderson commenced proceedings on the 1st October 2004, that is some nine months after the judgment in the EAT in ***Preston (No. 3)*** was first reported. Her claim was presented on her behalf by Messrs Thompsons, Solicitors who, via trade unions, represent several thousand part-time worker pension claimants. The details (particulars) of the claim were extremely brief and appear to have been tailored to Ms Sanderson's particular claim only to the extent that the dates referred to applied to her. The material paragraph reads:

> *"From the commencement of this employment until 31st May 1980, on the basis of her part-time status, the [claimant] was excluded from access to membership of the NHS Pension Scheme."*

16. Miss Whitworth commenced proceedings in mid-September 1992 (the copy of her claim form in the bundle does not appear to be date stamped). Although she named a local official of the trade union Amicus as her representative, she appears to have completed the form herself. The relevant part of the particulars of the claim reads:

> *"…until 1991 (I) was excluded from joining the Occupational Pension Scheme. This was because I was working part-time and was not eligible under Rule* (sic) *to be part of the Scheme".*

17. Mrs Hallam completed her claim form herself and complained that:

> *"On changing to part-time working on 30.11.1981 I was denied membership of the NHS Pension Scheme …In 1991 I was allowed to rejoin the scheme after government legislation…".*

18. In Ms Sanderson's case Mr Oudkirk points to the date on which the period of claim ends, 31st May 1980, and submits that this clearly shows that her claim is predicated on the basis of exclusion from the scheme being as the result of the scheme rules rather than her contract. On that date she ceased to be a part-time staff nurse and was accepted for full time midwifery training, and in consequence automatically became a member of the pension scheme. However, unless an intervening contract has been lost, she was not issued with a new contract of employment until some two years later. She could not therefore have been admitted to the scheme by reason of a change in her contractual terms. As both Mr Oudkirk and Mr Paines submit, all three of the original claims were clearly that each of the claimants had been excluded from the pension scheme because of an offending provision in the scheme rules.

19. That is not the case which they now seek to put. Rather, they now accept that the original premise was incorrect and that at all times material to their claims the scheme rules did not exclude them. Instead they seek to assert that the reason for their exclusion was the 'misleading' but nonetheless binding term in their contracts of employment. As Mr Paines submits, this moves the focus from scheme wide issues to the actions of individual employers and whether within that employer's organisation rather than across the NHS as a whole, a comparator exists and disproportionate impact can be demonstrated.

20. In my judgment, whatever theoretical difficulty there may be in distinguishing between the amplification or clarification of a claim for which permission to amend is not required, and amendments which whilst of substance do not seek to add a fresh cause of action, these cases clearly fall beyond the dividing line and permission to amend is required. I accept the submission of both Mr Oudkirk and Mr Paines that the entire thrust, the very nature of the claim, has changed. The fact that it is still put forward as an equal pay claim is relevant only when it comes to the exercise of my discretion whether to give permission to amend, in particular whether the application entails the mere amendment of the original claim or the advancement of a wholly new claim and if so whether the applicable time limit has expired.

Do the new grounds of complaint have any reasonable prospect of success?

21. Clearly a highly relevant factor in the exercise of my discretion is whether the proposed amendment has any reasonable prospect of success. In the case of Mrs Hallam the same issue arises in a rather different guise, although the net result is likely to be the same, namely whether the claim as amended by my direction of the 18th July 2001 should be struck out under rule 18(7)(b) on the grounds that it has no reasonable prospect of success. I posed the question in this way: Is whether the claim as amended has no reasonable prospect of success the determining factor in refusing leave to amend? Mr Paines quite rightly submitted that if I hold that the amended grounds do have some prospect

of success that is not the only issue which I must take into consideration when exercising my discretion whether to allow the amendments.

22. Mr Grant submitted that whilst in normal circumstances, if I was of the opinion that the amended claims had no reasonable prospect of success that would be determinative in favour of refusing permission to amend or striking out, because these are test cases the usual principles should not apply and I should nonetheless consider allowing the claims to proceed. So far as I understood his reasoning it was that to do otherwise would prevent the test issue having a proper hearing and further discovery which might come about as the result of cases progressing to a full hearing might assist the claimants in, for example, establishing disparate impact. That submission seems to me to wholly misconceived. The matter is before me today expressly to consider whether (either in the context of amendment or strike out) the claims have any reasonable prospect of success and it therefore behoves the parties to have prepared their respective cases on that basis. It would clearly be wrong in principle to say that whilst I was of that opinion I was not prepared to strike the claims out merely because they are test cases. If that was not the case, there would be little or no purpose in having test cases in litigation such as this.

23. The claims can only succeed if a number of conditions are satisfied: first that the contractual term was effective: secondly, that the presence of the term in the contract had a disproportionately adverse impact on women, which includes whether the claimants can identify a male comparator; and thirdly that they have suffered a detriment as a result of the 'misleading' term. This last issue raises the further question of whether on the facts of the test cases which emerge from the witness statements of the claimants (none of whom have attended the hearing), the evidence of Mrs Catherine Hignett, a Human Resources Advisor for Pennine Acute Hospitals who has given evidence to me in the case of Ms Sanderson, and the statements of Mrs Anne Topley the pension manager at the Nottingham City Hospital in the case of Mrs Hallam, and Mrs Rachael Lambourne, a Divisional Human Resources manager at the Queen's Medical Centre in the case of Miss Whitworth, the claimants have any reasonable prospect of establishing that they acted as they claim to have done in reliance on the 'misleading' term.

The effect of the 'misleading' terms

24. Ms Sanderson's claim covers the period April 1976 to April 1980: Miss Whitworth's from April 1979 to August 1991; and Mrs Hallam's from December 1981 to April 1991. The relevant scheme Regulations are therefore the National Health Service (Superannuation) Regulations 1961 (S.I. 1961/1441) as amended by the 1973 Amendment Regulations (S.I. 1973/242) which made significant amendments in relation to the admissibility of part-time employees into the scheme; and the National Health Service (Superannuation) Regulations 1980 (S.I. 1980/362) (which effectively consolidated the earlier provisions) as

amended by the 1989 Amendment Regulations (S.I. 1989/804) which amended and simplified the categories for membership.

25. Regulation 4(1) of the 1961 Regulations has the cross heading "Application" and provided so far as material, and as amended by regulation 4 of the 1973 Regulations,:

> *"Subject to the next succeeding regulation … this part of these regulations shall apply to the following officers of an employing authority who have attained the age of 18 years.*
>
> *…*
>
> *(f) any other part-time officer who satisfies the requirements of Schedule 7"*

26. Schedule 7 (the Schedule to the 1973 Regulations) provided:

> *"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 half of the hours which would constitute whole-time employment in his case;*
>
> *…*
>
> *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 1st 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 1st May 1973, the election shall take effect as from the beginning of the next pay period following the receipt be the employing authority of that election.*

27. Regulation 6 of the 1961 Regulations has the cross heading *"Participation in superannuation benefits"* and provides:

> *"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 first of those terms and conditions is found in regulation 7 which deals with contributions and requires both the officer and the officer's employing authority to make contributions into the scheme: *"For the purpose of defraying the cost of the superannuation benefits provided by these regulations…"* (reg 7(1)). In other words, the scheme is not wholly funded by the contributions of the officer and her employing authority.

28. Regulation 8 has the cross heading; *"Officer's pension and retiring allowance"* and provides that:

> *"(1) An officer of an employing authority shall be entitled, on ceasing to be employed by them, to receive from the Minister –*
>
> *(a) an annual pension…"*

29. None of the subsequent changes to the detailed operation or wording of the 1961 Regulations as amended by the 1973 Regulations and consolidated into the 1980 Regulations, affect those basic principles.

30. I entirely accept Mr Paines analysis of the way in which the scheme operates. An NHS employee working not less than half the full time hours for their post becomes and 'officer' for the purposes of the scheme with the inherent liability to make contributions into it and the right to receive a pension from it, not on application but on their election (Schedule 7 para 2(1)). The need for an application would suggest a risk of rejection; election carries no such risk. As Mr Paines submits, there is nothing in the Regulations which requires that election to be made on any particular form, the only requirement being that it be made in writing. The employer plays no part (most importantly no part in determining whether to accept the employee as an officer) other than to act as the recipient of the employee's election and to make the statutory contributions, and once the election is made the Regulations themselves (Schedule 7 para. 2(2)) not a civil servant in the Department of Health or an employee of the employing authority, determine the date from which the election takes effect. The pension is payable not by the employing authority but by the Minister.

31. Mr Paines also relies on what happened in practice. Mrs Hignett's diligent rummaging through the archives of the predecessors to the Pennine Acute Hospitals NHS Trust has revealed a total of 7 (probably 8) instances of part-time employees who received contracts with the same misleading term as Ms Sanderson. Of those at least 4 (probably 5) received option forms in respect of the pension scheme and three elected to join. In three of the five cases the election is known to have been made contemporaneously with (in one case shortly before the issue of) the contract; in one case (of a decision not to join) three months later. Self-evidently, the existence of the 'misleading' term was irrelevant in those cases. It also appears from the evidence of Mrs Hignett and from the contemporary documents that while the employing authority was responsible for providing its own contractual documents and that issues relating to the contract and to a new employee's appointment were left to the line manager, the standard option form and the booklet which accompanied it were issued centrally by the NHS Pensions Agency itself and were dealt with locally by pay-roll departments.

32. Against that, Mr Ford (whose submissions on this point were gratefully adopted by Mr Grant) submits that although the offending clause was *'ultra vires'* the employers and it was not the intention of the respondents to prevent the

claimants having access to the scheme, the offending clause did have that effect. The fact that the validity of a clause in a contract may be susceptible to challenge in the courts does not mean that it has no consequences during the time before it is challenged. He also submitted that if no equal pay claim can be brought in respect of the misleading term, the remarkable result would be that the victims of discriminatory pay arrangements could have no claim under domestic law if the pay difference arose from a term which was *ultra vires*. Mr Grant further submitted that the clause creates an estoppel by convention between the parties in that they have in the past jointly interpreted it in a certain way and the respondent cannot now resile from that interpretation.

33. Leaving aside for the moment whether Mr Ford's use of the term *'ultra vires*' is correct, I accept Mr Oudkirk's submission that his last point is clearly wrong. The claimants would have a remedy under the principle in ***Scally v. Southern Health and Social Services Board*** if they could show that they had been misled by a misstatement made by their employer into believing that they did not have a contractual right which they in fact had, if in consequence they suffered a detriment. It is not the respondent's case that the misleading term is void in the sense that it falls to be treated in all respects as though it had never existed, rather that it was merely of no legal effect. It is not the respondents' contention that it is not open to the claimants to claim that they had acted upon it to their detriment.

34. In support of his first submission, Mr Ford relies on the case of ***Boddington v. British Transport Police*** [1999] 2 A.C. 143 HL which, he submits, demonstrates that the courts are increasingly adopting a flexible approach to the issue of *ultra vires* rather than simply holding that such actions are of no legal effect, but are recognising that there are factual consequences which flow from them. The issue in ***Boddington*** was whether a criminal court hearing a prosecution for contravention of a bye-law had power to determine whether the bye-law was *ultra vires* and void. The appeal was allowed to the extent of holding that such a challenge was permissible, but the appellant's contention that the bye-law was in fact ultra vires was rejected. Mr Ford relies on a number of passages, principally from the speech of Lord Steyn at page 172 (the version provided for me in the authorities bundle does not have paragraph numbers or marginal letters).

> *"Nevertheless, I accept the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences. The best explanation that I have seen is by Dr Forsyth who summarised the position as follows in "'The Metaphysic of Nullity' – Invalidity, Conceptual Reasoning and the Rule of Law", at p. 159:*
>
> > *"it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on assumptions that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the*

> *second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act, and it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void."*

35. Mr Ford submits that in this context the 'second actor' was Ms Sanderson who acted legally by not joining the scheme. Even if Mr Ford is right that the 'second actor' is, in effect, the person against whom the unlawful act is directed, which intuitively, appears to be wrong, it is difficult to see where that takes him. He seems to be submitting that merely because Ms Sanderson has acted in a way which is lawful (by not joining the pension scheme) in reliance upon a clause which otherwise has no effect, that somehow gives the clause the effect which it hitherto lacked. Even without enquiring into who the 'second actor' is, that is plainly not what Dr Forsyth was saying. It is the validity of the acts of the second actor – 'these later acts' – which are in issue. Dr Forsyth does not suggest, as Mr Ford seems to submit, that merely because the second actor may be acting lawfully and in consequence *his* actions may not be invalid, the *ultra vires* provision under which he purports to act is thereby validated. That, in my judgment, is the chasm which Mr Ford must cross if he is to show that the 'misleading term' is effective, and whether or not Ms Sanderson acted lawfully in reliance on it is, for that purpose, wholly beside the point.

36. But a further reading of Lord Steyn's speech shows that intuition was in this instance not misleading and that the 'second actor' is not the person against whom the unlawful act is directed, but an intermediary who in reliance upon a provision which is *ultra vires* the first actor, takes such an action. Immediately following the paragraph on which Mr Ford relies, his Lordship said this:

> *"…and Dr Forsyth's explanation is entirely in keeping with the analysis of the formal validity of the enforcement notice in* ***Reg v. Wicks*** *which was sufficient to determine the guilt of the defendant."*

37. Lord Steyn had dealt with ***Reg v. Wicks*** earlier in his speech at page 169.

> *"****Reg v. Wicks*** *was a planning case. The defendant was charged with non-compliance with an enforcement notice. He attempted to challenge the validity of the enforcement notice at a criminal trial. In the leading judgment Lord Hoffman held that as a matter of statutory interpretation 'enforcement notice' in section 179(1) of the Town and Country Planning Act 1990 means a notice issued by the authority which is formally valid and has not been set aside. Accordingly, there was no defence to the criminal charge. That was the unanimous view of the House."*

38. On Mr Ford's analysis of the passage from Dr Forsyth's book, the second actor would be Mr Wicks the defendant, but that is clearly not the case; the second actor was the planning authority. The passage from Lord Steyn's speech

on which Mr Ford seeks to rely therefore does not say what he submits it says and, even if it did, would not have the effect which he submits that it has.

39. He further relies on extracts from the speech of Lord Browne-Wilkinson at page 164:

> *"But I am far from satisfied that an ultra vires act is incapable of having any legal consequences during the period between the doing of that act and the recognition of the invalidity by the court. During that period people will have regulated their lives on the basis that the act is valid. The subsequent recognition of its invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity."*

39. In my judgment, as Mr Oudkirk submits, to rely on this passage suggests a misunderstanding both of the respondent's position and of what Lord Browne-Wilkinson was saying. The respondents do not say that it is open to them once the clause has been declared *ultra vires* (a concept which they say is inapplicable to the misleading term in any event) to assert that in virtue of it having been declared void it is not open to Ms Sanderson to claim that she has been misled by it, and in my judgment Lord Browne-Wilkinson is saying no more than that such an argument if advanced by the respondents would be untenable. What he is plainly not saying, but what he would have had to be saying for the passage to be of any assistance to Mr Ford, is that because someone has taken an action in reliance on an invalid and therefore ineffective provision, the provision is thereby imbued with legal effect.

40. I agree with both Mr Oudkirk and Mr Paines that to introduce the concept of *ultra vires*, with its public law overtones, into a private law case such as this, and in particular to attempt to discover analogies with cases involving administrative acts, is inappropriate and can only mislead and confuse. At its simplest, the doctrine of *ultra vires* can be described thus: if A purports to grant to B the right to act in a way which A's powers to not permit him to grant to B, A's attempt to so grant is void because it is *ultra vires* A, although the actions of B towards C in reliance upon their supposed right to act may not be devoid of legal effect. But if A gives B a contract which merely misstates B's rights with regard to an entitlement which arises by virtue of something other than the contract (even if as here the right could not have arisen but for the existence of the contract) A is not purporting to act either within or without a power which he has and is not purporting to grant to B the right to act in pursuance of any such power: A has merely misstated B's rights. There are simply no analogies to be had.

41. On behalf of Miss Whitworth, Mr Grant submits that as both she and her employers conducted themselves on the basis that the contract meant what it said, that her employment was not superannuable, an estoppel by convention has arisen to prevent the respondent from now asserting otherwise. The 'misleading' term in Miss Whitworth's case was different from that in both Mrs

Sanderson's and Mrs Hallam's cases in that it said *"subject to confirmation your appointment is not superannuable."* Mr Grant relies on ***Amalgamated Investment & Property Co. Ltd (In liquidation) v. Texas Commerce International Bank Ltd*** [1982] 1 QB 84 CA, in particular the judgment of Lord Denning M.R. at p. 121 C – D:

> *"If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it – on the faith of which each of them – to the knowledge of the other – acts and conducts their mutual affairs – they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not – or whether they were mistaken or not – or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it."*

42. Mr Grant also relies on this passage from the judgment of Brandon LJ at p. 130G to 131A:

> *"The kind of estoppel which is relevant in this case is not the usual kind of estoppel in pais based on a representation made by A to B and acted on by B to his detriment. It is rather the kind of estoppel which is described in* Spencer Bower and Turner, Estoppel by Representation …*as estoppel by convention. The authors of this work say of this kind of estoppel, at p. 157:*
>
> > *'This form of estoppel is founded, not on the representation of fact made by the representor and believed by the representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.'"*

43. When asked the very obvious question – where is the course of dealing in this case which gives rise to the estoppel - Mr Grant submits that on the claimant's part it is her failure to apply to join the pension scheme in reliance on that clause and on the respondent's part their failure to take any steps to correct her view of it. The unreality of that proposition is, with respect to Mr Grant, self evident. Whilst their may be cases in which mutual inactivity could amount to a course of dealing giving rise to an estoppel by convention, this clearly is not one of them. Mr Grant's submission amounts to nothing more than that the claimant was misled by a misstatement by the respondent which the respondent failed to correct. As both Mr Oudkirk and Mr Paines submit, their can be no meaningful distinction between the misleading oral statement which, *pace* ***Preston (No. 3)*** does not give the person misled a cause of action under the Equal Pay Act or Art

141 EC, and a misleading written statement if that statement has no contractual effect.

44. In my judgment the cases advanced by the claimants in their amended grounds of complaint plainly have no prospect – let alone no reasonable prospect - of success. Mr Grant and Mr Ford have both, quite rightly in my judgment, accepted that if I was to hold that the misleading statements were ineffective, the claims could not succeed. I so hold. The claimant's right to membership of the NHS Pension Scheme arose by virtue of their employment in the Health Service for a sufficient number of hours to qualify them to apply to become an 'officer', that is a member of the pension scheme, and upon applying their admission to membership was automatic. Their employing Health Authority or latterly NHS Trust, could as little impose a contractual term purporting to make an eligible employee ineligible, as it could by contract purport to make an ineligible employee, eligible.

Disparate impact

45. I must briefly deal with two other issues, disparate impact and detriment. The claimant's case is that the insertion of such a term into the contract of part-timers had a disproportionately adverse impact on women meaning that the resultant inequality in pay between the woman whose contract included such a term and her male comparator's which did not, was indirectly discriminatory against women and therefore brought her claim within the ambit of the Equal pay Act and Art 141 EC. In my judgment all three test claimants' claims fall at this hurdle as well. Only Ms Sanderson has identified a male comparator said to be engaged of like work with her, and given that the relevant establishment within which the comparator must be found is now the individual employing respondent rather than the NHS as a whole, it seems clear that at least no male comparator engaged on like work exists in the case of the other claimants. The respondents do not admitted that a comparator engaged on work of equal value with any of the claimants exists and none is identified by the claimants.

46. Ms Sanderson, at paragraph 11 of the Factual and Legal Particulars of her amended claim identifies her comparator as Michael Smith, a full-time male nurse employed at the same hospital. Her reason for believing that his contract did not contain the misleading term is at para. 13(3) and is simply her belief that the contracts of all full time male nurses stated that their employment was superannuable. She offers no grounds for that belief. She has a corresponding belief that the contracts of other part-time female nurses stated that their employment was not superannuable. For a short period of time – between 1973 and 1977 on the limited sample available (7 or at the most 8), that does appear to be the case. But from 1977 to 1980, none of the contracts of part-time nurses so far discovered contain the clause. The respondent has no record of Mr Smith and in particular no copy of his contract. Whilst I could not say that Ms Sanderson had no reasonable prospect of establishing the existence of a

comparator, I am offered no basis on which I could say that either Miss Whitworth or Mrs Hallam had any prospect at all.

47. But on the issue of disparate impact, there seems no doubt that all three cases are equally hopeless. So far as both Miss Whitworth and Mrs Hallam are concerned they appear to be the only recipients in the employment of their respective employing respondents, of contracts with the misleading term. Mrs Hallam's case is unique in that she worked precisely half the equivalent full time hours for the post and it was for that reason alone that the misstatement of the qualifying rule – "more than" instead of "not less than" – had any impact. It is not suggested, and no evidence is offered, that any other person in the same position as her had a contract with the same misstatement of the rule. Miss Whitworth stated at paragraph 10(1) of the Factual and Legal particulars of her claim that she believed that the contracts of the other part-time cardiographers, of whom there were four, also contained the same 'misleading' term. But of the total of five part-time cardiographers including herself, four sets of records have been found of which only hers contains the 'misleading' term. In my judgment, it is clear almost beyond argument that in a large workforce a single isolated example of a practice of which compliant is made is incapable of demonstrating disproportionate impact on women: no relevant conclusions could be drawn from such a small number.

48. Ms Sanderson's case is different only in degree, the degree depending on where the line is drawn. If it is all of the part-time women employees for whom contracts have been discovered during the period 1975 to 1980, some 48 in number, only 7 or at most 8 (no contract exists for the 8th but as her employment began at a time when Mr Ford submits that the evidence suggests all part-timers had contracts with the misleading term, it is reasonable to include her) had contracts including the misleading term. If the dividing line is pre 1977, when the document which the respondent was using on appointing new employees changed, the number does appear to be 7 out of 7 or 8 out of 8. But even in Ms Sanderson's case the numbers are so small and more importantly are such a tiny proportion (I assume, as no figures are offered to me) of what I must presume to be a workforce numbering somewhere between the high hundreds and the low thousands, it would be quite impossible to demonstrate disparate adverse impact on women.

Detriment

49. The heading for this part of my reasons might well have been "The Merits" for in a sense that is what the question of whether the claimants can demonstrate that they have suffered a detriment is about. A claim under the Equal Pay Act and Art 141 EC cannot succeed if, despite the existence of a provision, criterion or practice which adversely impacts on women, the claimant has herself suffered no detriment. None of these claimants can so demonstrate – indeed such evidence as there is suggests that Mrs Hallam certainly and Ms Sanderson probably were not even misled in the way which they now claim to

have been and in Miss Whitworth's case the term was so vague as to be scarcely capable of misleading.

50 In all cases of this nature where we are having to reconstruct events of, in the case of Ms Sanderson, 30 years ago and in the other cases only a little less, it is inevitable that claimants will have genuinely forgotten what to them at that time were relatively unimportant matters, such as whether they were in fact invited to join a pension scheme. Such an invitation would be unimportant to someone who did not wish to join. A tribunal of which I was chairman dealt with this difficult issue at considerable length in ***Betts and others v. The Boots Company Plc*** ET 28 March 2006, and I adopt what we said on that occasion. Where a system for informing employees of their right to join a pension scheme was in place and there is evidence that it was working for others in the same employment as the claimant at the same time as the claimant, it is likely that in the absence of some compelling evidence to the contrary the tribunal will conclude that on the balance of probabilities, it was also working in the case of the claimant.

51. But in Mrs Hallam's case there is compelling evidence in respect of how the system worked for her. Mrs Topley's evidence is that all part-time staff who were eligible to join the scheme were sent a form on which they could either opt into or out of the scheme together with a booklet, produced by the NHS Pensions Agency, which (no copy can now be found) presumably explained the advantages of joining the scheme. Mrs Hallam had been a full time employee and therefore compulsorily a member of the scheme, but on becoming part time would have been suspended from membership unless she had opted to continue. Her contract which misquotes the eligibility rule also says that all eligible staff will be sent an option form. Mrs Topley has managed to trace a microfiche of Mrs Hallam's record card on which Mrs Topley recognises her own writing. She was then the payroll clerk. At the top of the record card there is a section "Details of Starting" and in box SS10 – which refers to a form which is sent to the Pensions Agency when an employee joins the scheme – Mrs Topley has inserted a tick next to the word option which indicates that she had sent an option form to Mrs Hallam. The word 'NO' is also inserted in this box which Mrs Topley says indicates that Mrs Hallam had returned the option form stating that she did not wish to join the scheme. A mere failure to return the form as opposed to a positive election not to join, would not have resulted in a 'NO' in the box. The card is initialled both by Mrs Topley and her supervisor in confirmation that the card had been completed correctly.

52. Mrs Hallam has said in correspondence to the tribunal that she has no recollection of ever receiving an option form, but in her witness statement for this hearing she makes no comment on the material part of Mrs Topley's statement. I am in no doubt that on the basis of the evidence before me, which appears to be the only evidence available, Mrs Hallam has no reasonable prospect of showing that she was misled by the term in her contract which incorrectly stated the

eligibility rule. Quite the contrary in fact. It seems to be clear that the reason why she did not join the pension scheme was because she expressly elected not to do so.

53. Miss Whitworth's contract did not even go so far as to say that her employment was not superannuable. It merely said that "subject to confirmation" that was the case. In her witness statement at paragraph 3 she says that she did not join the scheme "as my contract stated that the post was not superannuable" but that if it had said that it was superannuable she would have joined immediately. That is clearly not the case. The contract said "Subject to confirmation" and a person anxious to join the scheme would have made enquiries of her employer if confirmation was not received. Miss Whitworth does not claim to have made any enquiries or to have received any confirmation.

54. As I have already mentioned, it was an important part of her claim that all of the other cardiographers, who were both part-time and women, had also had the 'misleading' term in their contracts. Not only did that prove not to be the case, but in two of the three cases (other than Miss Whitworth's) for which records survive, those of Judith Martin and Christine Davey, the records show that they joined the scheme on their appointment as part-time cardiographers, although in one case that was four years and in the other case five years, after Miss Whitworth had commenced employment. On the basis of that evidence I do not believe that Miss Whitworth has any reasonable prospect of establishing that she suffered a detriment as a result of the so called 'misleading' clause.

55. In Ms Sanderson's case there is strong evidence of a system which was working for her contemporaries, for in the period when it seems that a small batch of contracts containing the 'misleading' term was issued, of the 8 part-time employees who appear to have received such a contract, it is known that five also received the option form of whom three opted to join. In his skeleton argument Mr Ford commented that it was not clear how that had arisen. Mrs Hignett is entirely clear. The responsibility for issuing the appointment and contract documents was with the line manager, but the responsibility for issuing the option forms was the pay roll department's. They received the option forms and explanatory booklets from the Pensions Agency and sent them to all eligible employees immediately their details were received from the line manager. From that evidence, which is naturally significantly more compelling that Ms Sanderson's purported recollection of long distant events, a tribunal could only conclude that, on the balance of probabilities, an option form had also been sent to Ms Sanderson. That being so she would also have no reasonable prospect of showing that she had suffered a detriment as a result of the 'misleading' clause.

Conclusion

56. No issue of amendment arises in Mrs Hallam's case. For the reasons which I have given, her claim as it is now put has no reasonable prospect of success and it is accordingly struck out under rule 18(7)(b).

57. So far as Miss Whitworth and Mrs Sanderson are concerned, permission to amend is refused on the grounds that the claim has no reasonable prospects of success for the various reasons which I have given. It is therefore not necessary for me to deal with any of the other issues which would fall to be considered under ***Selkent Bus Co Ltd v. Moore*** [1996] ICR 836 EAT. As I understand it, following the refusal of permission to amend, the claims necessarily fail as the claimants are in the same position as all other claimants who failed to opt into a pension scheme on becoming eligible to do so. But for the avoidance of any doubt I will allow the claimants 28 days from the date on which this judgment and reasons are sent to the parties to give reasons why their claims should not be struck out under rule 18(7)(b). In the absence of such reasons – I should say reasons which show cause why the claim should not be struck out – the claims will be struck out.

58. For the same reason I will allow the remaining claimants who fall within this test issue and to whom or to whose representatives a copy of this judgment and reasons are to be sent, 42 days to give reasons why their claims should not also be struck out under rule 18(7)(b).

.....
Chairman

Date:

REASONS SENT TO THE PARTIES ON

.....
AND ENTERED IN THE REGISTER

.....
FOR SECRETARY OF THE TRIBUNALS