Neutral Citation No: [2026] NIKB 45 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **HUM13126** *ICOS No:* **19/117863** *Delivered:* **21/08/2026**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(COMMERCIAL LIST)

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Between:

(1) DR KATHERINE MARGARET MACLURG BY HER EXECUTOR WILLIAM SLOAN MACLURG
(2) DR GILLIAN SARAH ELIZABETH CLARKE
(3) DR ELAINE HEATHER LIVINGSTON
(4) DR CIARA MCLAUGHLIN
(5) DR HELEN JANE ROGERS

Plaintiffs

and

BUSINESS SERVICES ORGANISATION

Defendant

_____

Rachel Best KC (instructed by Gateley Legal) for the Plaintiffs
Aidan Sands KC (instructed by Directorate of Legal Services) for the Defendant

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HUMPHREYS J

Introduction

[1] The first plaintiff was and the second to fifth plaintiffs are General Practitioners ("GPs") who were appointed and employed as General Practitioner Medical Advisers ("GPMAs"). Sadly since these proceedings commenced, the first plaintiff has passed away and this action is continued by her executor.

[2] The defendant is the successor in title to the four former Health and Social Services Boards and, latterly, the Health and Social Care Board ("HSCB") and now has responsibility for the contracts under which the plaintiffs were employed.

[3] GPMAs have responsibility for GP practices in their regional area, dealing with clinical and non-clinical queries, the investigation of clinical complaints, adverse incidents and any performance or fitness to practise concerns.

[4] Each of the plaintiffs claims that they have not been paid in accordance with the terms of their contracts of employment and, as a result, have been underpaid for a number of years.

[5] The defendant contends that, properly construed, the plaintiffs have been paid in line with their contractual entitlements. In the alternative, it says that the plaintiffs have waived any breach of contract or acquiesced in same. It also says that certain of the claims of the first and fifth plaintiff are defeated by operation of the provisions of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order").

Background

[6] In the summer of 2004 the defendant's predecessor, the Eastern Health and Social Services Board ("EHSSB") advertised for three new GPMA posts. In the advertisement it stated:

(i) The grade was that of "Consultant";

(ii) The GPMAs would report to the Director of Primary Care;

(iii) The salary was stated to be £55,699 to £72,483 per annum;

(iv) The terms and conditions, including salary, were "under review" in accordance with "Agenda for Change".

[7] Around that time there were significant changes afoot in relation to the pay and conditions of medical practitioners. A new contract had been introduced for NHS Consultants in January 2004. As of 15 January 2004, existing consultants had the choice of remaining on the "old" contracts or moving to the new terms. All consultants appointed after that date were placed onto the new contract. The salary range quoted for the GPMA posts reflected that which was payable to consultants under the old contract.

The GPMA contract

[8] In April 2006 the first plaintiff was sent her "New Medical Adviser Contract." It contained an entire agreement clause:

> "The contract and the associated Terms and Conditions of Service contain the entire terms and conditions of your employment with us, such that all previous agreements, practices and understandings between us (if any) are

superseded and of no effect. Where any external term is incorporated by reference such incorporation is only to the extent so stated and not further or otherwise."

[9] The contract contained a number of references to the Consultant Terms and Conditions of Service (Northern Ireland) 2004 ("CTCS"). These were incorporated in part despite the fact that GPMAs and consultants carry out quite different roles for different employers.

[10] The principal terms of the contract were as follows:

(i) Clause 2 - the first plaintiff's continuous employment began on 1 December 2004 and Schedule 1 of the CTCS gives guidance on such commencement;

(ii) Clause 5 - the first plaintiff would be responsible for the "duties as appropriate" as set out in Schedule 2 of the CTCS;

(iii) Clause 19.1 - the basic salary was £67,133 per annum "calculated in accordance with the provisions in Schedules 13 and 14 of the CTCS";

(iv) Clause 19.1 - the basic salary would increase when pay thresholds were received in accordance with the provisions of section 20.2 and Schedule 15 of the CTCS, the value of each pay threshold and the number of years' service required being set out in Schedules 13 and 14 of the CTCS;

(v) Clause 21 – the provisions of Schedule 17 of the CTCS apply in relation to pension entitlement;

(vi) Clause 22 - the provisions of Schedule 18 of the CTCS apply in relation to leave and holiday entitlement;

(vii) Clause 23 – expenses would be payable in accordance with Schedule 21 of the CTCS;

(viii) Clause 25 – termination of employment is governed by Schedule 19 of the CTCS.

[11] Annex B to the contract was entitled "Consultant Salary Scales with effect from 1 April 2003 Basic Rates of Pay" and applied to "First appointment as a consultant before 15 January 2004 (see Schedule 13)."

[12] This annex then set out the relevant salary on commencement. At one year's seniority a consultant was paid £65,035, rising incrementally until seven years' seniority at which point the salary was £73,290. This remained the case until the consultant reached 30 years' seniority when it rose to £78,195. Consultants would

become eligible for pay thresholds at the intervals set out in Schedule 13 of the CTCS on the anniversary of transfer to the contract.

[13] Annex C set out the "Consultant Salary Scales with effect from 15 January 2004", for those first appointed as a consultant on or after 15 January 2004 (see Schedule 14). The starting salary was £65,035, rising incrementally to £88,000 at threshold eight.

[14] Schedule 13 to the CTCS reads:

> "This Schedule applies to those whose first appointment as an HSC consultant is before 15 January 2004. Schedule 14 applies to those whose first appointment as a HSC consultant is on or after 15 January 2004. For the purposes of determining whether this Schedule or Schedule 14 applies, the date of appointment will be regarded as the date on which the consultant post was offered."

[15] Starting salary and eligibility for thresholds depends on seniority and this is defined as being:

> "the sum of the number of whole years completed as an HSC consultant plus the point on the salary scale when appointed plus any additional credited seniority plus the year that he/she is currently in."

[16] Annex A to the CTCS is entitled "Pay progression for consultants appointed before 15 January 2004" and sets out pay scales from M401 to M430, reflecting seniority from one year to 30 years and over. Within each of these pay scales are a number of thresholds which provide for salary increases over the years following transfer. For example, a consultant with 10 years' seniority would be placed on scale M410 and would receive salary increases after a further four, eight and thirteen years, at which stage maximum salary would have been reached.

[17] All consultants with between seven and 29 years' seniority transferred to the Schedule 13 payscales on the same basic salary but those with more years' seniority would move more quickly via the thresholds to the maximum salary level.

[18] Schedule 14 sets out the salary entitlements of consultants appointed after 15 January 2004. Annex B consists of a single pay scale, M400, with a number of spinal points from 0 to 19, based on the number of years completed as a consultant. Paragraph 5 of the Schedule provides:

> "Basic salary on commencement will be set at a higher threshold to reflect any approved consultant level experience that a consultant has gained."

[19] For example, a consultant appointed on 16 January 2004 would start at point 00 on the M400 scale and then see annual salary increases for the first five years up to M400 point 04 then increases every five years up to the maximum salary level M400 point 19.

[20] Schedule 15 provides that the basic salary payable would increase when the criteria for pay thresholds were met, the value of each pay threshold and the number of years' service required being set out in Schedules 13 and 14.

The evidence of the first plaintiff

[21] The first plaintiff was an experienced GP within the NHS and was working as a research fellow in Queen's University. In her affidavit, she recounts that she applied for the GPMA post and was interviewed on 19 October 2004 by Dr Stanton Adair, who was the Director of Primary Care for the EHSSB at the time, Mrs Dawn Raine, a senior administrator in primary care and an individual from human resources whose name she could not recall. She was offered the full time permanent post but as she wished to continue with her research work at QUB, was appointed to the part time permanent role with effect from 1 December 2004.

[22] Dr MacLurg has deposed:

> "At the end of my interview I specifically checked with the panel, which was chaired by Dr Adair, that the post would be paid according to the new Consultant Contract once that was implemented … He said it would be, reconfirming my understanding that the post would be paid according to the terms of the new Consultant Contract … I accepted the job on these terms."

[23] In her evidence, the first plaintiff refers to a document entitled "Create a Post", dated 2 December 2004, in which it is stated that the grade was that of "Consultant" and the pay scale was M400. On the same date Gerard O'Kane created a document called "Notification of New Appointment" in which the pay scale as set out in the job advertisement was originally noted but then crossed out and replaced with:

> "M400 £67,133 pa Pt 1 of 8."

[24] The first plaintiff did not see, nor was she aware of, either of these documents until she had sight of her personnel file following a data breach in or around February/March 2018. The case is made that these documents are entirely consistent with the representation made by Dr Adair at interview.

[25] Over nine months later, on 22 September 2005, an "assimilation form" was completed in respect of the first plaintiff. It recorded that she was first registered on

9 July 1987 and therefore had 17 years' service. Subtracting eight from this figure gave nine years' seniority. She was placed on salary scale from Schedule 13, M409, point one, at a figure of £75,654 per annum. This document was signed by Gerard O'Kane and Paula Smyth. Again, Dr MacLurg did not see this form until after the data breach had occurred in 2018.

[26] In relation to this issue of how seniority was calculated, Dr MacLurg's affidavit comments:

> "I was never shown any written policy as to how seniority was to be calculated and there was never any formal discussion about it … But it was generally accepted by everyone at the time and it seemed fair enough to me, as it would have taken a doctor an average of 8 years from graduation to appointment as a Consultant."

[27] Four days later, Mr O'Kane completed a "Staff Information Amendment Form" which recorded:

> "Payscale for above amended from M400 to M409 to reflect seniority of 9. Point on scale awarded to pt 1 of 15. Please pay any arrears owed to start date of 1 December 2004."

[28] This is another document which was not seen by the first plaintiff at the relevant time. In her evidence, Dr MacLurg states that this move to payscale M409, representing a move from Schedule 14 to Schedule 13 was never discussed with her and she was wholly unaware of it.

[29] The case made by the first plaintiff is that since she was appointed to post after 15 January 2004, she ought to have been paid in accordance with the M400 payscale contained in Schedule 14, at the appropriate level of seniority, and that was the basis upon which she accepted the post. She was unaware until 2018 that this was not in fact the case.

The evidence of the fifth plaintiff

[30] The fifth plaintiff is Dr Helen Rogers, who qualified as a GP in 1987 and remains employed as a GPMA by the defendant. She described to the court that her particular area of responsibility is the GP practices within the South Eastern Health and Social Care Trust. Part of her duties relates to the contracts held by GP practices whilst she also investigates complaints and serious adverse incidents, as well as advising on complex patient needs. Appraisal and validation of the performance of GP practices also falls within the remit of GPMAs.

[31] Dr Rogers was told by Dr Adair in the summer of 2004 that new GPMA posts were to become available and that they were going to be on the new consultant

contract and paid on the consultant salary scale. It was she who informed Dr MacLurg of the possibility of applying for these new roles.

[32] The evidence of the fifth plaintiff was that she started on 1 November 2004 and, at that time, she understood that she would be employed on the new consultant terms and conditions. On the basis of the deduction of eight years, this plaintiff had nine years' seniority.

[33] Like Dr MacLurg, Dr Rogers only became aware that she had been "assimilated" to salary scale M409 from Schedule 13 in April 2018 although the relevant document was signed by Mr O'Kane on 26 September 2005.

[34] In 2006 the fifth plaintiff was provided with her written contract. This stated that the date of commencement of her continuous employment was 1 December 2001 but otherwise was identical to that under which the first plaintiff was engaged.

[35] Dr Rogers was cross-examined at length about the differences between consultants and GPs which were uncontroversial. It was also put to her that various schedules from the CTCS which would not normally apply to her had been incorporated into her contract of employment. Dr Rogers made it clear that her understanding and expectation at all times was that she would be paid in accordance with Schedule 14.

[36] In relation to the assimilation process, Dr Rogers was taken to the "Staff Information Amendment Form", dated 26 September 2005, which documented the decision to move her from the M400 payscale to M409. It was suggested that the M400 scale was only ever used on a temporary basis pending the assimilation. She responded unequivocally that she was never informed of this process.

[37] Essentially, the criticism levelled at Dr Rogers was that she was trying to have her cake and eat it – that she sought the advantageous terms of the Schedule 14 pay arrangements and the recognition of her nine years' seniority. It was suggested to her that if the M400 scale were to apply, it would have to have been on the basis that she enjoyed no relevant experience.

The evidence of the fourth plaintiff

[38] Dr McLaughlin qualified as a doctor in 2004, became a GP in 2010 and was appointed as a GPMA with effect from 4 April 2016.

[39] This plaintiff had responded to an advertisement placed around October 2015 by the HSCB seeking to appoint three GPMAs, two permanent and one temporary. The advertisement stated:

> "Salary: NHS Consultant Scale"

[40] The published job description provided that these GPMAs would report to the Assistant Director of Integrated Care (Head of General Medical Services) who at that time was Dr Margaret O'Brien. In relation to salary, it stated:

> "NHS Consultant Scale £75,249 - £101,451 per annum."

[41] Dr McLaughlin gave evidence that she met with Dr O'Brien at a conference on 27 January 2016 and discussed the prospective salary for the role with her. Given that this would involve a move from existing employment as a GP, this was an issue of considerable importance to her, and the band referred to in the job description was self-evidently wide. Dr O'Brien assured her that her years of seniority as a GP would be taken into consideration and she would be placed on pay point 5, equivalent to a salary of £85,000 per annum.

[42] After her employment had commenced, Dr McLaughlin was informed by Human Resources on 18 April 2016 that she would be placed on point 1 of the salary scale, a salary of around £75,000.

[43] On that same day Dr McLaughlin emailed Dr O'Brien stating that this had come as "quite a surprise" and stating explicitly that she had only taken the job on the basis that she would be at pay point 5 on the scale.

[44] A response was received from Mr O'Kane on 21 April 2016 to the following effect:

> "This is a bit of a convoluted process that goes back to the days of the legacy Boards. I thought it would be best to send the pay assimilation (attached). The starting point is determined by relating your seniority to the pay scales that are related to seniority (for you that is M402, which has an entry point at the bottom of the scale – see pg 7 of the attached pay circular). And because we can't use those scales any more, we refer the salary point back to the current payscale of M400 (pg 4 of the attached circular), to determine the pay progression. I hope this helps explain the process."

[45] This plaintiff then engaged with the British Medical Association ("BMA") and Scott Murphy of that organisation contacted Mr O'Kane on 22 April 2016 asking that the assurances given by Dr O'Brien be honoured. Dr O'Brien was contacted and she advised that she had had a conversation with Dr McLaughlin in relation to the assimilation process but that she did not know the exact detail of this and Dr McLaughlin ought to pick this up with HR. Dr O'Brien stated:

> "Apologies but I did not think she would be starting on the first point of the consultant scale."

[46] A reply issued to Mr Murphy from the HR Department on 11 May 2016 as follows:

> "I have now had the opportunity to discuss this with Dr O'Brien who recalls a conversation with Ciara in which they did discuss starting salary. Dr O'Brien advised that whilst she mentioned in her discussion with Ciara that this may equate to approximately, £80,000, she used this as an example and advised Ciara that her salary would have to be calculated and determined by staff within the Human Resources Directorate.
>
> Human Resources Staff determine salary based on an applicant's years of experience following full qualification, and this is the consistent approach used.
>
> Dr O'Brien would not have been in a position to specify a starting salary as she would not have the relevant information required to identify a salary point and is well aware of this process following on from other appointments.
>
> I have checked the salary point and can confirm that the calculation and identification of the starting salary of £75,249 is correct.
>
> It is regrettable that Dr McLaughlin's expectations regarding her salary have proven to be less than anticipated but would emphasise that this has been determined in keeping with other appointments."

[47] On 15 June 2016, Dr McLaughlin emailed HR stating that she was not happy with her starting salary since it did not reflect her experience and qualifications and that she was continuing to work under protest whilst she took advice and pursued the matter. She did not sign the contract of employment sent to her.

[48] On 28 September 2016, Mr O'Kane emailed Mr Murphy to say that a meeting had taken place at which it was determined that the process remained valid and therefore Dr McLaughlin's salary would not be reviewed. It was asserted that the approach taken had been applied appropriately and consistently with others who had taken up similar positions.

[49] In cross-examination Dr McLaughlin was taken to her assimilation form which recorded that she had ten years' experience as a doctor and subtracting the eight years gave a seniority of two years. On the M400 pay scale this placed her on point one of

the pay scale, a starting salary of £75,836. It is accepted that this form was in error since she had, in fact, 11 years' experience and the relevant seniority ought to have been three years.

[50] The contract sent to Dr McLaughlin was identical to that under which the first and fifth plaintiffs were employed, save that the two annexes detailing rates of pay were replaced with one – Annex B. It was entitled "Consultant Salary Scales with effect from 1 April 2010" and provided for "salary on commencement", without any reference to either Schedule 13 or Schedule 14.

[51] Annex B did, however, set out the eight pay thresholds which are taken from the M400 Schedule 14 payscale. Confusingly, however, it then states:

> "Consultants will become eligible for pay thresholds at the intervals set out in Schedule 13 of the Terms and Conditions on the anniversary of transfer to the contract."

[52] These provisions are mutually inconsistent since the thresholds operate to effect pay progression differently between Schedule 13 and Schedule 14.

[53] Following the data breach in March 2018, and the information acquired in relation to other staff salaries, Dr McLaughlin raised a grievance on 12 May 2018.

The evidence of the second plaintiff

[54] Dr Gillian Clarke qualified as a doctor in 1994 and became a GP in 1998. She was appointed as a GPMA on 31 May 2014 to a temporary position, becoming permanent in October 2014.

[55] The HSCB had placed an advertisement in December 2013 for two GPMA positions, one permanent and one temporary, with the salary to be:

> "NHS Consultant Scale £74,504 - £100,446 per annum."

[56] Dr Clarke's evidence was that she checked the pay scales for consultants at this time and identified M400 as the relevant pay scale. Following the offer of employment, she had discussed salary with Dr O'Brien who indicated that she would be "well up the pay scale".

[57] Prior to commencement, Dr Clarke sought clarity from Mr O'Kane who informed her that she had ten years' seniority but would be placed on point 5 of M400, being £84,667. This was said to be on the basis of an assimilation policy.

[58] A contract of employment was sent to Dr Clarke on 14 October 2014, some months after she had commenced as a GPMA in a temporary position, specifying her salary as being £84,667 "calculated in accordance with the provisions in Schedules 13

and 14 of the Terms and Conditions of Service." By this time, £84,667 was the revalorised figure for pay point 5 on scale M400. This contract contained only Annex B (like that of Dr McLaughlin) and contained the same confusing mix between the thresholds set out in Schedule 14 and the wording which referred to threshold eligibility being based on Schedule 13.

[59] On Dr Clarke's analysis, she had 19 years of experience at the time of appointment and, applying the subtraction of eight, ought to have had 11 years' seniority. This would have placed her at a much higher point on the M400 scale.

[60] She stressed that the "assimilation policy" forms no part of the contractual terms and conditions under which she was engaged and when disclosure of the relevant policy was sought, it was revealed in an email of 8 June 2018 that no written policy actually existed.

[61] A meeting took place on 14 August 2016 to discuss these issues at which it was revealed that:

(i) Her pay had erroneously been calculated on the basis of 10 years' rather than 11 years' experience (mirroring the error in relation to Dr McLaughlin);

(ii) The 10 years' experience was applied firstly to Schedule 13, which would have placed Dr Clarke on scale M410, a starting salary of £82,950;

(iii) There was then a read across to the same salary level in pay scale M400 which was at point 5 on that scale.

[62] Dr Clarke commenced a grievance on 3 July 2018.

The evidence of the third plaintiff

[63] Dr Heather Livingston qualified in 1990 and commenced work as a GP in 1995. She was appointed to the post of GPMA on 1 August 2014.

[64] Prior to her appointment, Dr Livingston had discussions relating to her proposed salary with both Dr O'Brien and Mr O'Kane. She was informed by Mr O'Kane that she would be starting at point 5 on the M400 scale. In an email of 3 April 2014 she raised the issue of her 16 years' experience and asked how the pay offer of £84,667 (based on point 5 of M400) had been calculated.

[65] She again raised the question of her seniority in an email to Dr O'Brien on 10 April 2014. It had been explained to her that the calculation was based on "years since graduation" and amounted to four years' service. In the email Dr Livingston referred to her "consultant level experience" as a Senior Medical Officer and asked that this be taken into account.

[66] In the event, a contract was sent to Dr Livingston on 5 August 2014 providing for a salary of £84,667 and was signed by her on 15 September 2014. This contract was in identical terms to all the other plaintiffs but, like Dr McLaughlin and Dr Clarke, had only a single annex in relation to pay calculation (Annex B) and it contained the confusing combination of Schedule 14 thresholds and Schedule 13 eligibility.

[67] Dr Livingston raised a grievance in May 2018 following the data breach, contending that she ought properly to be recognised as having 16 years' experience (being 24 years less the agreed eight years) and this should have been reflected directly on the M400 pay scale.

The evidence of the defendant

[68] The defendant's principal witness was Mr Gerald O'Kane who had direct involvement with all five cases. He has worked in Human Resources firstly with the EHSSB from 2003 to 2010 then with the Business Services Organisation ("BSO") following the Review of Public Administration ("RPA").

[69] Mr O'Kane gave evidence regarding a proposal put forward by Dr Adair in September 2004 in relation to the terms and conditions for GPMAs. His paper noted that such medical advisors in the EHSSB had "always been employed on consultant terms and conditions". At the time of the proposed introduction of new consultant contracts, the Department had declined to provide funding for GPMAs on this basis but indicated that the four Boards could choose to fund this from existing resources. Approval was sought from the Remuneration Committee of the EHSSB to offer GPMAs the opportunity to "move to the new terms and conditions."

[70] This Committee met on 11 November 2004 and the members agreed that GPMAs should move to the new terms and conditions of the consultant contract, same to be funded from the primary care administrative budget.

[71] Following that resolution, Mr O'Kane stated that a working group, of which he was not a member, made up of representatives of the four Boards worked on the formulation of an assimilation process for GPMAs.

[72] Drs Rogers and MacLurg, who were appointed to their posts in November and December 2004 respectively, were initially paid on the basis of salary scale M400 in what Mr O'Kane described as a "holding position". Following the agreement of the assimilation process by the working group, Mr O'Kane completed the assimilation forms in September 2005.

[73] He then sent a memorandum to Dr Adair in October 2005 outlining that Drs MacLurg and Rogers had been assimilated on the basis of the new agreed formula. It did not state what that formula was but outlined the results:

	Previous Pay Scale	New Pay Scale

Dr MacLurg	M400 pt 1 £67,133	M409 pt 1 £75,654
Dr Rogers	M400 pt 2 £69,264	M409 pt 1 £75,654.

[74] A paper furnished to the Remuneration Committee on 8 December 2005 noted that GPMAs had been moved to the new consultant salary scale and that both a process for assimilation and a new contract had been drafted and would be issued soon.

[75] Mr O'Kane was cross-examined at length in relation to the assimilation process. He described it as a bespoke arrangement, involving the subtraction of eight years from the total years of experience to give a seniority figure that was then applied to the Schedule 13 pay scales. He accepted that no written policy could be found and that none of the plaintiffs have ever been provided with a copy of such a document. Indeed, no documents emanating from the working group had been identified or disclosed.

[76] Mr O'Kane also gave evidence that an issue arose in November 2010 when two new GPMAs, Drs Orr and Digney, were due to start employment. By this stage the HSCB had come into being and he was working for the BSO. He contacted Hugh McPoland, the HR director, who replied by email on 7 December 2010:

> "We agreed to use the formula used in EHSSB so you can apply it and let me know what it is."

[77] Mr O'Kane explained that the "formula used in EHSSB" referred to the deduction of eight years. However, when he came to apply the formula to the calculation of these doctors' pay, another significant step was inserted. These doctors were not paid on the Schedule 13 scales like Drs MacLurg or Rogers but rather, once the Schedule 13 pay scale figure was identified, it was translated into the relevant pay scale on M400, the Schedule 14 scale.

[78] By this route, each of these doctors was placed on M400 point 5. In a handwritten note on one of the assimilation forms, Mr O'Kane wrote:

> "Seniority used to determine starting salary, not the consultant pay scale."

[79] Mr McPoland explained the calculation in a letter to one of the doctors dated 21 March 2011, stating:

> "I can confirm that this salary was calculated by taking the number of years you are qualified as a doctor (31 years at the date of assimilation to this payscale) minus 8 years (which is the average number of years taken to reach Consultant level), giving a seniority calculation of 23.

> This suggests that we should place you onto payscale M421 (reflecting 23 years seniority), the first point of which is £83,892. As the M421 payscale only applied to those who transferred onto the Consultant contract on its inception, you have been placed on the M400 scale, at point 5, which equates to £83,892."

[80] The other doctor affected by the 2010 salary calculation received a very similar letter.

[81] The three plaintiffs who were appointed to post in 2014, Drs Clarke, Livingston and McLaughlin, all had their salary calculated on the basis of an eight year deduction followed by a "translation" of the relevant salary figure from the Schedule 13 scales to the M400 payscale. However, for reasons which Mr O'Kane was unable to explain, none of them received any written notification in the manner of the doctors appointed in 2010.

[82] Mr O'Kane did send an email to Dr McLaughlin of 21 April 2016 which asserted "we can't use those scales any more", referring to Schedule 13. This was despite the fact Schedule 13 was, and remains, expressly referred to in the contract presented to Dr McLaughlin.

[83] Mr McPoland, the director of HR in the BSO from 2010 until his retirement in 2017, gave evidence that he had almost 40 years' experience in the health service in an HR capacity. However, he was not part of the EHSSB at the time of the appointment of the first and fifth plaintiffs.

[84] When he was asked about the calculation of the salary of the two new GPMAs in 2010, he answered:

> "At the time, I felt that the schedule 13 salary scales would rapidly go out of use and that we would have preferred to have them on 14 where we knew that that would continue until a new agreement was reached at whatever time in the future."

[85] Later he emphasised:

> "I decided that having made that calculation for - we would switch people onto, for administrative purposes, schedule 14 on the basis that we expected schedule 13 salary scales to die in a very short space of time."

[86] Mr McPoland explained that he took this course of action in order to ensure the recruitment and retention of a suitable cadre of GPMAs.

[87] When pressed as to why the level of seniority was not simply applied to the Schedule 14 payscale, Mr McPoland stated that the employer would never have agreed to this because of the potential impact on "pay comparabilities" within the organisation. He accepted that this rationale had never previously been articulated by the defendant.

[88] Paula Smyth commenced work in HR for the EHSSB in 2004 at around the time the first and fifth plaintiffs were appointed as GPMAs. She had continued in that role and following reorganisation became Assistant Director, and later Director, of HR for the BSO.

[89] She also gave evidence around the assimilation process, accepting that there was no written policy. She had been involved in the terms of engagement of other GPMAs and maintained that no-one had been paid solely on the basis of the Schedule 14 payscale.

[90] In the course of the grievance process, Ms Smyth sent an email on 13 March 2019 seeking to explain how the salary arrangements had been arrived at. It stated:

> "A proposal was made and endorsed within the EHSSB to use the consultant salary scale for pay administration purposes."

[91] The phrase "pay administration purposes" was also used by Mr O'Kane in his evidence. It found no voice in any of the contemporaneous documentation but appears to have been used for the first time in the grievance appeal decisions. In any event, like much of the evidence in this case, it amounts to a subjective opinion as to the meaning of the plaintiffs' contractual terms and conditions.

[92] Dr Margaret O'Brien was appointed in 2010 as Assistant Director for Integrated Care and was the line manager for the GPMAs. Her evidence was that she had no involvement in the assimilation process or salary setting, which was a matter for HR.

[93] Dr O'Brien accepted that she met new recruits and would have discussed salary with them in general terms, including telling them that experience would be taken into account. However, she was not over the detail of the process and would not have been able to give any firm indication as to what the salary level may be.

[94] Dr O'Brien was challenged in cross-examination by reference to email traffic which seemed to suggest that she had a direct role in agreeing and setting salaries.

The grievance procedures

[95] Each of the plaintiffs raised grievances in relation to their pay following the data breach in March 2018. The grievances were not upheld and each plaintiff received correspondence dated 17 October 2018 stating:

> "The panel acknowledge that while there is no written documentation to support the process that was used to assimilate Medical Advisors to the consultant scale, there was a recognised process in place and this process has been consistently applied to all Medical Advisors from a non-Consultant background who had not previously been employed on the consultant pay scale."

[96] Notably, whilst the panel rejecting the grievances was able to refer to a "recognised process", it did not see fit to set out what that process actually entailed. The plaintiffs each pursued an appeal and these were heard in January 2019.

[97] On 22 March 2019 the plaintiffs were informed that their appeals had been rejected. The correspondence sent on that date from the HR Director, Ms Hargan, included the following:

> "Following EHSSB agreement that medical advisers were to be paid on the consultant salary scale a formula was introduced to recognise seniority. This formula took the number of years the individual had been qualified as a doctor minus 8 years (as a proxy for the average number of years taken for a doctor to become a consultant). The resulting figure was used as the point on which the medical advisors were assimilated onto the seniority pay scales (Schedule 13) which we understand were the scales which were agreed to be used at the time. We have been advised that this process was explained to the cadre of medical advisors in post at that time and they had to confirm their understanding and verify their previous experience prior to the assimilation taking place. We have been provided with evidence from personal files to confirm the process of verifying experience to inform seniority calculations. The seniority scales continued to be used by the EHSSB until RPA and all staff appointed subsequently transferred into the new Health and Social Care Board (HSCB) when it was formed.
>
> We have been advised that post 2009 the HSCB considered that a mechanism should be adopted to assimilate newly appointed medical advisors onto the new consultant salary scales i.e. Schedule 14. However the HSCB determined that it was still appropriate for the Schedule 13 "seniority

> scales" to be used as a part of the assimilation process. The seniority calculation (i.e. completed years qualified as a doctor minus 8 years) was therefore used to determine the relevant starting point or pay threshold on the "seniority scale" for newly appointed medical advisors. This starting point or pay threshold on the "seniority scale" was then referred back to the corresponding point or pay threshold on the generic consultant payscale (Schedule 14 M400). The medical advisor was placed on this pay threshold and progressed through the incremental points on this scale in line with the incremental progression rules contained within that payscale."

[98] This represented the first occasion that all of the plaintiffs were formally informed of the assimilation onto the Schedule 13 pay scales, or the use of the Schedule 13 pay scales to identify a corresponding point on the Schedule 14 M400 payscale.

[99] It is also noteworthy that the claim made by Ms Hargan that the GPMAs were advised at the relevant time of this process is wholly unsupported by any documentary evidence.

[100] Following the grievance appeal process, the second, third and fourth plaintiffs were made an offer either to maintain the status quo or to be moved onto the Schedule 13 payscales. This was rejected by them and these proceedings were commenced.

The evidence in relation to other GPMAs

[101] Several other individuals, who are not plaintiffs in these proceedings, have been engaged as GPMAs by the defendant or one of its predecessors over the years.

[102] Drs Meenan, McClure and King were employed as GPMAs prior to 15 January 2004. They were informed in November 2005 by Ms Smyth that they would be placed on the new consultant salary scale. Their seniority was calculated on the basis of years of qualification less eight years and they were placed at the appropriate scale from Schedule 13.

[103] Dr Bradley was appointed as a GPMA on 14 February 2005. At the outset he was paid in accordance with Schedule 14 but was assimilated to payscale M421 of Schedule 13, on the basis of a seniority of 22 years, in September 2005 by Mr O'Kane and Ms Smyth.

[104] Drs Orr and Digney were appointed in 2010 following the creation of the HSCB after the RPA process. Their salaries were calculated first by reference to their seniority and placed on Schedule 13, then translated onto Schedule 14. Dr Orr made a case in correspondence that, in his case, a higher salary had been agreed with Dr O'Brien.

[105] Dr Harper retired as the Director of Integrated Care on 30 September 2020. At the time of his retirement, his salary was £111,230. Following retirement, he then applied for a GPMA post and was appointed with effect from 2 August 2021. He was not subjected to any assimilation process but a decision was made to place him on the same salary level as he had been at the time of retirement, equivalent to the top of the M400 scale. The reasons for this approach were wholly opaque.

Findings of fact

[106] This is a case which is primarily concerned with the construction of the contracts of employment entered into by the plaintiffs and their employer. Much court time was occupied by evidence of subjective opinions on the meaning of contractual terms and the intentions of the parties, much of which was irrelevant to the ultimate analysis. However, there were certain factual issues which the court was required to determine.

[107] Having considered the evidence of all the witnesses, and the contemporaneous documents, I find the following facts on the balance of probabilities:

(i) In the case of the first and fifth plaintiffs, they were never told by any representative of their employer that their salary calculation had changed from being based on Schedule 14 to Schedule 13;

(ii) None of the documents relevant to the salary calculation process were disclosed to these plaintiffs and details of this only became known to them in 2018 following the data breach;

(iii) There was never any written policy setting out how the assimilation process was to be conducted for GPMAs;

(iv) There was an agreement, recognised and adopted by all parties, that the seniority of GPMAs would be calculated on the basis of years since qualification less a period of eight years;

(v) The second cohort, consisting of the second, third and fourth plaintiffs, were treated in a materially different fashion to the first and fifth plaintiffs;

(vi) This entailed a decision being made by Mr O'Kane and Mr McPoland to the effect that the Schedule 13 pay scales ought no longer to be used and introducing an approach whereby salary would be identified by reference to seniority on the Schedule 13 scale and then translated into Schedule 14 salary;

(vii) A discussion took place between Dr McLaughlin and Dr O'Brien on 27 January 2016 in relation to her prospective pay in which Dr O'Brien indicated the likely

level of pay, based on her seniority. I am satisfied that this did not amount to an unequivocal representation but was only an indication given by Dr O'Brien;

(viii) An outline explanation was given to Dr McLaughlin by Mr O'Kane on 21 April 2016 in relation to the use of Schedule 13 to calculate salary and the translation onto Schedule 14. Thereafter Dr McLaughlin disputed her level of salary and, at all times, made it clear that she considered this to be incorrect and she was working "under protest";

(ix) The contracts furnished to the second cohort were confused and confusing and none of them understood the mechanism by which their salary was calculated until the conclusion of the grievance appeal process.

The issue of interpretation

[108] The central issue in this litigation is whether the plaintiffs were contractually entitled to be remunerated in accordance with the M400 scale contained in Schedule 14 or by reference to Schedule 13.

[109] The two cohorts of plaintiffs were treated differently. Drs MacLurg and Rogers were placed on the Schedule 13 pay scales following an assimilation process whilst Drs Clarke, Livingston and McLaughlin were placed on the Schedule 14 payscale having been "translated" from Schedule 13.

[110] The plaintiffs' case is relatively straightforward. They say that each of them was employed after 15 January 2004 and therefore they ought to have been engaged on the Schedule 14 payscale without reference to Schedule 13. They agree that there was an assimilation process based on their length of experience less a figure of eight years. The plaintiffs say that the result of this process ought to have been used to fix their position on the M400 payscale and that Schedule 13 simply had no role to play.

[111] Dr McLaughlin also makes a discrete case that she entered into her contract on the basis of the express representation made by Dr O'Brien.

[112] In each case it is contended that the defendant has been in breach of contract by reason of its failure to pay salary on the basis of the plaintiffs' contractual entitlement.

[113] The defendant says that GPMAs were never employed under the consultant contract itself but rather a bespoke arrangement was devised whereby their remuneration was determined by reference to Schedule 13 seniority principles, modified through an assimilation process recognising GP experience, and consistently applied thereafter. It also denies that Dr O'Brien made any representation which was capable of having contractual effect.

The principles of contractual interpretation

[114] In a trilogy of cases decided in a six year period, the Supreme Court considered the principles to be applied by the courts in the construction of contracts. From these cases, *Rainy Sky v Kookmin Bank* [2011] UKSC 50, *Arnold v Britton* [2015] UKSC 36 and *Wood v Capita Insurance Services* [2017] UKSC 24, can be derived the following:

(i) The court's task is to ascertain the objective meaning of the language used by the parties;

(ii) In doing so, the court should ascertain what a reasonable person, possessed of all the relevant background knowledge available at the time, would have understood the contract to have meant;

(iii) The court should consider the contract as a whole;

(iv) Where the language used by the parties is unambiguous, the court should give effect to it;

(v) If there are two possible constructions, the court is entitled to prefer the construction which accords with business common sense;

(vi) Evidence of the subjective intentions of the parties is not relevant in determining what the contractual language means;

(vii) Construction is a unitary exercise in which each interpretation is considered in light of the wording, checked against the provisions of the contract and the commercial consequences analysed.

Contracts of employment

[115] Contracts of employment are subject to the application of these basic strictures of contractual interpretation.

[116] However, it must be recognised that contracts of employment have particular characteristics and constitute one of the species of relational contracts which import duties of good faith. In *Johnson v Unisys Ltd* [2003] 1 AC 518 Lord Steyn stated:

> "It is no longer right to equate a contract of employment with commercial contracts. One possible way of describing a contract of employment in modern terms is as a relational contract." (para [20])

[117] In *Keen v Commerzbank AG* [2007] ICR 623, Mummery LJ stated:

> "Employment is a personal relationship. Its dynamics differ significantly from those of business deals and of state

> treatment of its citizens. In general there is an implied mutual duty of trust and confidence between employer and employee. Thus, it is the duty on the part of an employer to preserve the trust and confidence which an employee should have in him. This affects, or should affect, the way in which an employer normally treats his employee." (para [43])

[118] Employees are entitled, pursuant to Article 33 of the Employment Rights (Northern Ireland) Order 1996, to a written statement of particulars of employment. This must contain a number of the terms and conditions of employment, including either the scale of remuneration or the method of calculating remuneration.

[119] However, such a document may not contain all the terms and conditions applicable to the employment relationship. Such contractual terms may derive from a number of different sources, including:

(i) Written documents;

(ii) Verbal agreements;

(iii) Collective agreements;

(iv) Implication on the basis of necessity or business efficacy;

(v) Statutory requirements; and

(vi) Custom and practice.

[120] In relation to the latter, the editors of Chitty on Contract (36th Edition, at 17.038) state:

> "If there is an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference a promise for the benefit of the other party in conformity with such usage or custom; provided there is no inconsistency between the usage and the terms of the contract. To be binding, however, the usage must be notorious, certain and reasonable; and it must also be something more than a mere trade practice. But when such usage is proved, it will form the basis of the contract between the parties …"

[121] In this context the word "notorious" refers to a custom or practice being so well known that the contracting parties are presumed to have entered into their agreement by reference to it. The editors of Chitty say:

> "To establish such a usage it must be proved that a course of dealing has acquired such a notoriety, has been so well established and has become so universal in the particular trade, that it must be taken to be incorporated into any contract that is entered into by the parties dealing in this particular business." (at 17.039)

Construction of the contracts

[122] Applying these principles, and in light of the relevant background knowledge, the reasonable person would have understood each of the contracts to mean that the GPMAs were employed on a bespoke contract which incorporated, in part, the CTCS.

[123] It is evident that the GPMAs were not employed as consultants but were entitled to certain of the terms and conditions which pertained to consultants. These included the provisions in relation to salary which was, in accordance with clause 19, calculated in accordance with the provisions in Schedules 13 and 14 of the CTCS.

[124] Schedule 13 applies to those "whose first appointment as an HSC consultant is before 15 January 2004." Schedule 14 applies to those appointed as an HSC consultant after that date. None of these plaintiffs were ever employed "as an HSC consultant" whether before or after 15 January 2004. However, in each case, they were employed as a GPMA after the date in question.

[125] Schedule 13 contains a definition of seniority which is based on "the sum of the number of whole years completed as an HSC consultant". Applying this definition, none of the experience of those employed as GPMAs could have any significance.

[126] Applied literally therefore, the contractual terms make little sense. The GPMA contract seeks to incorporate the provisions of Schedules which, on their face, have no application. The role of the court is to objectively ascertain what the parties meant when they used the words "calculated in accordance with the provisions in Schedule 13 and 14."

[127] The parties agree that a practice was adopted whereby the definition of seniority applied to GPMAs was based on the number of years post qualification less a period of eight years which represented the average time to qualify as a consultant. This was recognised and understood by each of the plaintiffs. This definition therefore modified the definition of seniority contained in the Schedules.

[128] The distinguishing feature between Schedule 13 and 14 is that date of appointment, namely 15 January 2004. The defendant invites the court to ignore that

distinction for the purposes of GPMAs. The problem with this analysis is that there was no agreement between the parties that the distinction be dispensed with in the way the seniority definition was modified. The only way in which the court could depart from the express words of the contract would be if an alternative term could be implied on the basis of custom and practice.

[129] The defendant also contends, in the case of the second, third and fourth plaintiffs, that a custom was adopted whereby their seniority was used to establish salary on the basis of Schedule 13 before this was translated onto the M400 Schedule 14 scale.

[130] However, there are three principal difficulties with the defendant's argument:

(i) The bespoke GPMA contracts contain an entire agreement clause;

(ii) In order to have contractual effect, any such a custom and practice must be "notorious"; and

(iii) It requires to be applied "invariably."

[131] In *Exxonmobil v Texaco* [2003] EWHC 1964 (Comm) the court held that an entire agreement clause was effective to exclude implied terms based on claimed custom and usage. The entire agreement clause in these contracts is backwards looking and limited to practices and understandings between the parties. In the case of the first and fifth plaintiffs, the alleged custom did not come into being until some months after their employment commenced but before their written contracts were issued. In relation to the other plaintiffs, the claimed custom seems to have commenced with Drs Orr and Digney in 2010, but this was not a practice or understanding between the defendant and the GPMAs who commenced employment in 2014.

[132] In any event, the defendant's reliance on the alleged custom or practice manifestly fails the notoriety test. The evidence of each plaintiff, which I entirely accept, is that they did not know about the basis of salary calculation. The first and fifth plaintiffs, employed well after 15 January 2004, were not told that their salaries were being calculated exclusively by reference to Schedule 13. In the case of the other plaintiffs, it was not well-known or established at the time of entering into these contracts or thereafter that Schedule 13 and 14 would be engaged by the defendant in this particular manner, not least because no-one told them.

[133] Furthermore, it is quite evident from the case of Dr Harper that the defendant's claimed custom and practice was not the invariable approach taken in GPMA contracts.

[134] For these reasons, there is no basis whatsoever to depart from the express words of the contract in relation to the application of Schedule 13 and Schedule 14. The operative date must remain 15 January 2004 when one considers which of the

Schedules applies to the employment of a GPMA. If he or she is engaged after 15 January 2004, then Schedule 14 must apply. If prior to that date it must be Schedule 13. That conclusion simply gives effect to the explicit wording of the contracts.

[135] As a result, the defendant's case on this issue must fail. The parties' respective rights and obligations are defined by the express words of the contracts, objectively construed, save for the agreed replacement definition of seniority for the GPMAs.

[136] The outworking of this analysis is that each of the plaintiffs, through their tenure as a GPMA, has been entitled to be paid in accordance with the provisions of Schedule 14 (M400) without reference to Schedule 13. The relevant experience is not "as a consultant" but as a qualified doctor, but the distinction between these is properly recognised in the subtraction of eight years to give the requisite period of seniority. Once this was established, each of these plaintiffs was entitled, as a matter of law, to be placed on the relevant point in the M400 payscale.

[137] I do not accept that any representation made by Dr O'Brien in relation to the salary payable to Dr McLaughlin was sufficiently certain and unambiguous to have contractual force. I find that she did give an indication that salary would be paid at a certain level, which was erroneous, but this was sufficiently caveated that this did not represent an actionable misrepresentation nor could it be incorporated as a contractual term.

Waiver and acquiescence

[138] The defendant's pleaded case in relation to waiver and/or acquiescence was not pursued with any enthusiasm in either its skeleton argument or closing submissions.

[139] Essentially, the defendant claims that the plaintiffs signed their contracts on the basis of a particular salary figure and are therefore bound by this or have acquiesced in it or, alternatively, have waived any right to claim breach of contract on the part of their employer.

[140] Fundamentally, it suffers from the same infirmity as the claim in respect of custom and practice. The plaintiffs cannot be said to have waived any right to claim in respect of a breach of contract of which they were wholly unaware. They were not provided with the relevant information as to the method by which their salary was calculated. In the case of Dr McLaughlin, she declined to sign her contract "under protest". The other plaintiffs entered into their contracts in good faith in the belief that the salary payable to them represented their contractual entitlement. Once it was discovered that this was not the case, grievance procedures were pursued and these proceedings instigated.

[141] There is nothing in the conduct of any of these plaintiffs which could remotely be said to be evidence of a waiver of any right to seek a remedy in respect of breach of contract.

[142] Equally, it cannot be said that any plaintiff acquiesced in circumstances where the employer failed to provide the necessary information which would have enabled the GPMAs to know the basis upon which their salaries were calculated.

Limitation

[143] The defendant contends that the actions brought by the first and fifth plaintiffs are time barred by operation of Article 4 of the 1989 Order which provides that an action founded on simple contract may not be brought after the expiration of six years from the date the cause of action accrued. The defendant accepts that these are "continuing breach" cases in that the plaintiffs claim that their salary has been underpaid for a period of years. However, it says that the plaintiffs cannot recover in respect of any underpayment prior to December 2013 since these proceedings were not commenced until 11 December 2019.

[144] The first and fifth plaintiffs rely on Article 71 of the 1989 Order which provides:

> "(1) Subject to paragraphs (3) and (5), where in any action for which a time limit is fixed by this Order, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the time limit does not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

[145] These plaintiffs say that the key factual issue in relation to the calculation of their salaries, namely the application of Schedule 13, was not revealed to them until the outcome of the grievance procedures and they are entitled to rely on Article 71(1)(b) to postpone the running of time.

[146] In *Potter v Canada Square Operations* [2023] UKSC 41 Lord Reed said in relation to the analogue provision of section 32(1)(b) of the Limitation Act 1980:

> "What is required is (1) a fact relevant to the claimant's right of action, (2) the concealment of that fact from her by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and (3) an intention on the part of the defendant to conceal the fact or facts in question." (para [109])

[147] I find on the evidence in this case that the basis of the calculation of the salary of the first and fifth plaintiffs was concealed from them by the withholding of the information relating to the application of Schedule 13, and that there was an intention on the part of the defendant to conceal this fact.

[148] The outworkings of the assimilation process were never made known to the plaintiffs nor were any of the relevant documents disclosed to them. The uncontroverted evidence of the first plaintiff is that she did not see such documents, nor was she aware of the basis for the calculation of her salary, until 2018. Equally, the clear evidence of the fifth plaintiff was that she understood her salary to be calculated on the basis of Schedule 14 and she was never advised otherwise by the defendant or its predecessors.

[149] The defendant attempted to argue that the plaintiffs may have found out these facts from their discussions with Dr Adair. That is evidently not the case. The defendant's HR professionals made a decision, when altering the basis upon which the plaintiffs' salaries were calculated, not to share the relevant information with their employees. This lack of transparency represented a breach of the duty of good faith which is a foundation stone of the relationship between employer and employee.

[150] In these circumstances, the plaintiffs are entitled to rely on Article 71(1)(b) of the 1989 Order and therefore I find that time did not run in these cases until 2018.

[151] The defendant's limitation defence must therefore fail.

Conclusion

[152] For the reasons set out, each of the plaintiffs' claims succeeds. The proper construction of their contracts of employment provides that payment of salary ought at all times to have been made in accordance with Schedule 14. I invite the parties to agree the wording of an appropriate declaration to reflect these findings.

[153] Insofar as the defendant has failed to pay salary on this basis it is liable to compensate each of the plaintiffs in respect of its breach of contract. The parties have indicated that they will seek to agree the respective figures for the damages claims in each case. In the event that agreement cannot be reached, the matter can be referred back to the court for determination. I will also hear the parties on the issue of costs.