TC02403

Appeal number: TC/2009/13863

SSP – agency workers on successive short employment contracts — whether, for purposes of SSP, s 86(4) Employment Rights Act 1996 deems indefinite contracts of employment where sufficient continuity of employment–* Brown *[1997] ICR 266 applied – appeal dismissed

SSP – 'COT 3 agreement' compromising claim to SSP- whether provision void under s 151(2) Social Security (Contributions and Benefits) Act 1992- yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NHS PROFESSIONALS **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

- and -

JON TRACEY HARDY

DIANNE CHRISTAL WINTERBURN

GILLIAN MARY JENKIN

PAUL RICHARD BAKER **Additional Parties**

TRIBUNAL: JUDGE DAVID LATHAM
JUDGE BARBARA MOSEDALE (CHAIR)

Sitting in public at the Royal Courts of Justice, Strand, London on 2-4 July 2012

Mr K Gordon, Counsel, instructed by DAC Beachcroft LLP, for the Appellant

Mr A Tolley, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

The four additional parties did not appear and were not represented.

DECISION

1. The appellant, NHS Professionals ("NHSP"), appealed against a review decision of HMRC dated 19 August 2009 which upheld four separate decisions notices given by HMRC under section 8(1)(f) Social Security Contributions (Transfer of Functions etc) Act 1999. These four decisions were one dated 15 August 2007 in respect of Mr Hardy; one dated 24 July 2008 in respect of Mr Baker; one dated 2 October 2008 in respect of Mrs Winterburn; and one dated 16 December 2008 in respect of Mrs Jenkin.

2. These four decision notices and the review decision determined that the appellant was liable to pay statutory sick pay ("SSP") to those four persons, who were joined as additional parties to this appeal, as follows:

Mr Hardy	£1,542.89
Mr Baker	£235.79
Mrs Winterburn	£193.00
Mrs Jenkin	£140.00

The issues

3. The four additional parties were agency workers of the appellant and the main issue was whether NHSP was liable to pay them SSP. The amount in dispute, recorded above, in respect of each of the four agency workers, was relatively modest but as the NHSP has on its books some 47,000 agency workers, the relatively modest amounts at stake in these four claims for SSP belie the importance of the case.

4. There was a second issue which affected only Mr Baker's claim to SSP, and that was whether the "COT3 agreement" entered into between him and NHSP precluded his dispute being considered by the Tribunal and/or determined the dispute against him. This was properly a preliminary issue but as it affected only one of the four additional parties, and as the parties at the hearing dealt with it as a subsidiary matter, we do the same. Our consideration of the COT 3 matter therefore follows our consideration of the main issue.

Jurisdiction of this tribunal

5. There was no dispute between the parties on the question of jurisdiction which it was agreed lay with this tribunal. The Social Security Contributions (Transfer of Functions, etc) Act 1999 gives authority to officers of HMRC to make decisions relating to entitlement to SSP. Section 8 of this Act provides:

> 8 **Decisions by officers of Board**.
>
> (1)Subject to the provisions of this Part, it shall be for an officer of the Board—

(a)….,

(b)….

(c)….,

(d)….,

(e)… ,

(f)subject to and in accordance with regulations made for the purposes of this paragraph by the Secretary of State with the concurrence of the Board, to decide any issue arising as to, or in connection with, entitlement to statutory sick pay, statutory maternity pay, statutory paternity pay or statutory adoption pay,

(g)…..

The four decisions at issue in this appeal were, as stated above, made under this provision.

6. The Statutory Sick Pay and Statutory Maternity Pay (Decisions) Regulations 1999 no 776 further provides:

"2. (1) An application for the determination of any issue arising as to, or in connection with, entitlement to statutory sick pay or statutory maternity pay may be submitted to an officer of the Board by –

(a) the Secretary of State; or

(b) the employee concerned.

(2) Such an issue shall be decided by an officer of the Board only on the basis of such an application or on his own initiative."

We refer to this provision again in paragraphs 207-213.

7. The Social Security Contributions (Transfer of Functions, etc.) Act 1999 then gives this Tribunal jurisdiction to hear appeals against such decisions:

11 **Appeals against decisions of Board.**

(1)This section applies to any decision of an officer of the Board under section 8 of this Act or under regulations made by virtue of section 10(1)(b) or (c) of this Act (whether as originally made or as varied under regulations made by virtue of section 10(1)(a) of this Act).

(2)In the case of a decision to which this section applies—

(a)if it relates to a person's entitlement to statutory sick pay, statutory maternity pay, statutory paternity pay or statutory adoption pay , the employee and employer concerned shall each have a right to appeal to the tribunal, and

(b)in any other case, the person in respect of whom the decision is made and such other person as may be prescribed shall have a right to appeal to the tribunal.

> (3)In subsection (2)(b) above "prescribed" means prescribed by the Board by regulations.
>
> (4)This section has effect subject to section 121D of the Social Security Administration Act 1992 (appeals in relation to personal liability notices).

8. Section 11 applies in this case as the decisions under appeal were made, as we have said, under s 8 of the same Act. Section 19 of the Act contains the definitions. It provides that "tribunal" refers the First-tier Tribunal, or where appropriate, the Upper Tribunal. This gives jurisdiction to this tribunal, the First-tier Tribunal (Tax Chamber) and not the Employment Tribunal which is not a chamber of the First-tier Tribunal.

9. The Employment Tribunal does not have concurrent jurisdiction: see the decision of Lady Smith in the Employment Appeal Tribunal decision of *Sarti (Sauchiehall St) Ltd v Polito* [2008] UKEAT 0049-07-1706 at paragraphs 24-25. In that case the employer refused to pay the employee SSP on the grounds that it did not consider the employee was entitled to it. Lady Smith held that the employee was unable to maintain his claim in the Employment Tribunal for unlawful deduction of wages as HMRC had exclusive power to determine liability to SSP and any appeal from a decision of HMRC had to be to the General Commissioners (now the Tax Chamber of the First Tier Tribunal).

10. This case was therefore heard in the Tax Chamber of the First-tier Tribunal in front of one permanent Judge of that Chamber and the President of the Employment Tribunal who was temporarily assigned to the Tax Chamber and who sat as a Judge of the Tax Chamber for the hearing of this appeal.

11. One point which was not raised at the hearing before us (presumably as the point was conceded), and which did arise in the *Sarti* case, was whether jurisdiction to resolve the issue of the effect of the COT 3 rested with this Tribunal or the Employment Tribunal. This Tribunal has exclusive jurisdiction to hear appeals against a person's entitlement to SSP as determined by HMRC. As quoted above in paragraph 5, HMRC has jurisdiction to determine "any issue arising as to, or in connection with, entitlement to" SSP. HMRC's jurisdiction (and therefore this tribunal's jurisdiction) is much wider than merely deciding entitlement to SSP as a matter of statutory law: it must include entitlement to SSP in general, including resolving issues such as whether a worker has effectively given up his right to SSP in a compromise agreement. Our conclusion is that we have sole jurisdiction on an appeal from a decision of HMRC on this issue too.

Background

12. The appellant was a Special Health Authority established by the NHS Professionals Special Health Authority (Establishment and Constitution) Order 2003, statutory instrument no 2003/3059 with effect from 1 January 2004. We shall refer to it as "NHSP" in this decision notice. It was abolished with effect from 1 April 2010

by the NHS Professionals Special Health Authority (Abolition) Order 2010 No 425 and all liabilities of the NHSP transferred to the Secretary of State for Health. Nothing turns on this in this appeal: and in any event the events at issue in this appeal occurred while NHSP was an independent health authority.

13. There was very little dispute over the facts in this case. The appellant and first respondent agreed a statement of facts and issues on which we rely. The four additional parties did not attend and were not represented at the hearing. They gave no evidence for the Tribunal to consider. Evidence was given by Ms Felicity Borrelli, Human Resources Manager with NHSP on behalf of the appellant. Her evidence was not challenged although counsel to HMRC and the panel asked her to expand on some of it. We accept her evidence and summarise our findings below.

Liability to SSP - the facts

Outline

14. The purpose of the NHSP was to provide temporary workers to other organisations within the National Health Service ("NHS"). NHS bodies might require temporary workers to cover absence on holiday or sickness of permanent members of their staff or for other reasons. The NHSP entered into contracts with various NHS bodies which set out the terms on which they would provide the NHS bodies with temporary workers.

15. NHSP would also enter into contracts with temporary workers. We will refer to these workers in this decision notice as agency workers, although this is for shorthand and we do not prejudge the question of when and if the workers were employees of NHSP or if they were "agency workers" within Regulation 19 (see paragraph 158 below). An NHSP contract with an agency worker was referred to as "flexible worker Contract of Engagement" or "NHS Professionals Interim Contract of Engagement" depending on the date on when it was signed. We will refer to such a contract in this decision notice as the "Terms of Engagement".

Terms of Engagement

16. The Terms of Engagement provided the terms on which the agency workers would work for the NHSP if and when they accepted an individual assignment at an NHS body which required temporary staff cover. The terms of the four Terms of Engagement entered into by the four additional parties in this appeal were not identical as NHSP's standard form contract evolved over time but nothing in this appeal turns on any of these minor differences.

17. It was accepted by HMRC by the time of the hearing that the Terms of Engagement for each of the four additional parties did not amount to contracts of employment. We agree that the Terms of Engagement did not amount to a contract of employment as there was no mutuality of obligation. Under the Terms of Engagement NHSP did not have any obligation to offer work to the agency worker

nor did the agency worker have any obligation to accept any work actually offered. For instance, Mr Hardy's contract, signed in December 2005, provided at clause 1:

> "NHS Professionals may invite you on occasion to undertake an assignment or series of assignments. NHS Professionals acknowledges that you wish to retain the choice of whether or not to accept any assignment offered to you, and you acknowledge that NHS Professionals is not obliged to offer any assignment of work to you. NHS Professionals will be your employer during and only for the period of any assignment to a Trust offered to you by NHS Professionals and accepted by you. It is agreed between NHS Professionals and you that each assignment is a self contained offer of work, and once the assignment is over you are not obliged to undertake any further assignments and nor is NHS Professionals obliged to offer you any, so that on completion of any assignment you will no longer be an employee of NHS Professionals."

18. Either party could by written notice bring the Terms of Engagement to an end at any time other than when an assignment was being carried out. The Terms of Engagement would expire without notice if the agency worker failed to undertake even one assignment during a set period. Ms Borrelli's evidence was that this was a period of six months but we find Mr Hardy's contract refers to a period of 12 months. The explanation of the discrepancy is likely to be that the details of the contracts changed over the years and nothing turns on this discrepancy in this appeal: it was not suggested that the Terms of Engagement of any of the four additional respondents had expired at the time they went off sick.

Assignments

19. Workers could accept an assignment and then later (but before the assignment commenced) notify the NHSP that they no longer intended to work it. Mrs Borrelli's evidence was that the NHSP discouraged agency workers from doing this with less than 24 hours notice before the start of the assignment. She said that if an agency worker were to do this repeatedly, the NHSP might terminate their Terms of Engagement with the NHSP.

20. Similarly, the NHSP could also cancel any individual assignment and would do so if, say, its client notified it that the temporary cover was no longer required.

21. As Mrs Borelli explained, flexible working arrangements suited all parties. NHSP's clients, the NHS hospitals, had varying needs due to holiday and sick leave of permanent staff. The agency workers were often student nurses, nurses on visas with working restrictions, or persons with children. The ability to be flexible on the numbers of shifts worked between term and non-term time was likely to be valuable to many of the agency workers.

22. Some of NHSP's agency workers had permanent employment with other employers, usually direct with a NHS body. They would choose to work assignments for the NHSP as an additional source of income. Such agency workers, if sick, would receive sick pay from their normal employer and not claim from the NHSP. For some

NHSP agency workers, including the four additional parties to this appeal, assignments for the NHSP were their only source of income. If sick, their entitlement to sick pay depended entirely on whether the NHSP was liable to pay it.

23. It was accepted by both parties, and we agree, that during the course of an assignment (normally an eight hour shift), the agency worker was an employee of NHSP. (And we note that the subsequently released decision of the Employment Appeal Tribunal in *Drake v Ipsos Mori UK Ltd* [2012] UKEAT 0604-11-2507 strongly supports this position). An agency worker who had no permanent employment with an NHS hospital was not an employee of the NHS hospital in which he carried out the assignment. There was a question whether, if an agency worker accepted a series of assignments at one time, whether that worker became an employee of NHSP for the duration of the *series* of assignments. It was not suggested that anything turned on this possibility in this appeal and we do not consider it: we address the appeal on the basis that as a matter of contract law each shift worked was a separate assignment and a separate contract of employment.

24. It was agreed that, apart from the provision in the Terms of Engagement that employment ceased at the cessation of each assignment, no notice to terminate a contract of employment was given by NHSP to any of the four additional parties. It is, of course, the appellant's case that such notice was unnecessary as only each individual assignment was a contract of employment, and each such contract of employment came to an end at the end of each assignment. It was its case that each contract of employment expired by effluxion of time.

The work pattern of each of the four additional parties

25. Mrs Jenkin undertook assignments for NHSP from 28 November 2006. She was block booked a month at a time for every Tuesday and Wednesday (with a few exceptions). Apart from the weeks commencing 24 December 2006, 27 May , 1 & 8 July, 23 December 2007, 2 & 23 March, 10 & 17 August 2008, she worked every Tuesday and Wednesday (with a very few exceptions) up to week commencing 31 August 2008. She was ill from 1 – 22 September 2008 and thereafter returned to work for NHSP.

26. At the time she went off sick, she had a few advance bookings for assignments and was paid SSP in respect of these. After that, she was not paid SSP for the remaining time she was unable to work as sick.

27. In total, she worked at least one day every week for NHSP for the four weeks to the week commencing 24 December 2006; for the 21 weeks to week commencing 27 May 2007; for the four weeks to week commencing 1 July; for the 23 weeks to week commencing 23 December 2007; for the 9 weeks to week commencing 2 March; and for the 19 weeks to week commencing 10 August 2008. In other words, out of the entire period of 102 weeks up to when she was sick, she worked at least one day in 93 of them.

28. Mr Hardy undertook assignments for NHSP from 28 February 2006 through to 31 December 2006. There was no pattern obvious to us in his assignments, neither in number of days worked nor in the days of the week worked. Apart from the six weeks (commencing 7, 14 and 21 May; 4 June, and 20 & 27 August 2006) in which he did not work, Mr Hardy worked between one and four shifts every week.

29. He was sick from 2 January to 5 June 2007. At the time of becoming sick he had no booked assignments and he was not paid SSP. And at that time he had worked at least one assignment every week for the preceding 18 weeks.

30. Mr Baker: Mr Baker undertook assignments for NHSP from 17 November 2006. There was no pattern obvious to us in his assignments, neither in number of days worked nor in the days of the week worked, although most weeks he worked three or four shifts. Apart from the five weeks (commencing 19 November 2006, 23 September 2007 and 13, 20, & 27 Jan 2008) in which he did not work, Mr Baker worked between one and four shifts every week.

31. He was sick from 1 to 28 February 2008 and afterwards continued to accept assignments from NHSP. At the time of becoming sick he had no booked assignments and he was not paid SSP.

32. Put it another way, from 26 November 2006 Mr Baker worked for at least one day each week for 43 weeks without break for NHSP to week commencing 23 September 2007 (his first break), and then for 15 weeks without break until week commencing 13 January 2008 (his three week break). That three week break was immediately followed by four weeks of sickness, which was followed by a return to work.

33. Mrs Winterburn: undertook assignments for NHSP from 27 January 2007. There was no pattern obvious to us in her assignments, neither in number of days worked nor in the days of the week worked. She worked anything from one to six shifts a week for NHSP apart from no work in the weeks commencing 28 January, 4 & 11 March 2007, 27 May, 23 & 30 September, 7 October, and 11 November 2007.

34. She was sick from 27 May to 16 June 2008. Afterwards she continued to accept assignments from NHSP. At the time of becoming sick she had no booked assignments and she was not paid SSP.

35. Out of the 71 weeks in the period, Mrs Winterburn worked 63 weeks. She worked at least one day per week in the 16 weeks continuously to 22 June 2007, and after a few breaks, at least one day per week in a further 29 weeks continuously up to the day she was first sick.

Day to day control of the agency workers

36. All parties were agreed that the agency workers were not employees of, nor did they contract with, the NHS hospital in which they worked their assignments.

37. Under its contracts with the NHS bodies, the NHSP required its clients to ensure appropriate induction and supervision of the agency workers and to be responsible for their health and safety. Inevitably, only the NHS hospital in which the agency worker was placed could give the worker detailed instructions on what he was required to do. We find on the evidence that the NHS bodies with which the agency workers were placed had day to day control of their work.

Disciplinary process

38. If a client NHS body complained about a worker, that NHS body and NHSP would conduct a joint investigation. If the result of that enquiry was that the NHS body was dissatisfied with the worker, it could refuse to take that worker again on a temporary assignment. But it was only if the NHSP itself considered that the worker should not work as a health worker that that worker would be removed from the NHSP register. If that happened and only if that happened would the agency worker never again be offered work by the NHSP. A letter would be sent terminating that agency worker's registration and Terms of Engagement: the NHSP did not consider that this letter was a termination of employment because the NHSP did not consider any individual agency worker to be an employee other than when they were actually working on assignment.

39. Indeed the NHSP had a different disciplinary procedure depending on whether the complaint was received during an assignment or after it had ended, as only in the former case did the NHSP consider the worker to be an employee and therefore entitled to the "full" disciplinary procedure.

The law – SSP and agency contracts

Entitlement to SSP

40. Entitlement to SSP is governed by the Social Security (Contributions and Benefits) Act 1992 ("SSCBA") and the Statutory Sick Pay (General) Regulations 1982 No 894 ("the SSP Regulations"). Section 151(1) of the SSCBA provides:

> "Where an employee has a day of incapacity for work in relation to his contract of service with an employer, that employer shall, if the conditions set out in sections 152 to 154 below are satisfied, be liable to make him, in accordance with the following provisions of this Part of this Act, a payment (to be known as 'statutory sick pay') in respect of that day."

41. The meaning of "employee" for the purposes of the SSCBA is given in section 163(1) which says:

> " 'employee' means a person who is –
>
> (a) gainfully employed in Great Britain either under a contract of service or in an office ….

> but subject to regulations, which may provide for cases where any such person is not to be treated as an employee for the purposes of this Part of this Act and for cases where any person who would not otherwise be an employee for those purposes is to be treated as an employee for those purposes;…"

42. Both parties were agreed that to be entitled to SSP under s 151, the agency workers had to be employees of NHSP at the time of the incapacity for work. We agree. If "employee" was read as referring to a person who had been an employee or even was to become an employee, thus giving them an entitlement to SSP at a time before their employment commenced or after it ceased, it would go beyond what was intended by Parliament.

SSP during assignments

43. As we have already said, both parties were agreed that the agency workers were employees of the NHSP during an assignment. Therefore, it had always been accepted by NHSP that its agency workers were entitled to SSP (subject to the normal rules such as the one relating to the three days waiting period) for days on which they had pre-booked assignments which they were unable to work due to sickness. This was because the NHSP accepted that the workers were employees during their assignments. Therefore, Mrs Jenkin, who had pre-booked assignments for part of the period that she was off work sick, was paid SSP in respect of her pre-booked assignments which she was unable to work.

44. We were not asked to rule on this as it was no part of HMRC's decision in the four cases (although we note in passing the provisions of Schedule 11 (2)(f)). The claim with which this tribunal is concerned is for the periods Mrs Jenkin and the other additional parties were sick and did not have pre-booked assignments.

SSP between assignments

45. NHSP's position is that it had no liability to pay SSP to agency workers in between assignments as the agency workers were not their employees at that time. HMRC accept that as a matter of common law the agency workers were not employees of the NHSP in between assignments because the overarching contract, the Terms of Engagement, was not a contract of employment. HMRC's case is that, despite the position under common law that the agency workers were not employees between assignments, they were deemed to be employees in between assignments because of the Employment Rights Act 1996 ("ERA") and in particular sub-section 86 (4).

Does the Employment Rights Act alter the common law position?

46. That Act provided for a statutory fiction, as follows:

> "**86 rights of employer and employee to minimum notice**

> (1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more -
>
> (a) is not less than one week's notice if his period of continuous employment is less then two years,
>
> (b) is not less then one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
>
> (c) is not less then twelve weeks' notice if his period of continuous employment is twelve years or more.
>
> (2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less then one week.
>
> (3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.
>
> (4) Any contract of employment of a person who has been continuously employed for three months or more which is a contract for a term certain of one month or less shall have effect as if it were for an indefinite period; and accordingly, subsections (1) and (2) apply to the contract.
>
> (5) ….
>
> (6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.

In summary, s 86 changed the terms of a contract of employment by deeming it to provide for minimum periods of notice to terminate, depending on how long the employee had worked for the employer. Sub-section (4) of s 86 converted certain short fixed term contracts into indefinite contracts requiring notice to terminate.

47. The appellant's position is that as a matter of common law a contract of employment could come to an end in a number of different ways. For instance, notice to end the contract might be given; the employee might die; or the contract (being a fixed term contract) might expire due to effluxion of time. In this appeal, each assignment was a fixed term contract of employment which expired at the end of each assignment. It is the appellant's case that no notice was required to bring the contract of employment to an end.

48. This is of course clearly correct as a matter of common law. HMRC's position is that the common law has been superseded by statute, and in particular s 86(4) ERA, so that once sufficient continuity of employment accrued, the agency workers' fixed term contracts ceased to be contracts for a fixed term and became indefinite contracts determinable by notice.

49. It was not HMRC's case that other common law methods of termination of the contract (such as frustration by death) no longer applied. It was their case simply that contracts within s 86(4), which under common law would have expired by effluxion of time, were deemed for all purposes to continue in effect unless notice given (or some common law termination event other than expiry of the fixed term occurred).

50. We were referred by the appellant to *Harvey on Industrial Relations and Employment Law* which says at Chapter 9:

> "[482] Every employee is entitled to a minimum period of notice of dismissal from his employer, if, but only if, it is necessary to give notice in order lawfully to terminate the contract. (ERA 1996 s 86)."

51. The appellant's case is that this supports their position that fixed term contracts do not need notice in order to be brought to an end: they end automatically at the end of their fixed term. But we find the extract to be of no help. Firstly, a straightforward reading of s 86 is that any fixed term contract exceeding one month expires by effluxion of time unaffected by s 86(4) and therefore this extract from Harvey would be consistent with HMRC's interpretation. Alternatively, if the appellant considers that the exception for fixed term contracts at [482] which Harvey makes is referring to *every* fixed term contract, including those of one month or less, then the author would have clearly failed to consider s 86(4) ERA and [482] would have to be disregarded as wrong.

52. We find that the appellant's outline of the position at common law is correct and in any event not in dispute: but the question for this Tribunal is whether the statutory fiction of s 86(4) which deemed certain fixed term contracts to be ones of indefinite duration applied for the purposes of SSP. The appellant's position is that however much s 86(4) gave to some agency workers on fixed terms contracts a right to notice (or compensation in lieu of notice), it did not give them rights to SSP. In other words, the statutory fiction of s 86(4) applied for the limited purposes of s 86 (the right to notice) but did not apply for other purposes, such as the right to SSP under the SSCBA.

Brown v Chief Adjudication Officer

53. HMRC point to the case of *Brown v Chief Adjudication Officer* [1997] ICR 266 where the Court of Appeal held that the provision that is now s86(4) *did* give a fixed term contract worker who had accrued sufficient continuity rights to SSP for a period of sickness. In that case, the appellant was a health worker employed day to day. As a matter of common law, like the additional respondents in this case, she did not have an overarching contract of employment. She claimed SSP for a period of ill-health and her claim was refused. On appeal to the Court of Appeal, she succeeded.

54. The case in the Court of Appeal turned on s 49 Employment Protection (Consolidation) Act 1978 which was the forerunner to and (in so far as relevant to this appeal) identical to s 86 ERA. Nourse LJ gave the short but unanimous judgment of the Court and in respect of s 49(4) he said:

> "[270 B] On the face of it section 49(4) applies to the employee here. No difficulty arises in relation to the definition of continuous employment; she was continuously employed for rather more than nine months; and her contract of employment was for a term certain of one day. Accordingly, the contract had effect as if it were for an indefinite period."

55. So for the purposes of what is now s86, the appellant in that case was found to be continuously employed. But what are the purposes of s 86? Does s 86 have any relevance to claims for SSP? The Court of Appeal held that it did. Nourse LJ said as follows:

> "[270 C-F] What then is the effect of section 49(4) on the employee's entitlement to statutory sick pay? Being a deeming provision, that is to say a provision which requires you to assume to be true a state of affairs you know to be untrue, the extent of its application must be judged by ascertaining for what purposes and between what person it is to be resorted to. Part IV of the Act of 1978 is entitled "termination of Employment". As I read its provisions, they are intended to be of general application as between employer and employee, so that, by virtue of section 49(4), an employer or employee who is affected by them is entitled or subject to all the rights and obligations to which he would be entitled or subject if the contract of employment had in reality taken effect as it is deemed to take effect, provided only that that would not, in any particular application, lead to an unjust, anomalous or absurd result.
>
> Section 153(1) of the Act of 1992 having defined the period of entitlement 'as between the employee and his employer', for the provisions of Part IV of the Act of 1978 must be taken to apply for the purposes of ascertaining that period. Moreover, there is nothing inherently unjust, anomalous or absurd in applying the fiction under section 49(4) of the Act of 1978 to an employee's entitlement to statutory sick pay. I therefore conclude that section 49(4) did indeed apply to the employee's case. The result was that her contract of employment had become a contract for an indefinite period which, under section 49(1)(a), was terminable by not less then one week's notice, which notice was never given. Therefore, by virtue of section 153(2)(a) of the Act of 1992, the period of entitlement should properly be treated as being the period from 21 June to 9 December 1992, with the consequence that the employee is entitled to statutory sick pay during that period."

56. The appellant's position is that the decision in *Brown* does not apply in the four cases before this tribunal. It takes this position for a number of reasons. It says:

> (a) The Court of Appeal in *Brown* failed to consider relevant authorities and statutory provisions (in legal jargon was 'per incuriam') and for that reason is not binding on this Tribunal and should not be followed (we deal with this in paragraphs 57-115 below);
>
> (b) *Brown* is distinguishable and should be distinguished on the facts (we deal with this in paragraphs 116-133 below);

(c) In any event, notice was given in all four cases in this appeal so any deemed contract under s 86(4) had come to an end before the periods of sickness (we deal with this in paragraphs 134-139 below);

(d) In any event, the requirement for notice was waived in all four cases in this appeal so any deemed contract under s 86(4) had come to an end before the periods of sickness (we deal with this in paragraphs 140-143 below);

(e) In any event, the additional parties except Mrs Winterburn had no entitlement to SSP under Schedule 11 to SSCBA (we deal with this in paragraphs 144-191 below);

(f) In any event, on the law as properly interpreted, two out of the four employees did not have sufficient continuity of employment for s 86(4) to apply (we deal with this in paragraphs 192-202 below).

Is *Brown* binding?

57. A decision of the Court of Appeal is normally binding on this Tribunal. The appellant's position (from which Mr Tolley did not dissent) is that a decision of the Court of Appeal which was *per incuriam* would not be binding on this Tribunal.

58. A definition of *per incuriam* was given in the case of *Huddersfield Police Authority v Watson* [1947] 2 All E R 193 at 196 per Lord Goddard CJ (not cited to us). He said:

> "What is meant by giving a decision per incuriam is giving a decision when a case or statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute."

A similar definition was given by Evershed MR in *Morelle Ltd v Wakeling* [1955] 1 All E R 708 at 718 (also not cited to us):

> "As a general rule the only cases in which decisions should be held to have been given per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such case some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it can properly be held to have been decided per incuriam must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be … of the rarest occurrence."

(Stare decisis is the doctrine of precedent which requires courts to necessarily follow a previous judicial decision from a higher, or in some cases, equivalent, court.)

59. Is it correct that this tribunal is not bound to follow decisions of the Court of Appeal which are per incuriam? It is clear that the Court of Appeal is not bound by any of its own decisions which were given per incuriam: *Young v Bristol Aeroplane*

Co Ltd [1944] 2 All E R 300 (not cited to us). Does the same licence extend to this tribunal? We do not need to reach a conclusion on this as (for reasons explained below) we conclude that the Court of Appeal's decision in *Brown* was not per incuriam. Our opinion on the issue, for what it is worth, is that a decision of a higher court which was plainly made in ignorance of binding authority or statute and plainly wrong, would not be binding on this Tribunal. But we think a Tribunal would be very slow to come to a conclusion that a decision of a higher court was per incuriam.

60. We go on to consider the appellant's case that the Court of Appeal's decision in *Brown* was per incuriam and explain why we do not accept it. We look at this issue under a number of heads, some of which concerns case law or statute law that was not expressly mentioned in the Court of Appeal's decision in *Brown* and some of which concern other matters:

(a) The House of Lords decision in *Westwood;*

(b) The legislative history of s 86(4);

(c) S 151(5) SSCBA;

(d) Schedule 11 SSCBA;

(e) The later cases of *Carmichael, Clark, Fuller* and *Reed;* and

(f) Lack of full legal argument.

Is Brown *per incuriam* Westwood*?*

61. Firstly, the appellant pointed to *Westwood v Secretary of State for Employment* [1985] AC 20 at 42C-D and 43A. This was a decision of the House of Lords and binding on the Court of Appeal. It was not mentioned in Nourse LJ's judgment but it was cited in skeleton arguments. As it was cited to the Court of Appeal, we do not think it can be properly said that their decision was made in ignorance – per incuriam - of the decision in *Westwood.*

62. In any event, we do not find that the decision in *Westwood* concerned a matter that was at issue in *Brown.* In *Westwood,* an employee was dismissed with neither the 12 weeks' notice to which he was entitled under s 86 nor compensation in lieu. The case concerned the calculation of damages to which he was entitled, but the significant point for this Tribunal is that, although s 86 gives employees rights to minimum periods of notice, the House of Lords held that a failure to give such notice was a breach of contract by the employer and rendered the employer liable in damages to employee. The failure to provide the notice required by s 86 ERA did not mean that the short notice to terminate was ineffective.

63. The appellant's case is that the failure to give notice to terminate a contract of employment does not prevent that contract coming to an end by effluxion of time: s 86 does not prevent short notice or no notice being given. *Westwood* simply means there is a liability in damages for short notice. In other words, each assignment ended at the end of each assignment, but once sufficient continuity of employment by a worker was accrued, NHSP became liable in damages to that worker for failing to

provide notice of termination, but not liable to pay SSP if the worker was sick after an assignment ended.

64. We are unable to agree with this analysis. *Westwood* was not a case which involved consideration of the deeming provisions of 86(4) ERA and is therefore not an authority on the meaning of s 86(4). As we have said, s 86 changes the terms of a contract of employment by deeming it to provide for minimum periods of notice to terminate depending on how long the employee has worked for the employer and the natural reading of s 86(4) is that it converts certain fixed term contracts of employment into indefinite contracts requiring notice. All that *Westwood* says is that failure to give the required notice results in a liability to damages. It says nothing about whether the deeming effect of s 86(4) was solely in respect of liability to damages for short notice or whether it had a wider application with the result that it applied for the purposes of SSP.

65. The appellant's analysis should be rejected in any event. It would result in a nonsense: if the appellant were right, once any employee with a series of short contracts of employment had clocked up sufficient continuity to fall within s 86(4), his employer would be treated as liable in damages for short notice each time each individual assignment ended, even while the employee continued to accept new short term employment contracts. This makes a nonsense of s 86(4) and cannot have been the interpretation intended by Parliament.

66. Unlike *Westwood, Brown* did deal with s 86(4) and concluded its deeming provisions extended at least to rights to SSP. *If* the employer in *Brown* had given Mrs Brown notice to terminate then *Westwood* would have been applicable in that such notice, if short, would have entitled Mrs Brown to damages but cut short her right to SSP. But such were not the facts of the case as considered in the Court of Appeal. Mrs Brown wasn't given notice, short or otherwise. Therefore, the failure by the Court of Appeal in *Brown* to mention *Westwood* in its decision was because it was not relevant to the issue in front of the court in *Brown*: the failure to mention *Westwood* certainly does not make the *Brown* decision *per incuriam.*

Was Brown *per incuriam the legislative history of s 86(4)?*

67. Section 86(4) started life in the Contracts of Employment Act 1963. Its long title was:

> "An Act to require a minimum period of notice to terminate the employment of those who have been employed for a qualifying period, to provide for matters connected with the giving of the notice and to require employers to give written particulars of terms of employment."

The side note to Section 1 (now s 86 ERA) reads:

> "The rights of employer and employee to a minimum period of notice."

There is nothing in this, says the appellant, that suggests that certain short term contracts are deemed to be indefinite for all purposes including SSP. And apart from

Brown, say the appellant, there is no other case on this point. Yet if the clause had such far reaching consequences, surely there would be other case law on it?

68. In summary, it is the appellant's case that *Brown* is per incuriam because if Nourse LJ had considered the legislative history of the provision, he would not have reached the conclusion which he did, at page 270C, that the provision that is now s86(4) was "intended to be of general application as between employer and employee". In the appellant's view, s 1 of the 1963 Act was intended to be of limited application and in particular simply to extend the number of contracts for which a minimum notice period was required to end them by notice.

69. If the precursor of s 86(4) had been intended to be of wider application rather than just applying to the question of damages for failure to give notice, says the appellant, then the 1963 Act would have mentioned this in its long title and, rather than being tucked away in a sub-clause, s 86(4) would have been in an entirely separate section.

70. We cannot agree. That s 86(4) was a sub-clause was clearly known to Nourse LJ and did not prevent him reaching the conclusion s 86(4) was intended to be of general application. And we do not consider that *Brown* is per incuriam just because the Court of Appeal did not discuss the legislative history of s 86(4).

71. As is apparent from the quotation of the judgment of Evershed MR in *Morrelle* at paragraph 58 above the decision must be in *ignorance* of a relevant statutory provision such that the reasoning of the case is "demonstrably wrong". Firstly, it is not apparent that the Court of Appeal was in ignorance of the legislative history of s 86(4): they were clearly aware of s 49 and therefore must be taken to be aware it might have had a legislative history even if they chose not to refer to it. Secondly, the failure to consider the legislative history does not make their reasoning "demonstrably wrong". On the contrary, it is far from obvious to us that had they expressly considered the legislative history, the Court would have reached a different conclusion.

72. We say this because the long title of the original Act simply fails to state whether the new, deemed minimum period of notice for certain contracts is for all purposes or only for limited purposes. Indeed, the logical inference, we think, of s 1 of the 1963 Act (and its subsequent incarnations) is that *any* employee, including one with an actual indefinite contracts and not merely a deemed indefinite contract, who was deemed by what is now s 86(1) to be entitled to more notice than his contract of employment gave him at common law, would be an employee for *all* purposes while working during the period for which he was now deemed to be entitled to notice (unless of course he was actually given short notice, in which case under *Westwood* he would instead be entitled to damages).

73. No one would find this a surprising result as the long title is: 'An Act to require a minimum period of notice to terminate the employment of those who have been employed for a qualifying period…' There is nothing to suggest that this deeming is only for certain purposes: such as giving the employee the right to damages if he was

given short notice but not giving him the right to SSP if he was ill during his deemed longer period of notice in a case where he was not given short notice.

74. Indeed, it is obvious that s 86 applies beyond merely giving employees the right to a minimum period of notice. The only way damages could be calculated for failure to give the statutory notice is on the basis that, but for the short notice, the claimant would have remained an employee and been entitled to be paid for work. The effect of s 86 is therefore that the employee remains an employee during the statutory notice period unless short notice is given.

75. So if s 86 in its entirety applies for all purposes it must follow that s 86(4) applies for all purposes too. In other words, as *Brown* held, a worker with successive short contracts and sufficient continuity of employment for s 86(4) to bite, remains an employee in between his short employment contracts (even though of course he would have no right to pay when he was not actually working: see paragraph 110 below.)

76. So had they considered the legislative history, the Court of Appeal may well have concluded that the predecessor of s 86(1) was a deeming provision for all purposes and so was s 86(4) likewise. We reject the appellant's case that the Court of Appeal's decision was per incuriam the legislative history of s 86(4).

Was Brown *per incuriam s 151(5) SSCBA?*

77. Section 151(5) of the SSCBA provides

> "In any case where an employee has more than one contract of service with the same employer the provisions of this Part of this Act shall, except in such cases as may be prescribed and subject to the following provisions of this Part of this Act, have effect as it the employer were a different employer in relation to each contract of service."

78. As we understand it, the appellant's argument is that ERA does not apply because the ERA presupposes continuous employment with the *same employer*. Yet, says the appellant, s 151(5) SSCBA means, that for the purposes of SSP, each separate assignment must be deemed to be with a different employer. *Brown* did not consider this.

79. HMRC's position is that s 151(5) is referring to concurrent and not consecutive contracts. It points out that the provision uses the present tense "has" indicating that the drafter was considering a person with more than one contract of employment at the same time. HMRC also points out that *Harvey's* commentary is also predicated on the basis that s 151(5) applies to concurrent contracts of employment.

80. HMRC does appear to be right that this somewhat surprising provision is intended to apply to concurrent contracts: it was modified by the Statutory Sick Pay (General) Regulations 1982 which provided an exception to s151(5). This exception applies in all cases other than those in which earnings are not aggregated for the

purposes of national insurance contributions. It relates to *concurrent* contracts. The provision is:

> [reg 21] Where 2 or more contracts of service exist concurrently between one employer and one employee, they shall be treated as one for all purposes of Part I except where, by virtue of regulation 11 of the Social Security (Contributions) Regulations 1979, the earnings from those contracts of service are not aggregated for the purposes of earnings-related contributions.

81. We also note that Schedule 11 SSCBA deals with successive contracts with the same employer, which again indicates that s 151(5) was not intended to deal with successive contracts with the same employer.

82. Therefore, we find that s 151(5) refers only to concurrent contracts of service with the same employer. In any event, we do not need to decide the point. S 151(5) is irrelevant to the decision in *Brown.* The court having decided that s 86(4) applied for all purposes, the effect was that Mrs Brown (having sufficient continuity) was deemed to have a single continuing contract of employment with the same employer. Even if S 151(5) applied to successive contracts with the same employer, it did not need to be considered as Mrs Brown did not have successive contracts with the same employer. She had one continuing contract. *Brown* was not per incuriam s 151(5) SSCBA.

Was Brown per incuriam Sch 11 SSCBA?

83. One point which was not raised in the hearing was that the Court of Appeal in *Brown* did not consider that the SSCBA had its own code giving employees under successive short contracts of employment with the same employer rights to SSP. Therefore, did Parliament really intend s 86(4) to apply to s 151 of the SSCBA in order to give rights to SSP when the SSCBA contained its own code for dealing with employees with successive short contracts? That code is contained in Schedule 11 paragraph 4 and we consider it in detail below in paragraphs 172-191.

84. Our view is, as we have said above in respect of the legislative history of the ERA that, even though it appears as if the Court of Appeal did not expressly consider either the legislative history of the ERA nor Schedule 11 of the SSCBA, this does not make their decision demonstrably wrong.

85. Had they considered paragraph 4 of Schedule 11 they might well have concluded that that code was intended to give rights to SSP in cases where even an application of s 86(4) would not give rights, as it is of wider scope. In any event, for the same reasons as given in respect of the legislative history and in paragraphs 109-115 below, it is far from certain to us that had the Court of Appeal expressly considered Schedule 11, they would have reached a different conclusion.

Was Brown *per incuriam because it was not considered in later cases?*

86. We were referred to a number of other cases, decided after *Brown,* which the appellant considered showed *Brown* was wrongly decided because the subsequent cases did not refer to *Brown*. The appellant considers the outcome of the cases would have been quite different had the Court of Appeal's analysis in *Brown* been applied.

Carmichael

87. The appellant's position is that *Carmichael and another v National Power PLC* [1999] ICR 1226 would not have been decided the way it was if s86(4) ERA meant that certain short fixed contracts should be deemed to be indefinite for all purposes and not just the purpose of s86 itself.

88. In *Carmichael,* the two appellants worked as tour guides at a power station on a casual "as required" basis. They were not obliged to accept work that was offered nor was National Power obliged to offer them work.

89. They advanced the case that an exchange of correspondence between them and National Power in 1989 amounted to an employment contract and that therefore they were entitled under s 1(1) of the Employment Protection (Consolidation) Act 1978 (the precursor to the ERA) to written particulars of the terms of their employment. Only a person who has entered into or is working under a contract of employment is an "employee" as defined and entitled to a written statement of particulars.

90. The case reached the House of Lords and Lord Irvine gave the leading judgment with which the other four lords all concurred. Lord Irvine agreed with the finding of law of the industrial tribunal that the contract properly construed was not a contract of employment as it did not involve mutuality: as a matter of fact neither appellant was obliged to accept what work that was offered nor was National Power obliged to offer them what work that was available.

91. Neither the predecessor section to s 86(4) ERA, nor *Brown,* were considered. Lord Irvine stated:

> "the claim to particulars of terms of employment was not advanced on the basis that when they actually worked as guides they did so under successive ad hoc contracts of employment."

92. Yet, says the appellant, if s 86(4) was of such wide application as *Brown* decided that it was, surely the appellants would have advanced a case based on their successive ad hoc contracts of employment? Both appellants had worked for National Power for some years before they brought their case: surely they would have had sufficient continuity of employment to be employees with indefinite contracts of employment by virtue of s 86(4)?

93. However, we cannot see that there is anything in the appellant's argument. It amounts to the rather startling proposition that *Carmichael* demonstrates that *Brown* was wrongly decided simply because counsel in *Carmichael* referred the law lords neither to s 86(4) nor the case of *Brown.* While there might have been something in

the appellant's case on this if the Court in *Carmichael* had been referred to s 86(4) and actually concluded that it should be ignored as inapplicable, this did not happen. All we can conclude is that the law lords in *Carmichael* were not referred to the predecessor to s 86(4) and the case is therefore not an authority on the scope of this provision.

Clark

94. The appellant also referred us to the decision of the Court of Appeal in *Clark v Oxfordshire Health Authority* [1998] IRLR 125. In that case, the appellant pursued the health authority for unfair dismissal, also under the Employment Protection (Consolidation) Act 1978. She was a nurse whose contract with the health authority was that she would be offered work (at a specified hourly rate) on a casual basis. It was a finding of fact that the health authority was not obliged to offer her work and she was not obliged to accept work that was offered.

95. The Employment Tribunal at first instance found that the contract (normally referred to as a global or umbrella contract) did not itself amount to an employment contract due to the lack of mutuality. It did not consider whether a specific assignment could by itself have amounted to a contract of employment.

96. The Court of Appeal unanimously (reversing the Employment Appeal Tribunal) reinstated the Employment Tribunal decision that as a matter of law the umbrella contract did not amount to an employment contract. It remitted the case to the Tribunal to consider whether at the relevant time there was a specific assignment which was an employment contract and which could found a claim for unfair dismissal.

97. Again the decision itself concerned only the question of an overarching contract of employment: like *Carmichael* the possibility that the appellant's last short term assignment should be deemed to be an indefinite contract of employment under s86(4) was not put to the Court. The case is therefore not authority on the scope of s 86(4).

Fuller

98. The appellants in *Stevedoring & Haulage Services Ltd v Fuller* [2001] EWCA Civ 651 were workers who worked on a casual basis with no obligation by the company to offer them work nor for the workers to accept what work that was offered. As in the *Carmichael* case, the workers wanted a written statement of the particulars of their employment under s 1 ERA.

99. The Court of Appeal said that as a matter of law the contract could not amount to a global contract of employment. The court did not remit the case to the Tribunal to consider whether there were successive ad hoc employment contracts each time the workers actually worked because the representative for the for workers could not suggest a practical reason for so doing and the case had never been put on this basis.

100. Neither s 86(4) nor *Brown* was brought to the attention of the Judges. The case is therefore not authority on the scope of s 86(4).

Reed

101. The appellant also referred us to the case of *Reed Employment Plc and others v HMRC* [2012] UKFTT 28 (TC) which was a decision of this Tribunal. In that case there was a finding that the workers were only employed during each assignment and there was not any overarching or global contract of employment. Section 86(4) was not considered.

102. Mr Tolley points out that s 86(4) was irrelevant to the issue in front of the Tribunal in that case, but whether a consideration of s 86(4) or *Brown* would have led the Tribunal to a different conclusion is really irrelevant: they were not considered and so the case is not an authority on them. In any event, as a decision of this Tribunal, it cannot be suggested that it affects the binding nature on us of the Court of Appeal's decision in *Brown.*

Summary

103. These cases do not advance the appellant's position. As a matter of contract law a person with successive short contracts of employment might also have an overarching contract of employment. Such a global contract could only exist if there was mutuality of obligation and no such global contract was found to exist in any of these cases any more than in the cases at issue in this appeal. But whether there is a global contract of employment is a matter of contract law and an entirely separate question to the question of whether as a matter of legislation a worker who works under successive short contracts of employment is deemed to have an indefinite (or global) contract of employment. The only legislation which might deem such an indefinite contract is s 86(4) ERA but none of these cases (with the exception of *Brown)* considered this and only *Brown* is therefore authority on this.

104. The appellant suggests that the failure of eminent counsel to bring s 86(4) to the attention of the judges in those cases must have been because it was obviously irrelevant. But we cannot agree. Even if counsel had considered *Brown* wrongly decided, they should not have considered it to be *obviously* irrelevant to any of these cases as, as a Court of Appeal decision, it is a binding decision on all courts except the House of Lords (now Supreme Court). It seems much more likely it was simply overlooked. But for whatever reason Counsel did not refer s 86(4) or *Brown* to the courts in these cases, Counsel's failures cannot be relied on by the appellant. The Courts in those cases did not consider s 86(4) and their decisions are therefore not authorities on it. The only authority on the scope of s 86(4) remains *Brown*.

105. In any event, a case could only be per incuriam if it had failed to consider binding authority or a relevant statutory provision: the failure of later cases to consider *Brown* cannot make *Brown* per incuriam, although it might mean the later cases were per incuriam.

Was Brown *per incuriam as it lacked full legal argument?*

106. The appellant suggests that *Brown* was wrongly decided. It pointed out that the Court of Appeal did not have the benefit of any legal argument contrary to the position which they adopted. Mrs Brown was represented by counsel: counsel for the Chief Adjudication Officer chose to support Mrs Brown on the s86(4) point (see page 270 G-H).

107. But, as a matter of law, the absence of legal argument to the contrary does not make any decision per incuriam. Evershed MR in *Morrelle* at page 718 also said:

> "In our judgment, acceptance of the Attorney General's argument would necessarily involve the proposition that it is open to this court to disregard an earlier decision …whenever it is made to appear that the court had not, on the earlier occasion, had the benefit of the best argument that the researches and industry of counsel could provide….Such a result would plainly be inconsistent with the maintenance of the principle of stare decisis in our courts. In conclusion, on this point, we would add that we are unable to accept the suggestion of counsel for the plaintiff that the decision in the [other case] should be regarded as per incuriam on the ground that necessary party to the proceedings…were not before the Court. A decision cannot, in our judgment, be treated as given per incuriam, simply because of a deficiency of parties….."

Therefore the absence of representations to the contrary in *Brown* cannot make that decision per incuriam.

108. It is the appellant's position that the Court of Appeal's decision was wrong in law, but we cannot consider their view: the Court of Appeal's decision has not been shown to be per incuriam and therefore it is binding on us.

109. We note in passing that in any event, it is not at all apparent to us why the appellant considers that the decision was wrong. The appellant says that taken to its logical conclusion, applying s 86(4) in all situations would result in agency workers, who have no right to nor guarantee of any work, accruing rights to paid holiday leave and the right not to be unfairly dismissed. Yet it is not obvious to us why this outcome would be wrong in law or policy bearing in mind it would only apply to workers who accrue sufficient continuity of employment with the same employer. We note that in any event the NHSP now accepts that it has to give its agency workers paid holiday leave (although at the time of the events at issue in this appeal it only considered itself liable to pay cash in lieu of holiday entitlement). And nor is it apparent to us why as a matter of policy workers with sufficient continuity of employment who were unfairly dismissed during an assignment should have rights unavailable to those terminated, perhaps only a few minutes later, after an assignment had ended.

110. It was also suggested to us that taken to its logical conclusion, *Brown* would entitle agency workers with sufficient continuity of employment to be paid between assignments on the grounds that they remain employees between assignments. We do not agree that this is the logical outcome of *Brown.* Section 86(4) deems the

employment to become indefinite but it does not otherwise alter the terms of the employment: the employer would only be liable to pay the employee on the terms of the existing contract. In other words, the employer would only be liable to pay the employee for the work that was actually carried out.

111. The purpose of the ERA was to protect workers. The Supreme Court in *Gisda Cyf v Barratt* [2010] UKSC 41 said (in respect of a different provision of the ERA) that:

> "[35] These considerations provide the essential rationale for not following the conventional contract law route in the approach to an interpretation of section 97. ….it is a statutory construct. It is designed to hold the balance between employer and employee, but it does not require – nor should it – that both sides be placed on an equal footing. Employees as a class are in a more vulnerable position than employers. Protection of employees' rights has been the theme of legislation in this field for many years. The need for the protection and safeguarding of employees' rights provides the overarching backdrop to the proper construction of section 97.
>
> [36] …..
>
> [37] We do not consider, therefore, that what has been described as the 'general law of contract' should provide the preliminary guide to the proper interpretation of section 97 of the 1996 Act, must less that it should be determinative of that issue. With the proposition that one should be aware of what conventional contractual principles would dictate we have no quarrel but we tend to doubt that the 'contractual analysis' should be regarded as a starting point in the debate, certainly if by that it is meant that this analysis should hold sway unless displaced by other factors. Section 97 should be interpreted in its setting. It is part of a charter protecting employee's rights. An interpretation that promotes those rights, as opposed to one which is consonant with traditional contract law principles, is to be preferred."

112. It seems to us that what the Supreme Court said here could equally aptly be said of s 86(4) and the question whether it applies in all circumstances or solely to determine whether damages are due for lack of notice.

113. While temporary employees in general cannot expect the same rights as permanent employees, it seems likely that it was the intention of Parliament to treat workers who work on successive temporary contracts for the same employer as if they were permanent employees. Otherwise, it would be easy for employers to avoid owing obligations, such as SSP, to permanent employees by employing its staff on successive short contracts.

114. The appellant's view is that *Gisda* should be seen in the context of that part of the ERA that provides the code on unfair dismissal. But we think HMRC is right to say that the principles set out above which the Supreme Court applied to the analysis of that code were meant to apply generally. And it seems to us that *Brown* is an application of those principles: giving s 86 an interpretation consistent with a charter protecting employee's rights rather than upholding contract law principles.

115. In conclusion we do not find that the decision in *Brown* was per incuriam: nor do we do think it was wrong much less manifestly wrong. We consider ourselves bound to follow it, unless it is distinguishable on the facts, which is what we now move on to consider.

Is *Brown* distinguishable on the facts?

116. We have concluded that *Brown* is a binding decision of the Court of Appeal: it is not per incuriam. If the appellant wishes to challenge *Brown* because it considers it wrongly decided, the only forum in which it can do so is the Supreme Court. But any binding decision is only precedent to the extent that the cases are not distinguishable.

117. No two cases are entirely alike. It is always possible to distinguish one case from another: whether they should be distinguished depends on whether they differ in *relevant* facts.

Mrs Brown's case comparable to NHSP worker with pre-booked assignments?

118. NHSP's case is that Mrs Brown would have been expected at work if she was not ill. Mr Gordon described her as having an indefinite series of pre-booked assignments. In other words, the appellant saw Mrs Brown as comparable to one of its own workers who had pre-booked assignments which they were unable to fulfil due to sickness. The appellant would pay such workers SSP (see paragraphs 43-44).

119. We are unable to agree. This was not the basis of the decision in *Brown.* If the facts in *Brown* were that Mrs Brown was due to be working on the days she was sick, and would have been in breach of contract had she failed to appear without good reason, then the Court of Appeal would have said so. But their decision was based on the finding of the tribunal that Mrs Brown had been employed day to day and that she was only an employee on the days she was sick by virtue of s 86(4). We reject Mr Gordon's suggestion that the basis of the decision in Brown was that Mrs Brown had an on-going series of booked assignments.

120. Our conclusion is that the four cases before us cannot be distinguished from *Brown* on the basis that the appellant considered she had an expectation of work lacking in these four cases. Whether or not she had such an expectation, it formed no part of the basis of the decision. The facts of the four cases before this tribunal are therefore comparable to those as found in *Brown.*

Is there a test that an individual case must not be "unjust, anomalous or absurd?"

121. HMRC's case is that the legal test following *Brown* is simply whether or not the worker falls into s 86(4): did the worker accrue sufficient continuous employment? This depends on how long they were continuously employed and whether their contract was for a term certain of one month or less. Mrs Brown fell into the protection of s 86(4): whether the four workers in this appeal did is a question we address below.

122. The appellant suggests, however, that following *Brown*, there is an additional legal test that should be applied before any worker can have the protection of s86(4) to obtain rights to SSP. Mr Gordon points out that Nourse LJ referred to "unjust, anomalous or absurd" results and the appellant's position is that individual cases can be distinguished from *Brown* where the facts differ such that it would be unjust, anomalous or absurd for that individual to receive SSP. Nourse LJ said:

> "….As I read its provisions, they are intended to be of general application as between employer and employee, so that, by virtue of section 49(4), an employer or employee who is affected by them is entitled or subject to all the rights and obligations to which he would be entitled or subject if the contract of employment had in reality taken effect as it is deemed to take effect, provided only that that would not, in any particular application, lead to an unjust, anomalous or absurd result.

123. We do not agree with the appellant's analysis of this statement. Nourse LJ was not establishing a test that s 86(4) only applied to claims for SSP other than where it would (in the opinion of the Court or Tribunal) lead to unjust anomalous or absurd result in any particular appeal. What he meant was that it was not an unjust anomalous or absurd result <u>in general</u> that s 86(4) should apply to all claims for SSP.

124. By using the word "application" the judge did not mean "any particular appeal". His reference to "any particular application" was a reference to its application in an area of employment law, such as liability to pay SSP. There is no scope under the ratio in *Brown* for this Tribunal to look at each of the four cases and decide whether applying s 86(4) to their claim for SSP would lead to an unjust, anomalous or absurd result on their particular facts: the Court of Appeal has ruled that in any case it is *not* unjust, anomalous or absurd for s86(4) to apply to SSP. And that is binding on us.

"Unjust, anomalous or absurd" on particular facts?

125. In case we are mistaken in our view on this, we go on to consider the appellant's case that applying s 86(4) to the four agency workers' claims for SSP in the four cases would be unjust, anomalous and absurd.

126. We accept that there is a slight oddity in that the decision in *Brown*, applied to an agency worker for the NHSP who, after he had accrued sufficient continuity of employment to be within s 86(4), decided to no longer accept assignments, nevertheless would remain entitled to SSP if sick after his last assignment.

127. But this right to SSP would only exist for a limited period of perhaps 1 to 3 months depending on the exact facts in any particular case. This is because SSP is calculated on normal weekly earnings. SSP is only paid where the claimant's normal weekly earnings in the 8 weeks up to their last pay day exceeds the lower earnings limit for class 1 NICs (see SSCBA Schedule 11 paragraph 2(c) and s 19 of the General Regulations for calculation of normal weekly earnings). In effect, once this minimum is reached, all workers are entitled to the same weekly rate of SSP.

128. So for a time after ceasing to work, and ceasing to intend to work for NHSP, a worker would still be entitled the full rate of SSP (assuming he had earned above the lower earnings limit). But as time passed with the worker no longer accepting assignments from the NHSP, the worker's normal weekly earnings as calculated on the 8 weeks before his last pay day would fall until it fell below the lower earnings limit and the right to SSP would cease.

129. But we do not accept that, overall, it is unjust, absurd or anomalous that agency workers for NHSP should be entitled to SSP once they have accrued sufficient continuity of employment. On the contrary, it does not appear unjust, absurd or anomalous that an agency worker's right to SSP should be the same as that of a part-time worker working the exact same number of days per week for the exact same number of years but who happens to have an indefinite contract of employment rather than Terms of Engagement.

130. In any event, we see nothing on the facts of the individual cases (set out in the table below) to suggest any great distinction with Mrs Brown's case. Mrs Brown worked for nine months for a housing association on contracts from day to day. Each week she worked for not less than 24 hours (approximately equivalent to three shifts). The middle column of this table shows the number of weeks in which each worker worked at least one shift and frequently rather more:

	Period from when first accepted assignment to when sick	**Weeks without any assignments during that period**
Mrs Jenkins	102 weeks	9 weeks
Mr Hardy	44 weeks	6 weeks
Mr Baker	62 weeks	4 weeks
Mrs Winterburn	71 weeks	8 weeks

131. We do not know the reasons why they did not work during those weeks without assignments: it may have been choice because they wanted a holiday or it may have been that no work was available. Nevertheless, it can be seen that they worked on assignments for NHSP for a much greater proportion of the time than they had weeks without work.

132. We do not agree that the facts of Mrs Brown's case was so very different to the facts of the four workers in this case. We do not agree that, faced with the facts in the four cases in front of this Tribunal, the Court of Appeal would have reached the opposite conclusion and in particular, we do not agree that they would have found it to be an 'unjust, anomalous or absurd result' for the four agency workers in this case to be entitled to SSP.

133. We do not consider that any of the four cases before this Tribunal can be distinguished on these grounds from *Brown:* we address below in paragraphs 192-202 whether each of the four workers had sufficient continuity of employment.

Notice given?

134. The third ground of attack by the appellant was that, even if *Brown* was correctly decided, the application of s 86(4) did not result in liability to SSP because the required notice to terminate the deemed contract of employment had been given. The basis of this part of the appellant's claim was that the Terms of Engagement expressly provided for the termination of employment at the end of each assignment. The agency workers were, therefore, says the appellant, on notice that each contract of employment would end, and that was notice sufficient for s 86(1).

135. If the appellant were right, of course, the question would arise, when was the notice given and when did it expire? If the agency worker had less than two years continuous employment, they would be entitled to a minimum of a week's notice. Would the notice to terminate be given to them when they signed the Terms of Engagement? Or when they were booked on any particular assignment? Or when they commenced any particular assignment? If the appellant were correct, these difficult if not absurd questions would have to be answered as the agency worker's entitlement to SSP would depend on the answer (as they would only be entitled to SSP if sick during a booked assignment or within their "notice" period after an assignment ended).

136. However, we do not find the argument to be correct as a matter of law. The appellant's argument, that a fixed term contract necessarily includes notice that the contract will end on the appointed date, is undeniably correct as a matter of common law. But the question is whether that has been modified by statute. Statutes should be interpreted so as to avoid absurd results, as such a result cannot have been intended by Parliament.

137. Whatever s 86 means, it does not mean that a fixed term contract, merely by including a date of termination, includes *notice* of termination: that would render s 86(4) meaningless as every "contract for a term certain of one month or less" would necessarily include notice of termination merely because they were fixed term contracts. Such an interpretation would mean that no employee could ever benefit from the protection s 86(4) was clearly intended to provide.

138. In conclusion, the mere fact that the Terms of Engagement provided for each contract of employment to terminate at the end of each assignment was not "notice" to terminate the deemed contract of employment arising under application of s 86(4) ERA. In particular, once they had sufficient continuity of employment within s 86(4), the clause in their agreement with NHSP which stated that their employment ended at the end of each assignment did not constitute notice of termination.

139. For the sake of completeness, we note that HMRC consider section 203 of the ERA means that the fixed term cannot be notice to terminate under s 86. S 203 provides that:

> "provision in any agreement…is void in so far as it purports – (a) to exclude or limit the operation of any provision of this Act …."

Whether the provision that employment terminated with the end of each assignment (see clause 1 reproduced at paragraph 17 above) is a provision rendered void by s 203 is debatable. On the face of it, such a provision does not purport to exclude s 86: on the contrary, it is the provision the existence of which puts the successive contracts within the ambit of s 86(4). We do not decide this point as it is unnecessary. We have already decided in the preceding paragraph that on the ordinary rules of statutory construction that clause 1 of the Terms of Engagement is not notice under s 86(1).

Notice waived?

140. Alternatively, the appellant argued that notice was waived by the agency workers when they signed the Terms of Engagement. Its case was that the agency workers agreed to their contract of employment ending at the end of each assignment. Therefore, within s 86(3) (see paragraph 46 above) this was an "occasion" on which the agency worker was "waiving his right to notice".

141. However, again we cannot accept that this is correct as a matter of law and for much the same reason. Firstly, s 86(3) refers to a waiver "on any occasion", the clear implication of which is that the drafter envisaged an event subsequent to the employment contract being entered into (or otherwise the words "on any occasion" would simply have been omitted). In other words, it envisaged a specific waiver for a specific occasion and not a general waiver given at the start of the contract.

142. Further, Parliament would not have intended s 86(4) to be effectively meaningless. And s 86(4), which only applies to fixed term contracts, would be meaningless if by entering into a fixed term contract a worker was taken to be waiving his rights to notice he would otherwise become entitled to by virtue of s 86(4).

143. In conclusion, the mere fact that the Terms of Engagement provided for each contract of employment to end at the end of each assignment was not a "waiving" by the worker of any right to notice he might have under s 86(4). We reject the appellant's case on this.

Conditions for SSP not met

144. It was also the appellant's case, assuming that we found against it on all the above points (as we have) that three out of the four appellants cannot benefit from the decision in *Brown* because they do not meet other preconditions for SSP.

145. To be entitled to SSP an employee has to meet 3 conditions. The day for which SSP is claimed must fall within a period of incapacity for work (s 152 SSCBA); it must fall within a period of entitlement (s 153 SSCBA); and it must be a qualifying day (s 154 SSCBA).

146. This part of the appellant's case rests on s 153 SSCBA and the meaning of "period of entitlement". This clause provides at sub-clause (3) as follows:

> "Schedule 11 to this Act has effect for the purpose of specifying circumstances in which a period of entitlement does not arise in relation to a particular period of incapacity for work."

147. Schedule 11 at Paragraph 2(c) is the source of the restriction that there is no entitlement to SSP where the employee's normal weekly earnings are below the lower earnings limit which we have mentioned at 127 above. It was also the source of a restriction at paragraph 2(b) as follows:

> "the employee's contract of service was entered into for a specified period of not more than three months"

148. The appellant's case is that this exclusion would cover all four of the agency workers in this case. However, even as enacted paragraph 2(b) was subject itself to an exclusion from its scope; and it has since been repealed. Before turning to these two issues, we first consider whether paragraph 2(b) applies at all.

Definition of "contract of service" for Sch 11

149. If we were to agree with the appellant that the meaning of "contract of service" in Schedule 11 SSCBA was the contract at common law unaffected by any deeming provisions and in particular s 86(4) of the ERA, then we would agree that the contract of service (in other words, any individual assignment) was entered into for a specified period of not more than three months. Indeed, each assignment was for a single working day. The evidence was that individual assignments were not booked more than a month ahead in any event.

150. It is HMRC's case, however, that the "contract of service" was the contract in the form it was deemed to take by statute and in particular by s 86(4) ERA. *Brown* decided that the deeming effect of s 86(4) applied for the purposes of the SSCBA and in particular it meant that the appellant's period of entitlement was calculated as if her contract of employment was indefinite and no notice had been given: see page 270 E-F cited above at paragraph 55.

151. Nourse LJ expressly said that the 1978 Act provisions (now s 86) must be taken to apply to the question of the period of entitlement. As the period of entitlement must depend on the terms of the contract of service, it follows in our view that s 86(4) applies to determine the terms of the contract of service in s 151-153 SSCBA. The "contract of service" in paragraph 2(b) of Schedule 11 to the SSCBA is therefore the contract as it is deemed to be by s 86(4). And, if the four additional respondents can show sufficient continuity, then that contract is one of indefinite length and *not* one for a specified period of not more than three months.

152. We recognise, however, that such an interpretation renders paragraph 4(b) of Schedule 11 otiose in many (but not all cases). Why, we ask, would Parliament have included an exception where short contracts aggregate to a total of 3 months or more when it could have relied on s 86(4) to aggregate short contracts? We have already considered this in paragraph 83-85 and concluded that nevertheless the decision in *Brown* is binding on us.

153. So our finding is that "contract of service" in Schedule 11 2(b) refers to the contract of service as it is deemed to be by s 86(4). Section 86(4) deems any contract of employment of a worker with sufficient continuity of service with the same employer to be an indefinite contract. Paragraph 2(b) only applies to contracts for a specified period. So provided they have sufficient continuity of service, none of the four additional parties in this case fall within Paragraph 2(b). So their period of entitlement, and right to SSP, is unaffected by Schedule 11 Paragraph 2(b).

154. But in case we are wrong on the definition of "contract of service" in this context, we go on to consider the other provisions of Schedule 11 which, as mentioned above, also limit the application of paragraph 2(b). Therefore, paragraphs 155-191 below are predicated on the basis, contrary to our finding, that "contract of service" refers to an assignment unmodified by s 86(4). These paragraphs therefore deal with a hypothetical situation but we deal with the point as it was argued in front of us and the case may go on appeal.

Was Schedule 11 Paragraph 2 repealed?

155. We deal first with the question whether paragraph 2(b) was repealed so far as the agency workers in this case are concerned.

156. The Employment Act 2002 provides as follows:

> **45 Fixed-term work**
>
> (1)The Secretary of State shall make regulations—
>
> (a) for the purpose of securing that employees in fixed-term employment are treated, for such purposes and to such extent as the regulations may specify, no less favourably than employees in permanent employment, and
>
> (b) for the purpose of preventing abuse arising from the use of successive periods of fixed-term employment.
>
> (2) ……
>
> (3)The regulations may—
>
> (a) ….
>
> (b) ….
>
> (c) ….
>
> (d)amend, apply with or without modifications, or make provision similar to any provision of—
>
> (i) ….
>
> (ii) …
>
> (iii)the Social Security Contributions and Benefits Act 1992;
>
> (e) ….
>
> (4) ….

(5)In its application to this section, section 51(1)(b) includes power to amend an enactment.

…..

Section 51 Orders and regulations

(1)Any power of the Secretary of State to make orders or regulations under this Act includes power—

(a) …

(b) to make such incidental, supplementary, consequential or transitional provision as the Secretary of State thinks fit.

(2)Any power of the Secretary of State to make orders or regulations under this Act is exercisable by statutory instrument.

(3) ……

157. In other words, the Secretary of State was given the power to amend the SSCBA by Regulations and that is what he did in the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("the 2002 Regulations"). Neither party suggested that these regulations were beyond what the Employment Act gave the Secretary of State the right to do.

158. Schedule 2 to the 2002 Regulations repealed paragraphs 2(b) and 4 of Schedule 11 to the SSCBA 1992. However, paragraph 19(1) provided:

"**19 Agency workers**

(1) These regulations shall not have effect in relation to employment under a fixed-term contract where the employee is an agency worker."

159. In other words, in this hypothetical scenario, the appellant can rely on paragraph 2(b) of Schedule 11 if the four additional respondents in this case were agency workers within the meaning of Regulation 19(1) of the 2002 Regulations. (We note in passing for completeness, that Regulation 19(1) was itself amended in 2008 by the Fixed-term Employees (Prevention of Less Favourable Treatment) (Amendment) Regulations 2008 no 2776 so that the appellant's case on this applies to the agency workers in this case as they were sick before 27 October 2008 but would not apply to claims for SSP after that date. For such workers, there is no question but that Paragraph 2(b) has been repealed).

160. The parties were not agreed on whether the four additional parties in this case were "agency workers" within the meaning of Regulation 19. The remainder of Regulation 19 provided as follows:

"(2) In this regulation 'agency worker' means any person who is supplied by an employment business to do work for another person under a contract or other arrangement made between the employment business and the other person.

(3) In this regulation 'employment business' means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying person

> in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity."

161. Whether the four additional respondents were agency workers therefore turned on whether NHSP was an 'employment business.' And whether it was an employment business turned on whether its agency workers were supplied 'to act for, and under the control of" the NHS trusts to whom they were sent on assignment.

162. The appellant's case is that its agency workers acted for and under the control of the NHS hospitals. The nature of their work was such that only the NHS hospital could tell them what to do. While working the agency workers were employed by NHSP, but control of the actual work they undertook was with the hospital to whom they were assigned. And it is to this issue that the findings of fact in paragraphs 36-39 are relevant.

163. HMRC's case was that Regulation 19(3) was referring to legal control and not operational control, and although HMRC accept that as a matter of fact the NHS trusts had day to day operational control of the agency worker's work, its case is that only NHSP as a matter of fact had legal control because only the NHSP could terminate the employment of the agency workers or carry out disciplinary action. The most the NHS trust to whom any particular worker was assigned could do was to exclude a worker from its premises.

164. Both parties referred us to the Social Security (Categorisation of Earners) Regulations 1978 which in Schedule 1 Para 1 contained a list of workers who were deemed to be employed if their work was of a certain nature. This included:

> "employment….in which the person employed renders, or is under obligation to render, personal service and is subject to supervision, direction or control, or the right of supervision, direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person…"

165. HMRC's case is that this provision was concerned with legal and not operational control. The appellant considers it is concerned with both.

166. We do not need to reach a conclusion on this: we only need to reach a conclusion on the meaning of control in Regulation 19(3) of the 2002 Regulations. The phrase in Regulation 19(3) is not the same as in the 1978 Categorisation Regulations so even if we were to reach a conclusion on the 1978 Categorisation Regulations it would not dictate the answer for Regulation 19(3).

167. Mr Tolley referred us to the case of *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* [2009] ICR 1183 where "control" was used by the court with the meaning of legal control. But that was a case on whether a person who controlled a company could at the same time have a genuine contract of employment with that company: "control" was not used in any relevant statute and nothing turned on the difference between legal and practical control. The question was whether or not the contract of employment was a sham. It tells us nothing about the meaning of "control" in Regulation 19(3).

168. Mr Gordon referred us to *R v Massey* [2008] 1 WLR 937 which was a case of the meaning of "control" in the Sexual Offences Act 2003 and in particular whether the defendant controlled the activities of a prostitute. Control was here found to be used by the legislation in the sense of practical ability to direct an activity by whatever means. For obvious reasons, it was not even suggested that Parliament could have meant "control" to be limited to legal control.

169. Neither case was helpful in the context of Regulation 19(3). We consider that the meaning of "control" in any particular piece of legislation and specifically whether it is referring to legal or practical control will depend on the context in which it was used as it is from the context the intention of Parliament can be discerned.

170. The answer so far as Regulation 19(3) is concerned seems simple. The intention of Parliament was to carve out agency workers: the archetypal agency worker is one is employed by an agency but actually sent out to work for and on the day to day instructions of the client of the agency. "Control" must therefore be understood in this context. Control therefore means day to day control. Any other conclusion would render s 19 virtually meaningless as it is difficult to imagine an agency worker who would be under the legal control of (in the sense of being able to be dismissed by) someone who was not his employer.

171. So the four additional respondents in this case were agency workers within the meaning of s 19(1) as it was not in dispute (and we find) that they were under the day-to-day operational control of the NHS Trusts to whom they were assigned. So in conclusion, and bearing in mind at this point we are dealing with a hypothetical situation, in so far as the workers in this case were concerned, Paragraph 2(b) was not repealed at the time they were sick.

Excluded from exception?

172. We therefore move on to consider whether (in this hypothetical scenario) the four additional respondents were within the exception to paragraph 2(b) contained in paragraph 4.

173. The exclusion from paragraph 2(b) was as follows:

> "4. (1) Paragraph 2(b) above does not apply in any case where –
>
> (a) at the relevant date the contract of service has become a contract for a period exceeding three months; or
>
> (b) the contract of service (the "current contract") was preceded by a contract of service entered into by the employee with the same employer ("the previous contract") and –
>
> (i) the interval between the date on which the previous contract ceased to have effect and that on which the current contract came into force was not more than 8 weeks; and
>
> (ii) the aggregate of the period for which the previous contract had effect and the period specified in the current contract (or, where that

period has been extended, the specified period as so extended) exceeds 13 weeks.

(2) For the purposes of sub-paragraph (1)(b)(ii) above, in any case where the employee entered into more than one contract of service with the same employer before the current contract, any of those contracts which came into effect not more than 8 weeks after the date on which an earlier one of them ceased to have effect shall be treated as one with the earlier contract."

174. As can be seen there are two routes by which Paragraph 2(b) can be disapplied. A worker need only show that they are within Paragraph 4(1)(a) or 4(1)(b) to disapply paragraph 2(b). We deal with each in turn.

175. Paragraph 4(1)(a): contract exceeding three months? As we only reach paragraph 4 if we are wrong and the appellant is right on the meaning of "contract of service" in Schedule 11 SSCBA, we are in the hypothetical situation (as explained in paragraph 154 above) of assuming that it means the contract at common law unaffected by any deeming provisions and in particular s 86(4) of the ERA. Therefore, for this limited and hypothetical purpose, we agree with the appellant that the "contract of service" referred to in paragraph 4(1)(a) was each assignment and therefore was not for a period exceeding three months. The additional parties cannot benefit from the exclusion within paragraph 4(1)(a) in this hypothetical situation.

176. Paragraph 4(1)(b): series of contracts? We go onto consider HMRC's alternative position which is that the four agency workers fall within paragraph 4(1)(b). As already stated, we are assuming our decision in paragraph 153 is wrong and that therefore "contract of service" in paragraph 4(1)(b) refers to the contract at common law.

177. At first glance all four additional parties would benefit from this exception. Paragraph 4(2) allows all their separate assignments to be aggregated, and glancing at the table in paragraph 130 it would appear all four had worked for NHSP for more than 13 weeks.

178. The appellant does not accept this. It says that the contracts should be counted in hours.

179. The appellant's case is that 13 weeks refers to 2,184 hours of work: in other words it is 13 weeks multiplied by 7 days multiplied by 24 hours. On the facts, only Mrs Winterburn worked more than 2,184 hours in total.

180. The appellant's point is that if, on the contrary, the Tribunal were to interpret 13 weeks in any other way it might lead to an absurd result in that someone who worked an 8 hour shift late one night to early the next morning would lead them to be credited with 2 working days. Or someone who worked a single overnight shift in 14 days but happened to work that shift overnight on Saturday evening to Sunday morning would be credited with two weeks' work arising from a single 8 hour shift.

181. The appellant also referred us to the case of *Wilkie v Inland Revenue Commissioners* [1952] 1 Ch 153. The Income Tax Act 1918 contained a provision at Rule 2 of the Miscellaneous Rules relating to Sch D income that there was no liability to UK taxation for someone resident in the UK for a temporary purpose only and who was not in fact resident in the UK "for a period equal in the whole to six months in any year of assessment". The decision of Donavan J was that:

> [page 162] "…when computing the period of six months for the purposes of rule 2 there is nothing in the language of the rule to prevent hours being taken into the computation, but that, on the other hand, since what has to be determined is the period of actual residence, it is legitimate to do so."

In other words, the court effectively counted the six months in hours.

182. We were also referred to the working time regulations which count in hours. The appellant accepts that these are stand alone regulations which are intended to prevent workers working more than 48 hours in 7 days. The legislation is precise on how 48 hours are calculated and expressly states that a day is a period of 24 hours beginning at midnight.

183. We are unable to accept the appellant's case that the reference to 13 weeks in paragraph 4(1)(b) is a reference to 2,184 hours. If that is what Parliament intended, that is what they would have said.

184. We don't agree with Mr Gordon that rejecting his case leads to absurdity: while the examples he gives (paragraph 180 above) might be thought absurd they are easily cured without resorting to counting in hours. For instance, an overnight shift could be regarded as a single day's work.

185. Further, the instances quoted by the appellant where time is counted in hours refer to specific cases where *hours* mattered. Clearly the working time regulations look to hours as they are intended to control the number of hours a person works in a week. And if one is looking at a question of residence, the whole time is relevant. It doesn't matter whether the person is awake or asleep. If resident at all, they are equally resident when asleep as when awake. But in the context of *working* days, a working day is well understood to be a very different period of time to a calendar day: see, for example, what Nourse LJ said in *Brown* at paragraph 270B quoted at paragraph 54 above. A normal working day is understood to be about 8 hours. People do not normally work 24 hours without stopping and no one would understand a reference to a working day to be a reference to working for 24 hours.

186. So we reject the appellant's case on hours, but how are the 13 weeks to be counted and would the additional parties qualify?

187. Firstly, we note that there are a number of references to periods of time in Schedule 11 and in our view they would all have been intended to be calculated in the same manner as Parliament did not say otherwise. There are a number of references to time, such as in paragraph 2(e)which refers to a "period of 57 days" and is clearly

referring to a period of 57 consecutive days. Similarly, paragraph 2(b) refers, as mentioned above, to a contract of service of "not more than three months". We find that a contract of service of three months would be commonly understood to refer a contract which required a person to provide their service to another at various times during a period of consecutive days amounting to three months on the calendar. It would not be understood to refer to a person working discontinuously for 2,184 hours (which, depending on how many hours per week were worked, could take a person a very long time indeed to achieve), still less to refer to someone working continuously without break or sleep for three months.

188. Schedule 11 is part of the SSCBA. The Court of Appeal in *Brown* held that the deemed contract of employment under s 86(4) of the ERA is the "contract of service" under the SSCBA. Does this mean that the concept of continuity of service in s 210 ERA should be read across in Schedule 11 SSCBA? It is clear under s 212(1) ERA that an employee only has to be employed for a part of one day in a period of 7 days to be treated as employed for that week.

189. We agree with Mr Gordon that s 212(1) ERA is not a definitions section that can be used in interpreting Schedule 11 SSCBA. The decision in *Brown* was that the deeming provision of 86(4) was intended by Parliament to apply for all purposes: however, there is nothing in the Act itself nor the decision in *Brown* to suggest that s 212(1) was intended to or should apply beyond the definition of continuity as given in s 210-212 of the ERA.

190. But this does not help the appellant. Bearing in mind our conclusion a working day is a day for these purposes, even a conservative interpretation of 13 weeks is that a single shift should be seen at least as one day of work and a week would at the most be seen as seven working days. On this basis, all four additional parties would qualify: all worked in excess of 100 days (some well in excess of this). So *if* Schedule 11 paragraph 4 was in point, we find that the additional parties would be able to rely on it as an exception to paragraph 2(b) and the appellant would not be able to rely on paragraph 2(b) to avoid liability to pay SSP to them. And this is a conservative interpretation: it is possible that a week in which the appellant worked at least part of one day counted towards the 13 weeks.

191. But as we have already said, our position on this is hypothetical. For the reasons explained in paragraph 153, paragraph 2(b) does not apply to any of the additional parties once they had accrued sufficient continuity of service for s 86(4) to apply, as, at that point, their contract of employment was deemed to be one for an indefinite period.

Did they accrue sufficient continuity of service?

192. And that takes us to the last point. Did the additional parties accrue sufficient continuity of service to benefit from s 86(4) and the decision in *Brown?*

193. The appellant accepts that Mr Hardy and Mrs Winterburn had sufficient continuity of employment because they had worked for at least one day each week for

at least 13 weeks before the week in which they were first ill. It does not accept that Mr Baker and Mrs Jenkin had accrued sufficient continuity of service because they had not worked for at least one day of each week for the 13 weeks immediately preceding their sickness (Mr Baker had 3 weeks without assignments immediately prior to his sickness and Mrs Jenkin had 2 weeks without assignments two weeks' before her period of sickness).

194. The provisions on the meaning of "continuously employed" as used in s 86(4) are, as we have said, in s 210-212 ERA:

> **Part XIV Interpretation**
>
> **Chapter 1 Continuous Employment**
>
> **210 Introductory**
>
> (1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.
>
> (2) [omitted as not relevant]
>
> (3) In computing an employee's period of continuous employment for the purposes of any provision of this Act, any question -
>
> (a) whether the employee's employment is of a kind counting towards a period of continuous employment, or
>
> (b) whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment,
>
> shall be determined week by week; but where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of twelve months in accordance with section 211.
>
> (4) Subject to sections 215 and 217, a week which does not count in computing the length of a period of continuous employment breaks the continuity of employment.
>
> (5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.
>
> **211 period of continuous employment**
>
> (1) An employee's period of continuous employment for the purposes of any provision of this Act –
>
> (a) (subject to subsection (3)) begins with the day on which the employee starts work, and
>
> (b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.
>
> (2) [repealed]
>
> (3) If an employee's period of continuous employment includes one or more periods which (by virtue of section 215, 216, or 217) while not counting in computing the length of the period do not break continuity

of employment, the beginning of the period shall be treated as postponed by the number of days falling within that intervening period, or the aggregate number of days falling within those periods, calculated in accordance with the section in question.

212 Weeks counting in computing period

(1) Any week during the whole of part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

(2) [repealed]

(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is –

(a) incapable of work in consequence of sickness or injury,

(b) absent from work on account of a temporary cessation of work, or

(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose,

(d) [repealed]

counts in computing the employee's period of employment.

(4) Not more than twenty-six weeks count under subjection (3)(a) between any periods falling under subsection (1).

195. In other words, to be continuously employed an employee must not have a break of employment of more than one week except in specified circumstances.

196. HMRC do not suggest that any of the specified circumstances existed in the cases of Mr Baker and Mrs Jenkin. In particular they do not suggest that the breaks in employment of these two persons were breaks within s 211(3) (in other words because they fell within the provisions of s 215, or 216 or 217 ERA). Nor do HMRC suggest that s 212(3) applied either. We have not reproduced s 215-217 as it is not necessary: there was no evidence about the reasons why Mr Baker and Mrs Jenkins did not work those weeks in question and therefore HMRC are unable to show that the reasons for the absences were ones which would permit the absences to be disregarded for the purposes of calculating continuity.

197. HMRC's case is that these breaks are irrelevant. HMRC's case is that a proper construction of s 86(4) is that once an agency worker on short term contracts accrues sufficient continuity of employment, then the very next short term contract is deemed by s 86(4) to be an employment contract of indefinite term. Therefore, any breaks in working subsequent to that occasion are irrelevant as the worker has at that time a pre-existing contract of employment for an indefinite period.

198. On HMRC's case it is irrelevant that Mr Baker and Mrs Jenkins were not in continuous employment for the three months immediately preceding their absence on grounds of ill-health. All that matters for s 86(1) is that by virtue of s 86(4) and a prior period of three months continuous employment, they were working under a deemed indefinite contract of employment which did not end by effluxion of time.

199. The appellant's case is that the worker claiming SSP would have to show continuity of employment for at least 13 weeks immediately preceding the sickness. However, we find there is nothing in s 86(4) which requires this. The appellant's interpretation incorrectly elides two concepts by suggesting the right to SSP arises where (and only where) there has been 13 weeks continuity immediately before the sickness. But what actually happens is that s 86(4) grants to a worker an indefinite contract once he has achieved the 13 weeks continuity. And it is that indefinite contract which gives the agency worker the right to SSP. There is no requirement for the 13 weeks' work without break to immediately precede the period of sickness. Breaks *after* sufficient continuity has been accrued do not terminate the deemed contract of employment.

200. We note that HMRC also rely on s 210(5) (set out above) which creates a presumption of continuity. Their point is that, as the appellant has not shown that the reason for the break in work by Mr Baker and Mrs Jenkin was *not* approved breaks within s 211(3) or 212(3), it must be presumed that the breaks did not break continuity. While we agree with HMRC on this, we found our decision on the reasoning explained in the previous paragraph.

201. In conclusion, we find that all four additional parties had accrued sufficient continuity of employment before they became sick. As set out in paragraphs 27, 29, 32, and 35 above, Mrs Jenkin had worked at least one day every week for 21 weeks to 27 May 2007, Mr Hardy had worked at least one day every week for the 18 weeks before he was sick, Mr Baker worked at least one day every week for 43 weeks to 23 September 2007 and Mrs Winterburn had worked at least one day every week for 16 weeks to 23 June 2007. It was not suggested (other than as set out at paragraph 193 and which we have dismissed) that after their period of working continuously for 13 weeks that there was any event which terminated their deemed indefinite contract of employment. Therefore, we find at the time they became sick all had indefinite contracts of employment because of s 86(4) and were entitled to SSP under s 151 SSCBA.

202. That determines the appeal in favour of Mr Hardy, Mrs Winterburn and Mrs Jenkin. For Mr Baker, however, as explained in paragraph 4, we need to determine whether we have any jurisdiction to entertain his claim because of the COT 3 agreement he entered into with NHSP.

The preliminary issue for Mr Baker

Facts

203. Mr Baker entered into written Terms of Engagement with the appellant on 3 October 2005. He worked for NHSP as set out in paragraph 30-32 above. He was sick from 1 to 28 February 2008 and performed no assignments for the NHSP during this period.

204. On 9 September 2008 he brought proceedings in the Employment Tribunal against NHSP, making complaints of unfair dismissal and unlawful deduction of

wages (which included a claim for unpaid SSP of £235.79 relating to his sickness in February 2008). On 31 October 2008, Mr Baker and the NHSP entered into a COT 3 agreement brokered by ACAS. The agreement was that NHSP would pay Mr Baker £500 in settlement of all his claims, including his claim for SSP. No particular part of the £500 was allocated to any particular part of his claim. The material parts of the settlement read as follows:

> "Mr Paul Baker ("the Claimant") and NHS Professionals ("the Respondent") hereby agree to accept the terms set out below without any admission as to liability in full and final settlement of:
>
> 1. the Claimant's claims under case number […]; and
>
> 2. the Claimant's claim to HM Revenue & Customs for payment of Statutory Sick Pay) (their reference [….]); and
>
> 3. all and any other claims however arising which the Claimant may have against the Respondent or its officers, agents and employees arising from or in connection with the Claimant's employment…..
>
> 4. The terms of this agreement are as follows:
>
> 4.1 The Respondent agrees to pay the Claimant the sum of £500.00……
>
> 4.2 ….
>
> 4.3 The Claimant agrees to write to the Employment Tribunal withdrawing the claim listed under number […..]
>
> 4.4 The Claimant agrees to write to HM Revenue & Customs withdrawing his claim for the payment of Statutory Sick Pay……
>
> ….."

205. Mr Baker did write to HMRC in fulfilment of the terms of the COT 3 agreement by way of an undated letter:

> "I am writing to advise that following the agreement of terms of settlement with NHS Professionals regarding various issues including Statutory Sick Pay, I wish to withdraw my claim against NHS Professionals for unpaid Statutory Sick Pay.
>
> I look forward to receiving your written confirmation that my claim for Statutory Sick Pay against NHS Professionals has been formally withdrawn."

This was clearly received by HMRC as HMRC acknowledged receipt of it in a letter (also undated) to NHSP. HMRC's letter was acknowledged by NHSP's solicitors in a letter dated 1 December 2008.

The issues

206. NHSP say two issues arise out of this:

(1) Firstly, must the Tribunal automatically allow the appellant's appeal with regards Mr Baker because Mr Baker withdrew his claim to SSP?

(2) Is the COT 3 agreement effective to compromise Mr Baker's claim for SSP such that the NHSP has no liability to pay Mr Baker any SSP to which he would otherwise have been entitled to under the SSCBA?

We deal with each issue in turn.

Issue 1 – Jurisdiction of HMRC to make determination

207. HMRC's point is that the Statutory Sick Pay (Decisions) Regulations 1999 no 776 set out in paragraph 6 above at Regulation 2(2) permit an HMRC officer to make a decision on entitlement to SSP "on his own initiative". So their case is that the decision maker in this case could make the decision which is under appeal even if Mr Baker had not applied for SSP; and therefore it must follow that the decision remains effective even though (as actually happened in this case) Mr Baker withdrew his claim to SSP after the decision by the HMRC officer was made.

208. We were referred to *Young's Recycling* [2011] UKFTT 45 (TC) which was a decision of this Tribunal. On the application of Mrs Day the employee, HMRC issued a decision on statutory maternity pay ("SMP") due to Mrs Day for a stated period. Mrs Day also made a claim against her employers to the employment tribunal. As in Mr Baker's case, subsequent to HMRC's decision on her right to SMP, Mrs Day reached a compromise agreement with her employer.

209. The judgment records that HMRC refused to withdraw their decision because they were not told the terms of this agreement so they did not know if Mrs Day had been paid the SMP they thought was due (nor whether the employer had paid NIC on the amount of SMP HMRC considered due). The compromise agreement was not produced to the Tribunal. The judgment of the Tribunal was to uphold the decision of HMRC that the SMP was due.

210. HMRC consider the case to be authority that this Tribunal can consider a determination made by HMRC even where employee has contractually bound itself not to pursue the matter. The appellant's position, on the contrary, is that the implication of the decision is that if the Tribunal had seen the compromise agreement, it would have decided the case in favour of the employer

211. We are not sure the case is authority for any of these propositions as the judgment is short and it is not clear that the Tribunal expressly considered its jurisdiction in light of the compromise agreement. In any event, the decision is not binding on this Tribunal.

212. We find that, because of the express wording of Regulation 2(2), HMRC's power to make a determination on entitlement to SSP is independent of an application by the Secretary of State or the employee. So the withdrawal by the employee of his application for SSP cannot affect HMRC's power to make a determination on SSP.

213. As HMRC had the power to make the decision, and to maintain it in the face of Mr Baker's withdrawal of his application, this Tribunal has jurisdiction to hear NHSP's appeal in respect of it.

Issue 2 – does the compromise agreement mean that NHSP has no liability to pay SSP to Mr Baker?

What is a COT 3 agreement?

214. A "COT 3" agreement is the colloquial term for a conciliation settlement brokered by an ACAS officer under s 203 Employment Rights Act. That Act provides an employee with a number of rights, such as the right to written particulars of the terms of their employment (s 1) and the right to minimum notice (s 86) both of which provisions we have already discussed. Section 203 of that Act provides:

> "(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports –
>
> (a) to exclude or limit the operation of any provision of this Act, or
>
> (b) to preclude a person from bringing any proceedings under this Act before an employment tribunal.

In other words, agreements to contract out of rights under the ERA are void.

Agreement void under ERA?

215. However, this provision is modified by the following sub-section which in certain circumstances permits agreements that would otherwise be void because of s 203(1) above. In so far as relevant to this case, s 203(2) provides:

> (2) Section (1) –
>
> (a) ….
>
> (b) ….
>
> (c) …..
>
> (d) ….
>
> (e) does not apply to any agreement to refrain from instituting or continuing proceedings where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996, and
>
> (f) ….
>
> if the conditions regulating compromise agreements under this Act are satisfied in relation to the agreement.

216. For an agreement compromising an employee's rights under the ERA to be valid under s 203(1)(e), therefore, it had to be brokered by an ACAS officer under s 18 of the Employment Tribunals Act 1996. This section provides for a conciliation officer (the ACAS officer) to endeavour to promote a settlement of proceedings which would otherwise come before an employment tribunal. It provides that it applies:

> "in the case of employment tribunal proceedings and claims which could be the subject of employment tribunal proceedings -"

and it goes on to list various Acts under which employees may have rights. This long list does *not* include claims under the SSCBA.

217. Further, s 18 only relates to proceedings before an employment tribunal. While the employment tribunal does have jurisdiction to deal with claims for unlawful deductions and therefore has jurisdiction to hear a claim that SSP that was due was unpaid, it does not have jurisdiction to deal with a dispute over entitlement to SSP for the reasons given in paragraphs 5-11.

218. Both parties were agreed that the agreement between Mr Baker and NHSP was an agreement under s 203(2)(e) and indeed referred to it as a COT 3 agreement as such agreements are commonly referred to as such.

219. But while the COT 3 agreement was (certainly no one suggested otherwise) effective under s 203 ERA to compromise Mr Baker's rights under the ERA, in so far as it related to SSP it was not an agreement made under s 18 Employment Tribunals Act 1996. The ACAS officer had no power to promote the settlement of a claim to entitlement to SSP as it did not arise under the ERA.

220. We say this even though we have already explained at length that Mr Baker's right to SSP arose because he was deemed to have an indefinite contract of employment by virtue of s 86(4) ERA. So indirectly, at least, his claim to SSP rests on the ERA. However, Mr Baker's claim was for SSP and was a claim that could only be determined by this tribunal whether or not our determination would rely on the ERA. Therefore, in so far as the COT 3 related to SSP, it was outside the scope of s 18 Employment Tribunals Act 1996.

221. We note in passing that the ACAS officer would have had power to promote a settlement of a claim for unlawful deduction of wages, which would cover unpaid SSP where entitlement was not in issue, but that does not apply in Mr Baker's case where entitlement was in dispute.

222. However, the COT 3 agreement in so far as it related to SSP was not only outside the scope of s 203(2), it was outside the scope of s 203(1) entirely. S 203(1) did not make that part of the agreement relating to SSP void because that part of the agreement was not excluding or limiting any provision of the ERA or precluding proceedings being brought before the employment tribunal because, as explained in the previous paragraph, the claim was for SSP which did not arise under the ERA nor could it be pursued in the employment tribunal.

223. So in conclusion there is nothing in the ERA which would prevent the parties reaching an agreement on SSP. The appellant's view is that, therefore, as the COT 3 is clearly a contractual agreement with consideration, it is binding between the parties as a matter of contract law. HMRC accept the position as at common law but says that the agreement in so far as it relates to SSP is void by statute.

Agreement void under SSCBA?

224. As we have said, entitlement to SSP is governed by the SSCBA and the SSP Regulations. Section 151(2) of the SSCBA provides so far as relevant:

> "(2) Any agreement shall be void to the extent that it purports –

(a) to exclude, limit or otherwise modify any provision of this Part of this Act, or

(b) ….."

225. The appellant's position is that the COT 3 agreement does not, and does not purport to, "exclude, limit or otherwise modify" the provisions relating to SSP.

Purpose of provision?

226. What does s 151(2) mean? It is clear that were a contract of employment to seek to limit a person's right to SSP which might arise in future during their employment, that provision of the contract would be void under s 151(2).

227. However, does s 151(2) also prevent a person from settling a dispute as to his rights to SSP after the occurrence of the events giving rise to the claimed entitlement? On the one hand, it might be thought it should not be interpreted this way as it would be against public policy to prevent parties reaching out of court settlements. On the other hand, an employee is normally in a weaker bargaining position than the employer so public policy might be that they should not be able to compromise their legal position even in an out of court settlement after the event.

228. By analogy the ERA s 203 makes a distinction between agreements which purport to exclude the ERA (s 203(1)(a)) and agreements which purport to prevent proceedings in the employment tribunal (s 203(1)(b)) (the provision is set out in paragraph 214 above). Is this making a distinction between agreements seeking to limit the employee's rights *before* the employment has commenced and agreements seeking to compromise the employee's rights *after* the employment has ceased? And if so, only s 203(1)(a) could be compared to s 151(2) as the wording is very similar: there is no equivalent to s 203(1)(b) in the SSCBA. Therefore, it could be said, s 151(2) only seeks to make void terms in employment contracts which seek to limit the employee's rights to SSP at the outset and not to prevent an employee entering into an out of court settlement including compromising any rights to SSP that had already accrued.

229. However, s 203(1) could equally be read as making a distinction between a clause which seeks outright to oust rights under the ERA and a clause which does not go this far but which has the same effect by requiring the employee to promise it will never seek to enforce his rights under the ERA. Therefore, perhaps s 203(1)(a) should be read as applying to both "before" and "after" agreements and s 151(2) should be read likewise.

230. So how should we interpret s 151(2)?

Authorities?

231. The appellant brought to our attention the case of *Wilson v Clayton* [2003] EWCA Civ 1657. In that case the employee lodged a claim for unfair dismissal with the employment tribunal. Before the claim was heard he entered into a consent order

with his employer on terms that not only was he reinstated, and paid his lost remuneration, he was also paid a basic award for unfair dismissal. HMRC claimed the basic award was an emolument or benefit of his employment because the consent order gave the employee more than the employment tribunal could have awarded him. The Court of Appeal nevertheless held that the basic award was paid in compromise of a claim for unfair dismissal and was not taxable as a wages or benefit of employment.

232. We find that the Court of Appeal reached no firm conclusion (see paragraph 29) on whether the consent order was void because it made an award greater than one open to the employment tribunal and because its effect was to preclude employees from bringing proceedings. It did not reach a conclusion on this because its purpose was to ascertain whether the money was taxable, and not whether money which had been paid was lawfully due.

233. The case is therefore not really helpful as it contains no clear guidance on how s 203(1) and by analogy s 151(2) should be interpreted.

234. HMRC referred us to the case of *Collison v BBC* 1998] ICR 669. In that case, the applicant commenced working for the BBC in 1978. In 1990 he lodged a claim for unfair dismissal by the BBC, claiming that he had been continuously employed by the BBC since 1978. He settled this dispute in an agreement brokered by ACAS. The terms of this agreement included one that there was no admission by the BBC that the applicant had ever been its employee.

235. At some point he recommenced employment with the BBC until he claimed for unfair dismissal again in 1995. The employment tribunal hearing his claim reached a decision on a preliminary issue holding that the ACAS agreement precluded the applicant from claiming continuous employment prior to 1989 (the events leading to the 1990 agreement). On appeal to the Employment Appeal Tribunal it was held that it was not possible to contract out of ERA rights in relation to continuity of employment and therefore even if the ACAS agreement purported to exclude any right to deemed continuous employment prior to 1989, as a matter of law it could not have this effect.

236. So it is clear from this case that the employee was unable to contract out of his rights to continuous employment *before* the relevant employment (his second employment with the BBC) commenced. But it is no help on whether s 203(1) applies to out of court settlements. (We note that it involved an out of court settlement but it was an out of court settlement entered into *before* the employment giving rise to the claim. The case says nothing on whether an out of court settlement entered into after employment had terminated in 1995 would have been effective.)

Conclusions

237. We were not referred to any authority on the question of whether an out of court settlement after employment had terminated which compromised an employee's claim

to SSP is void under s 151(2). Nor have we found any authority on s 203 which should apply by analogy.

238. There is ambiguity whether S 151(2) was intended to apply only agreements *before* the event or agreements both before and after the event. As there is ambiguity, we should give it a purposive interpretation.

239. But it is difficult to discern what would have been the intention of Parliament. As a matter of policy parties to a dispute ought to be able to reach out of court settlements. On the other hand, employees are normally in a much weaker negotiating position than an employer, and without the safeguard of ACAS conciliation such as applies with disputes under the ERA, it might be thought to be against policy to allow SSP claims to be compromised. On the other hand of course, where the dispute over SSP arises in the context of an ERA dispute, by default, it seems, on the facts of Mr Baker's case, the ACAS conciliation officer may well be involved.

240. On balance, taking into account the fact that Parliament has provided a statutory mechanism for resolution of disputes over entitlement to SSP (as already mentioned the employee can require HMRC to make a decision under the Statutory Sick Pay (Decisions) Regulations 1999, set out at paragraph 6 above), we conclude the public policy in favour of out of court settlements would not have been a major concern when drafting the SSCBA. S 151(2) we think, was intended to be read as applying to any provision affecting anyone's entitlement to SSP whether entered into before or after the entitlement had arisen.

241. We therefore conclude the preliminary issue in favour of Mr Baker. He was entitled to SSP of £235.79 and the COT 3 agreement, as it did not provide for payment of this sum in respect of SSP, was ineffective to settle Mr Baker's entitlement to it. He therefore remains entitled to be paid it by the appellant.

242. We note, though without deciding the point, that as the COT3 had undivided consideration for compromising both those aspects within s 203ERA and the SSP, our finding that it was void in so far as the SSP was concerned, may cast doubts on its overall validity.

243. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DAVID LATHAM
BARBARA MOSEDALE
TRIBUNAL JUDGES

RELEASE DATE: 4 December 2012

Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 on 20 December 2012