Reserved judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Mr O Allen	DSG Retail Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 11th May 2018

EMPLOYMENT JUDGE Coaster

Representation
For the Claimant: in person
For the Respondent: Mr R Bailey (Counsel)

JUDGMENT

The judgment of the Tribunal is that

1) The claimant's claims breach of contract and unlawful deduction from wages fail.
2) The claims are dismissed.

The issues

1. It was agreed by the parties at the commencement of the hearing that the only claims before the Tribunal are for notice pay (breach of contract) and unlawful deduction of wages. Previous allegations of race discrimination were dismissed on withdrawal on 26th October 2017. The claims are defended.

Evidence

2. I was provided with a bundle of documents which the claimant confirmed contained all the documents he would be referring to. Any reference to page numbers in this decision are references to the bundle which I exhibit as R1. The documents included the claimant's employment contract, the respondent's staff

handbook, notes of meetings with the claimant, documents relating to the grievance, investigation and disciplinary procedure.

3. I was provided with witness statements from the claimant and for the respondent, from Mr D Lovatt, Mr A Curatolo, Mr S Atkins and Mr R Bullock. Each adopted their respective witness statement and was cross examined.

4. There were no credibility issues with any of the respondent's witnesses. I found the respondent's witnesses to be honest and straight forward. The claimant was sincere and vehement in his belief that he had been wronged, however, he persisted in taking a contrary view on the content of oral testimony of some witnesses, despite evidence being supported by contemporaneous documents which the claimant immediately claimed were fabricated. The claimant was at times, obstinate, argumentative and contrary. I acknowledge and have taken into account in my findings the difficulties faced by the claimant as a litigant in person in presenting his case.

Findings of fact

5. I have made my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account in my assessment the credibility of witnesses and the consistency of their evidence with surrounding facts. My findings of fact are relevant to the agreed issues.

5.1 The claimant was engaged as a Delivery & Installation Technician based at the respondent's Birmingham Customer Service Centre (CSC) commencing on 22nd November 2016, inter alia on the following terms as set out in the principal statement of terms and conditions of employment:

- Gross annual basic salary: £16,500 per annum paid four-weekly into the claimant's bank or building society account

- Over time: his hours of work would be averaged out over an 8 week period to determine any overtime payments which are paid to the claimant every other four-weekly pay period.

- Hours of work: his contractual hours are 41 per week based on 5 over 8 working pattern.

- Policies procedures and conduct: The respondent had various employment policies, procedures and codes of conduct, in order to comply with legal requirements and in the interests of good employee relations. The employee was required to read these as they were designed to help and guide employees in behaving in a responsible manner.

- Employees were required at all times to comply with company policies, procedures and codes of conduct. Any breach of the Company's policies, procedures and codes of conduct could result in disciplinary action which may result in your dismissal.

- Notice period: the employee is entitled to receive – and is required to give – four weeks' notice during the first four years' continuous service; thereafter, one additional week for each complete years of service to a maximum of twelve' weeks' notice after twelve or more years' continuous service. Specific notice provisions relating to misconduct are contained in the Colleague Handbook.

5.2 The respondent's Colleagues' Handbook at page 243 section 4.19 states the following:

> Excellent customer service, products and processes are vital to our business success but what really sets us apart is the quality of our people their sense of responsibility and involvement, their commitment to teamwork, and their willingness to set the highest standards of conduct in all that they do.

5.3 In the disciplinary procedure on pages 210 to 2212 the respondent sets out the examples of what the respondent considers to be acts of gross misconduct. Particular reference was made in the hearing to the following entries in the list of examples of misconduct which is of such a serious nature that it justifies dismissal without notice:

- abusive or threatening behaviour;
- discrimination (including harassment) against another person on any grounds, including race, colour, nationality or ethnic origin, sex or marital status, change of sex, disability, religion or belief, sexual orientation or age;
- bullying or harassment;
- unauthorised absence from work and/or failure to complete a scheduled shift whilst at work.

In addition, the employment contract refers to gross misconduct being a serious breach of terms & conditions of employment.

5.4 The respondent has a 'job finish policy' which requires the delivery schedule to be completed before the driver and his mate return to depot irrespective of the time the shift would normally finish, but subject always to drivers' hours regulations. Normally a shift would start at 7.00am be finished by 5.30pm.

5.5 The respondent's financial year commence 1st May – 30th April. Each of the 52 weeks of the year is numbered consecutively from week 1 being the first week in the financial year to week 52 being the final week in the financial year.

5.6 Employees are paid every 4 weeks, normally on the Thursday of every 4th week, commencing in week 4, and continuing in week 8, week 12, week 16 etc., providing 13 pay dates in the year.

5.7 The respondent operates two shift patterns. For administrative staff it is a 5 over 7 day shift pattern. For drivers/installation staff it is 5 over 8 day shift pattern.

5.8 The 5 over 8 day pattern requires the employee to work five consecutive shifts, followed by three days rest before starting the shift pattern again. This results in the employee working five consecutive shifts in some weeks and four consecutive shifts.

5.9 By way of clarification, in week 1 the first of five consecutive shifts commences on Sunday followed by three days' rest on Friday, Saturday and Sunday; in week 2 the five consecutive shifts commence on Monday, with Saturday, Sunday and Monday of the following week being three days' rest; in week 3 the five consecutive shifts commence on Tuesday with Saturday of week 2 and Monday and Tuesday of week 3 as three days' rest. In an 8 week block over which the hours an employee has worked on this 5 over 8 shift pattern, the employee will work five consecutive shifts each week in the first three weeks of the 8 week block and four consecutive shifts a week in the last five weeks of the 8 week block, a total of 35 working days.

5.10 Without overtime when all shifts are worked, this amounts to 328 working hours each 8 week block of weeks, averaging to the contractual 41 hours a week.

5.11 If overtime hours above 328 hours in an 8 week block are worked, the overtime is paid at time and a half. If the employee has worked less than 328 hours he is paid nevertheless for 328 hours.

5.12 Additional premiums are paid where an employee works on a scheduled day off or on a bank holiday and when an employee works beyond 8pm.

5.13 Hours for sickness and/or holiday count towards the total of 328 hours in an 8 week block.

5.14 The average length of a standard shift is 9.4 working hours per shift. Additional hours worked due to the 'jobs finish policy' count towards the 328 hours in the 8 week period with extra hours counting as overtime.

5.15 The claimant believed that his was contracted to work 41 hours a week and because of his 5 over 8 shift pattern, he worked an 8 day week, not a 7 day week; therefore he believed that he had to work 41 hours in 5 days. If the claimant is correct that he was working an 8 day week on the 5 over 8 shift pattern, he would average 35.87 hours in a 'normal' 7 day week [41 hours ÷ 8 weeks x 5 shifts] and not 41 hours a week.

5.16 The claimant believed that as he was working an 8 day week, he could finish his shift at 4.15 each day instead of 5.30pm. The claimant then commenced a work to his interpretation of his employment contract.

5.17 The claimant queried his pay on 8th February 2017; he attended a meeting on 22nd February 2017 with a senior manager who explained the respondent's pay structure.

5.18 The claimant raised a grievance on 5th March 2017 about his pay which included allegations of pay being incorrectly calculated for the hours he was working, payment of overtime, being asked to undertake a CRB check twice, his probation period being extended because he had raised a complaint about his pay, and an additional payment of £100 for an extra job he had been asked to do.

5.19 The grievance was heard by Mr Atkins, the Field Operations Manager for the respondent's Northern Division on 18th April 2017. Mr Atkins did not know the claimant. The claimant chose to be unaccompanied.

5.20 The claimant explained to Mr Atkins that he worked a 5 over 8 shift pattern and therefore worked an 8 day week of 41 hours. Mr Atkins took time to explain the respondent's established 5 over 8 shift pattern which amounted to 328 hours in an 8 week period, averaging the contracted 41 hours a week.

5.21 The notes of the grievance meeting show that the claimant agreed with Mr Atkins' explanation of the 5 over 8 shift pattern over an 8 week period.

5.22 The grievance outcome letter dated 17th May 2017 repeated Mr Atkins' explanation of the calculation of hours worked over the 5 over 8 shift pattern over a block of 8 weeks. The grievance was upheld partially due two minor errors in calculation of bank holiday overtime and in no other respect. The grievance outcome was that the claimant had already been paid compensation in excess of the calculation errors.

5.23 The claimant did not appeal the grievance outcome.

5.24 On 3rd June 2017 the claimant ceased work and returned to site at 16.15 before completing his deliveries and not at 17.30 by which time his deliveries should normally have been completed. Two customer deliveries were still on

board. The claimant had not phoned in to the depot to say he was returning early.

5.25 On arrival at the depot, the claimant refused to respond to questions from Shaun Beavon, a First Line Manager at the Birmingham CSC about his early return on his shift without giving advance notice and before completing the customer deliveries allocated to him. The claimant's position was that he had finished work at 4.15pm and that any inquiries of him should be made in company time. Mr Beavon undertook a fact find with the claimant's mate, Mr C Willis, who confirmed that he had worked with the company for 18 years and had always followed the jobs finish policy subject to a 7pm cut off.

5.26 By his own admission, the claimant was operating a work to rule.

5.27 On 4th June 2017 a formal investigation meeting was conducted by Mr Lovatt accompanied by Mr Scott McKenzie taking notes. The first page of the investigation script states:

"You are here today for an investigation meeting. The purpose of this meeting is to:

a) investigate an incident of working to rule finishing at 16.15
b) discuss the allegation that you have brought jobs back putting customers at risk, not working a reasonable amount of overtime"

5.28 The claimant refused to sit down at the investigation meeting unless it was recorded. Mr Lovatt refused to record the meeting. He also informed the claimant that it was not company policy to allow representation at an investigation meeting.

5.29 The claimant accepted that on the previous day he did not complete two customer deliveries. He claimed that he had not needed to request permission to return to site (at 4.15pm) at the end of his work time and that he couldn't' be forced to work overtime (after 4.15pm).

5.30 The claimant asserted that he was contracted to work 41 hours over 8 days and therefore his working day should end earlier than 17.30pm. He claimed that he had been advised by associates in London to "*work to rule*". When Mr Lovatt explained how the 5 over 8 shift pattern and pay provisions worked, the claimant told Mr Lovatt that he was either mistaken or he was "a professional con man". The claimant described Mr Lovatt's explanation of the 5 over 8 shift pattern as "*new bullets*" and "*new ammunition*" for him.

5.31 The claimant commented to Mr Lovatt that " *I am a military man and I like to fight you know."* Mr Lovatt claims that the claimant said words to the effect *"look at the size of you no wonder you' re a bully."* Mr Lovatt understood the comment to be a personal comment about his weight which he found offensive.

5.32 The claimant disputes this interpretation of what he said. He claimed that his reference to Mr Lovatt's weight was in respect of his managerial position in the company.

5.33 The notes of the investigation taken by Mr McKenzie record the words "*is it the size of your body is that why you are a bully."*

5.34 The investigation meeting was terminated by Mr Lovatt. After a short break Mr Lovatt informed the claimant that he was suspended. The 'suspension script' handed to the claimant and signed by him stated that the reasons for suspension were because of an allegation of gross misconduct and of bullying, harassment or discrimination. Additionally it referred to allegations of working to rule and putting customers at risk. The claimant signed and dated the suspension script.

5.35 On Monday 5th June 2017 Mr Lovatt emailed the curtailed investigation meeting notes and suspension script to the HR department. Mr Lovatt considered the claimant's conduct to warrant a disciplinary hearing.

5.36 On 8th June 2017 Mr Curatolo, Site Manager at the Basingstoke CSC, sent to the claimant a letter of invitation to a disciplinary hearing to take place on 14th June 2017. The allegations to be met were:

- Failing to complete a schedule shift whilst at work, where you have left work before the end of your shift time without authorisation or approval to do so.

- Breach of the company equality and diversity policy whereby you made a serious inappropriate and offensive comment to a manager regarding his appearance;

- Threatening behaviour in the workplace, whereby you said to a manager that you are a "fighter".

5.37 It was stated that these allegations, if proved, would be a breach of the claimant's terms and conditions of employment. The claimant was also warned in the letter that the respondent considered the allegations to be potentially gross misconduct which may result in his dismissal without notice.

5.38 The claimant was invited to attend the disciplinary hearing with a companion. He was provided with copies of the investigation and suspension scripts of 4th June 2017, witness statements from Glen Willis and Shaun Beavon and a copy of the disciplinary policy.

5.39 On 8th June 2017 the claimant raised a grievance against Mr Lovatt's conduct of the investigatory meeting on 4th June 2017. He alleged that because

he told Mr Lovatt that he worked his contractual hours ending at 4.15 every day, Mr Lovatt refused to discuss the claimant's contract which the claimant considered to be bullying because of Mr Lovatt's position as a manager in the company and that Mr Lovatt had deliberately tried to twist the claimant's words to his advantage to end the meeting abruptly. He further alleged that Mr Lovatt knew and understood that when the claimant referred to himself as a fighter, he was referring to fighting for his overtime pay from November 2016 to February 2017.

5.40 The claimant also reasserted that if he clocked on at 7.am and clocked out at 4.15pm, after a lunch break that makes it an 8.15 hour shift for 5 shifts which amounted to 41 hours.

5.41 There was some discussion within the respondent on how to deal with the grievance and it was left to be dealt with at the disciplinary hearing.

5.42 At the disciplinary meeting the claimant submitted a lengthy statement. He reiterated his complaints about Mr Lovatt's conduct of the investigation meeting.

5.43 During the disciplinary meeting the claimant explained that on 3rd June 2017 he had started his shift at 7am and had clocked out at 4.30pm, although he had wanted to clock out at 4.15pm. He explained that his work time ran out and he didn't do overtime. He confirmed that he knew that two customers' deliveries were not fulfilled. Mr Curatolo explained to the claimant how the 5 over 8 shift pattern operated. The claimant disagreed as in his view his contract of employment plainly stated that he worked 41 hours in 5 over 8 and that wasn't he being bullied into disregarding his written contract to fulfil the company's own goals?

5.44 Mr Curatolo asked the claimant why he had not informed the site that he was returning without completing his deliveries. The claimant replied that he considered it to be the driver's mate's responsibility to make the phone call.

5.45 Mr Curatolo explained the job finish policy. The claimant did not agree with it. He said he had never seen it.

5.46 The claimant repeated his explanation that his reference to Mr Lovatt's weight was a reference to his seniority, his position, within the company. The claimant also insisted that his reference to being a fighter was a reference to him fighting for his pay.

5.47 Mr Curatolo adjourned the meeting to interview Mr McKenzie personally in an attempt to ascertain precisely what had been said in the investigation meeting. Mr McKenzie was clear that the comment about Mr Lovatt's weight was a reference to his size. He delicately confirmed to Mr Curatolo that Mr

Lovatt was a “larger gentleman”. He stated to Mr Curatolo that the claimant had been difficult and was refusing to answer questions, and the longer the meeting went on the more irritable and aggressive the claimant had become.

5.48 Mr McKenzie was clear that the reference to being a military man and that he liked to fight were made in a threatening way, rather than being a reference to fighting for his pay.

5.49 Mr Curatolo found Mr McKenzie to be an honest witness who took the matter seriously.

5.50 Mr Curatolo readjourned the disciplinary meeting and gave the claimant a copy of the notes of the interview with Mr McKenzie. The claimant alleged that Mr McKenzie’s account was fabricated.

5.51 Mr Curatolo again adjourned the disciplinary hearing to consider the evidence he had heard and the allegations. He found the following:

(i) That the claimant had failed to fulfil his duties by ending his shift early leaving two customer deliveries not complete, and returning to site at 4.15pm.

(ii) That the claimant had failed to notify the site of his early return because he wrongly believed that he was entitled to return earlier than 5.30pm because he was strictly following his own incorrect understanding of his work pattern. He had deflected blame to his co-worker for not notifying the site of his early return even though it was the claimant’s decision.

(iii) That he, Mr Curatolo, was satisfied that the claimant had acted inappropriately in referring to Mr Lovatt’s size in terms of weight rather than seniority in the company.

(iv) That he, Mr Curatolo found the claimant’s insistence that Mr Lovatt and Mr McKenzie had told lies and had fabricated what had been said at the 4th June 2017 meeting was not credible based on the evidence.

(v) The claimant had shown no remorse for his conduct.

5.52 Mr Curatolo understood from the claimant’s statement that the claimant had an historical dispute with his managers over pay and overtime. He was not surprised given, in his view, the claimant’s fundamental misunderstanding of how the company’s working hours operated. Mr Curatolo did not believe that the historical dispute over pay, misconceived as it was, detracted from the seriousness of the claimant’s conduct on 3rd and 4th June 2017.

5.53 Mr Curatolo concluded that the appropriate course of action would be to summarily terminate the claimant's employment by reason of gross misconduct. He reconvened the disciplinary meeting and informed the claimant accordingly Confirmation of Mr Curatolo's decision was sent in a letter dated 14th June 2017. The claimant was informed of his right to appeal.

5.54 The claimant later withdrew his appeal.

Submissions

6. I heard oral submissions from both parties. I took a full note of the submissions which I have re-read and taken them into account in my deliberations and conclusions below. As the claimant is a litigant in person and made oral submissions, I set out below a summary of the relevant submissions he made.

- The way the respondent pays makes me a whole worse off;
- I do 5 over 8 and they pay me for 5/7;
- [*Of the historical dispute*: no mistake was made, it was calculated.
- It is a white collar crime. They got rid of me because I found out what they were doing.]
- I never had a complaint [about being aggressive];
- I did five days over 8 days but the company clocked four days and paid for four days or three days.
- This contract is 5 on 3 off. If you work 8 days and get paid for 7 you are worse off.
- I never got sacked for attitude or aggression – there was never a complaint about that.

7. The Appellant referred to being sacked for whistle blowing. Detriment and /or dismissal for making public interest disclosures were not his pleaded case and I made no further reference to the claimant's submissions on whistleblowing.

Statement of issues and relevant law

8. In respect of breach of contract, did the claimant fundamentally breach the contract of employment by an act of so-called gross misconduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct; if so, did the respondent affirm the contract of employment prior to dismissal?

9. In respect wages allegedly not paid, did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by calculating his pay and overtime on the basis of 5 over 8 meaning five days worked and three days off consecutively, with contractual hours worked and overtime due calculated every 8 weeks.

Conclusions

10. The claimant's claim for notice pay and unlawful deduction from wages depends on whether his interpretation of his employment contract is correct in that a 5 over 8 shift pattern means an 8 day week. If he is wrong, then was his conduct a fundamental breach of his employment contract justifying the respondent's summary termination of his employment contract.

10.1 The claimant accepted in cross examination that all references to a week in his employment contract was a reference to a seven day week. He nevertheless maintained that his contract should have said 5 over 7 not 5 over 8 if the respondent was correct. He was adamant he worked an 8 day week. When it was put to the claimant that even if the working week was 7 days, it was still possible to have a shift pattern of 5 days on and 3 days off. The claimant, agreed but said that was an attempt to swindle him. He said that the company should have made it clear if they wanted to apply a 5 over 8 shift pattern over seven working days. It should have been highlighted to him at the beginning.

10.2 When it was put to the claimant that he had agreed and accepted in the grievance hearing with Mr Atkins the explanation that 5 over 8 was calculated over a seven day week. The claimant replied that it was "white collar fraud". The claimant was adamant that he had to stick to working his hours in five days out of 8 days. The claimant refused to accept any interpretation other than 5 over 8 means five days out of 8 days, meaning an 8 day week.

10.3 I have considered the provisions of the employment contract and also the respondent's custom and practice. The claimant was contractually required to work 41 hours a week. He was also contractually required to work the 5 over 8 shift pattern. It was not a 5 over 8 week. It must be accepted by the respondent, that the contract does not expressly explain that 41 hours a week is averaged over 8 weeks; had it done so, it would have avoided the claimant's misinterpretation, for that is what I find that it is. Had it been explicitly set out in the contract that 41 hours a week is averaged over 8 weeks, as it does for over time, there could be no misinterpretation.

10.4 Over time hours are expressly stated to be averaged out over an 8 week period. It follows therefore that for overtime hours to be calculated as an average over 8 weeks, inevitably the 41 hour week requirement will require the same treatment otherwise the overtime hours could not be calculated.

10.5 The claimant's claim that he worked an 8 day week and that his interpretation is the correct interpretation of his contract is wrong. There is no such period of time as an 8 day week. Had the respondent intended to apply an 8 day week it would have been required to make that departure from the norm of a 7 day week, expressly clear. There was no need for the respondent to

highlight that they were applying a 7 day week as the claimant claimed; it is universally accepted that a week comprises 7 days, not 8.

10.6 The claimant was informed several times orally and in writing how his shift pattern worked. He did not dispute that he had received those explanations. He simply refused to accept them. He obstinately refused to accept that any interpretation but his own was correct.

10.7 I find that the claimant's logic is fundamentally flawed. He was contracted to work 41 hours a week. The shift pattern was 5 over 8 shifts. There is no express provision in the claimant's contract that he works an 8 day week. The claimant's argument therefore requires him to make an attempt to imply a contractual term that the 5 over 8 shifts means that it is worked over an 8 day week, and not a 7 day week.

10.8 In common law a term can only be implied into a contract in the following circumstances:

- The term is necessary in order to give the contract business efficacy; or

- It is the normal custom and practice to include such a term in contracts of that particular kind in this case an employment contract; or

- An intention to include the term is demonstrated by the way in which the contract has been performed; or

- The term is so obvious the parties must have intended it.

10.9 None of those apply to the claimant's employment contract. The term which the claimant wishes to imply does the opposite of giving the contract business efficacy – it does not correspond with other terms in which a week accepted as 7 days is applied would be unworkable.

10.10 It is not the normal custom and practice to operate an 8 day week either in the respondent's business or in the respondent's industry sector. It is the opposite, the normal custom and practice is to apply shifts over a 7 day week even if they overlap into the next week.

10.11 The application of an 8 day week was not demonstrated by the way the contract had been performed, it was the opposite, the respondent consistently and persistently explained how the 5 over 8 shift pattern applied over a 7 day week and an 8 week period.

10.12 The term is not so obvious that the parties must have intended it. The respondent did not at any time act in a way which indicated that they intended an 8 day week to apply.

10.13 In summary, I find that the claimant's argument that his contract required him to work 41 hours in 5 days is fundamentally, flawed and is plainly wrong.

10.14 On the basis of his fundamental misunderstanding of the 5 over 8 shift pattern applied over a week and calculated over 8 weeks, the claimant worked to rule which entailed him cutting short his normal working day. He was working to rule on 3rd June 2017. He said in cross examination he would have continued to work to rule if he had not been dismissed. On 3rd June, in cutting short his working day, he deliberately left two customers without their deliveries. In so doing he put the respondent's reputation at risk.

10.15 The claimant was by his action of working to rule, in serious breach of his employment contract for (i) deliberately not working his contractual hours; and (ii) failing to complete a scheduled shift whilst at work. On this basis alone the respondent was entitled to summarily dismiss the claimant. His conduct damaged the reputation of the respondent and was in breach of the job finish policy.

10.16 I do not accept that the claimant was unaware of the job finish policy as he had stayed out and returned late to the depot to complete deliveries on occasions prior to 3rd June. It is not mitigation that the claimant was mistaken in his belief as to the interpretation of his contract as he had had plenty of opportunity to accept the respondent's repeated explanations of the contractual provision of a 5 over 8 shift pattern and modify his behaviour. He simply refused to accept that he was wrong.

10.17 I then consider the allegations of bullying and harassment, and abusive or threatening behaviour. Mr Lovatt was offended by the claimant's comments about his size/weight. He also found the comments made by the claimant that he was a military man and liked to fight were threatening.

10.18 The claimant denied he had made such comments. He claimed that Mr Lovatt and Mr McKenzie had told lies and had fabricated that to terminate the investigation meeting early. He also denied there had been an investigation meeting as it was a Sunday and Mr Lovatt and Mr McKenzie had been in track suits. He said there was no meeting because it was not recorded and the claimant was not accompanied by a representative. I understand that the claimant means that he did not accept it was a correctly conducted investigation meeting.

10.19 I find that there was a valid investigation meeting in which to a limited extent the claimant participated until Mr Lovatt cut the meeting short. It is only a legal requirement that an employee should be permitted representation where a disciplinary sanction is likely to be levied. No disciplinary sanction was levied by Mr Lovatt; suspension is not a disciplinary sanction.

10.20 I have considered the allegation that Mr Lovatt was fabricating or misinterpreting deliberately what the claimant had said to him in the meeting. I found Mr Lovatt to be a level headed witness who was direct and unhesitating in giving his evidence. His evidence struck me as honest. I also considered the notes of the meeting taken by Mr McKenzie. They were contemporaneous notes made whilst he observed the meeting between Mr Lovatt and the claimant. Under the rules of evidence, where facts are disputed, contemporaneous notes are powerful and persuasive evidence as to what actually happened.

10.21 I did not have the benefit of hearing Mr McKenzie's testimony. However, Mr McKenzie's evidence in the disciplinary hearing was consistent with his notes of the investigatory meeting and with Mr Lovatt's evidence to this hearing. Mr Curatolo found Mr McKenzie to be honest and that he took the proceedings seriously.

10.22 I do not believe that Mr Lovatt or Mr McKenzie fabricated their account of the investigatory meeting. I prefer Mr Lovatt's and Mr Curatolo's evidence to the claimant's evidence and believe their evidence to be a more accurate description of what happened and the claimant's demeanour at the investigation meeting.

10.23 I have considered whether the comments made by the claimant were sufficient to justify summary dismissal. In respect of the comment about Mr Lovatt's weight, and about him being a bully were insolent and insubordinate. It does not fall within harassment because of a protected characteristic under the Equality Act 2010 although clearly it was unwanted conduct which had the effect of causing an offensive environment.

10.24 With regard to the comment about being a military man and liking fighting, together with comment about bullets and ammunition seem to be rather out of context with an investigation meeting which Mr Lovatt conducted professionally and calmly and therefore even though the claimant said these, it seems to be more a statement of bravado with ill-chosen words and an ill chosen analogy, than a real and imminent threat of physical violence. However, Mr Curatolo considered the words to be threatening. He based that on Mr McKenzie's evidence which I did not have he benefit of hearing. I therefore I cannot say it was unreasonable of him to have made this finding.

10.25 Taking the conduct of the claimant towards Mr Lovatt in the context overall of the claimant's conduct on 4th June, I find that the respondent was entitled to terminate his employment summarily for gross misconduct. Even if the claimant's comments to Mr Lovatt singly are insufficient to amount to gross misconduct, taken together, I find that summary dismissal was justified. I have found in any event that the claimant's conduct on 3rd June 2017 was a serious breach of contract and justified summary termination of employment. There was no breach of the claimant's employment contract. The claimant has no claim to notice pay.

10.26 There was no affirmation by the respondent of the claimant's conduct.

10.27 With regard to the claim for unlawful deduction from wages, Mr Bullock agreed at paragraph 34 of his witness statement that the claimant's schedule of dates and hours of work were correct and agreed. However he challenged the claimant's calculation of £1,01.61 (88 hours) of unpaid overtime based on an 8 day week. Mr Bullock produced am amendment to the claimant's schedule in which the claimant's dates and hours of work were recast correctly on a 7 day week with the 5 over 8 shift pattern.

10.27 Mr Bullock illustrated that the claimant had been paid all over time due and that he had been paid for 328 hours per 8 week block despite the occasions when he had worked less than 328 hours. The claimant did not initially challenge Mr Bullock's calculations. When I explained that if the claimant did not challenge Mr Bullock's evidence, it could be accepted as fact. The claimant then declared that he did challenge Mr Bullock's evidence, all of it, but failed to identify where Mr Bullock's calculations were incorrect save that they should have been calculated on an 8 day week.

10.28 Having found that the claimant's insistence that he worked an 8 day week to be misconceived and wrong, I accept Mr Bullock's evidence that the claimant is owed no arrears of wages and find that there has been no deduction from wages.

10.29 In summary, the claimant was not dismissed in breach of contract. In a case of gross misconduct, such as this case, the respondent was entitled to dismiss summarily in accordance with its disciplinary policy. The claimant's claim of unlawful deduction from wages is also not established.

Employment Judge Coaster
30 May 2018