EMPLOYMENT TRIBUNALS

Claimant: Mr D Foden

Respondent: Royal Mail Group Limited

HELD AT: Liverpool **ON:** 16 & 17 April 2018

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr I Taylor, CWU
Respondent: Mr S Peacock, solicitor

JUDGMENT

The judgment of the Tribunal is that.

The claimant did not suffered an unlawful deduction of wages and the claimant's claim brought under S.13 of the Employment Rights Act 1996 as amended is not well-founded and is dismissed.

REASONS

1. By a claim form received on 1 September 2018 the claimant claims unlawful deduction of wages and other payments, in addition to holiday pay. The holiday pay and shift allowance claims were settled by a COT3 immediately before this hearing, and the only claim outstanding is the "incremental pay point progression" claim brought under S.13 of the Employment Rights Act 1996 as amended ("the ERA").

2. The respondent disputed the claimant's claim, maintaining the claimant was not contractually entitled to a promotion that would attract the incremental pay point

progression for which a formal promotion process was required, and relied upon the first instance decision in Mr P Rogers v RMG [25 April 2016] case number: 2302398.

3. The Tribunal heard evidence from the claimant on his own behalf, which it found to be truthful and credible. It also heard evidence on behalf of the respondent from Brian Nightingale, production control manager, and Ray Mulvey, senior business facing HR, which is also found to be truthful, although both had a different view as to whether the position of temporary promoted manager required some form of formal process.

Agreed issues

4. The following issues have been agreed with the parties for the Tribunal to determine;

4.1 Whether not the claimant's wages claim was properly payable? Was there an express contractual right to the wages claimed at the mid point (after 1 year) and the max point (after 2 years) pay points for Grade ML4?

4.2 Was the respondent in breach of the implied term of trust and confidence that gave the claimant the contractual right to be promoted to a TP manager and therefore progress through the minimum/maximum pay points for a Grade M4 rather than remain as a substitute manager at the entry pay point?

4.3 Did the respondent use its discretion when conferring non-contractual benefits irrationally or capriciously?

4.4 If the Tribunal finds a contractual term exists is the wages claim capable of qualification, what was the precise point/date the claimant says he was promoted by virtue of an implied term thereby entitling him to the wages he now claims?

5. The Tribunal was presented with a bundle of documents which it took into account, in additional to the witness statements, a skeleton argument filed on behalf of the respondent and oral closing submissions which have been incorporated into this judgment and reasons requested by the parties at the end of the hearing. Having taken into account the above, the Tribunal has made the following findings of facts:

Facts

6. The claimant was employed by the respondent initially in the role of indoor postman based at the Chester Mail Centre for a period of some 18 years. From 20 July 2009 to 8 February 2010 the claimant was temporarily promoted to a managerial grade before returning to his original operational postal grade "OPG." The temporary promotion resulted in a variation of contract confirming the claimant had accepted the offer made in a letter dated 16 July 2009 and signed by the claimant on 17 July 2009. In the letter dated 17 February 2010 it was confirmed the claimant's terms and conditions of employment "will be varied due to a reversion from long term temporary promotion" that referenced the reversion to grade OPG. The Tribunal concluded on the balance of probabilities the claimant was aware of the process concerning temporary promotions which entailed contractual changes to be

put in writing following an informal process of discussion and agreement. The Tribunal was satisfied the claimant was fully aware of the differences between substitution and temporary promotion.

7. The respondent had available on its intranet accessible to all employees, including the claimant, a non-contractual 'Reward Policy," ("the Policy") that outlined the various aspects of pay which could be offered to employees. The Tribunal accepted the undisputed evidence of Ray Mulvey that the principle of substitution had been in operation within the Royal mail since the 1980's. It is notable that the respondent is unionised; the claimant was represented by the Communication Workers Union. The Reward Policy made it clear that it did not form part of contracts of employment, and provided details and explanations how the reward offerings were made up, paying employees when they were promoted on either a permanent or temporary promotion, and when employees were working in a higher grade referred to as "substitution." The claimant relies on the information provided with regards to substitution as a basis for his claim of unlawful deduction.

8. The Reward Policy provided the following:

8.1 "where an employee of a higher grade is absent from work for any reason, cover will be found, often in the form of an employee 'stepping up' to the higher grade on a temporary basis (substitution). Being a substitute can be a positive opportunity for learning and skill development. Substitution for some grades is covered by collective union agreements."

8.2 The employee who is substituted in the employee's higher grade may be paid at the rate equivalent to the higher grade they are temporarily undertaking.

8.3 With reference to longer term substitution it was provided "if the period of substitution is **expected to last longer than 13 weeks this should be treated** [my emphasis], as a temporary promotion and normal resourcing arrangements should apply. Additionally, if the job being covered is vacant, then temporary promotion is generally appropriate in any event."

9. The claimant also relies on the document titled "Reward Guide for Employees" as a basis of establishing his interpretation of the Reward Policy to the effect that a long-term substitution should always result in temporary promotion. The following information was relied upon by the claimant;

9.1 On the face of the guidance reference was made to where further advice could be obtained via HR services outsourced by the respondent. Within the document temporary promotion is defined as "when an employee's promotion is not substantive. For starting pay (and progression) purposes, the general principle is that the terms and conditions for temporary promotion are identical to a substantive promotion. However, there is no contractual entitlement to retain pay and benefit into the future." The claimant, as a result of his temporary promotion in 2009-2010 had experienced such a pay benefit.

9.2 "Temporary promotions should only be considered if an employee is expected to cover a role for a minimum of 13-weeks. If less than 13 weeks *substitution* should

be considered…if employees are unsure whether temporary promotion is appropriate they should contact HR Services Advice Centre.

9.3 Under the heading 'Payments' it was provided "substitution payments are generally calculated as the difference between the minimum notional basic pay or salary for the higher grade and the employee's current basic pay or salary," and "at the outset, if the period of substitution is expected to last longer than 13-weeks, treat it as temporary promotion and normal resourcing arrangements should apply. Additionally, if the job being covered is vacant then temporary promotion is **generally appropriate** [my emphasis] in any event."

10. Following the claimant's temporary promotion in 2009 to 2010 he reverted and continued to work on the full-time OPG grade for the duration of his employment to date.

11. In January 2012 the claimant agreed to "step up" and substitute as a manager on the weekend shift under the respondent's Policy. It is not disputed the manager he was covering went to work on another project, which the claimant found out after the event ran for some 12-months. The original contract hours for the position was 22 hours, although these were increased by the respondent who provided duties on a Friday and Monday to ensure the claimant retained his full-time hours. The undisputed evidence before the Tribunal was that during the initial period of substitution the claimant worked exclusively as a substitute, covering a number of other managers' duties in addition to the weekend role.

12. It was accepted by the claimant in cross-examination that his experience as a substitute manager was career enhancing and that was one of the objectives for him; the claimant ambitious to secure a permanent managerial role working weekends.

13. When the claimant accepted the offer of substitution he did not know how long it would last for, and was unclear as to how long the project was expected to last. There was no evidence before the Tribunal that as at the outset of the substitution the manager in question had agreed to as 12-month project or not. There was no evidence before the Tribunal of any expectation on the part of the parties that the manager's absence would be longer than 13-weeks. It has since transpired the manager took part in two 12-month projects before leaving the business in 2014, whereupon the part-time 22 hour role became vacant but was not advertised.

14. On some date in late 2012 another manager agreed to change his working hours in order to accommodate the claimant who wanted to work on a Monday, and the 4-hours worked by the claimant on a Friday ceased. Over a period of time the claimant's hours changed to Saturday – Sunday, 06:00 to 20:00 and Monday 14:00 to 02:00 totalling 40 hours which suited the claimant for personal reasons, so much so, that when managerial vacancies were advertised he did not apply for them. There is no dispute the claimant was happy with his working arrangements; he had the temporary responsibility of a manager, was gaining experience in a managerial role, earning a higher rate of pay albeit at the minimum rate for the position, on hours that were compatible with his private life. Had the claimant came to the view his pay should be increased in accordance with that of a temporary manager as opposed to a substitute manager he could have stepped down. It was submitted by Mr Taylor

that stepping down was unrealistic and could potentially be career damaging. The Tribunal accepted theoretically this could always be a possibility, however, there was no suggestion the claimant has ever considered stepping down. He would not because the role and hours were advantageous to him, and there was no satisfactory evidence the claimant's career would have been damaged; he was an experienced manager and would no doubt be well placed had he chosen to apply for managerial vacancies and the evidence given on behalf of the respondent was credible on this point.

15. An issue arose as to whether the claimant covered different roles such as MS2 or ML3 grade; the respondent's case was that he had periods of substitution for one of two days involving different managers and therefore it cannot be said he had been substituted exclusively into the ML4 weekend duty. The claimant in oral evidence questioned the validity of a 12-page print-out showing his substitutions over a period of time from 4 November 2011 to 7 September 2017. The respondent's witnesses were not cross-examined on this document in any depth, and nor was the Tribunal taken to it in any detail. On the balance of probabilities the Tribunal found as a matter of logic between January 2012 and late 2012 the claimant worked on a number of managerial roles as substitute together with his continuous weekend duties which remained unchanged. By late 2012 the claimant worked the weekend and the Monday continuously to date, and thereafter not covered other manager roles although it was always open to him to be substituted across the business if he was so inclined.

16. It is notable at the time the claimant accepted the substitution role in January 2012 his expectation and that of the respondent was that he would substitute different roles. It cannot be said the claimant had any expectation of a temporary manager's position at the time, and he was happy with the status quo.

17. The undisputed evidence before the Tribunal from Brian Nightingale and Ray Mulvey was that the weekend position of 22-hours that had become vacant in 2012 remained so for two reasons; the first was that parties were content with the claimant's substitution as this benefitted both. The second reason related to the various re-organisations and proposed changes to the managerial template at Chester Mail Centre over the period when the claimant has worked in the substitution role, not least the closing down of the Shrewsbury Centre and impact on the number of managers that could relocate to Chester. A second reorganisation continues to date.

18. It is accepted by the parties during the time the claimant has been substituting he has received the correct rate of pay in line with his substitution roles. What is in dispute is the claimant's view that he was or should have been made a temporary manager as opposed to substitution and thus entitled to annual incremental pay increases and/or bonuses a temporary promoted or substantive manager would receive under the respondent's pay scales.

19. The claimant raised a grievance having sought legal advice on another matter in January 2017 on the basis that he had worked over the week-end shift as a substitute for 6-years without the benefit of incremental wages and allowances a temporary manager would have received. In his witness statement the claimant

stated had the weekend role been advertised, he would have applied for it and was not given the opportunity to do so. Under cross-examination he confirmed given the role was vacant he should have been temporarily promoted into the ML4 grade as he had been carrying out the role on the bottom grade for 6 years.

20. The claimant suggested he had been treated differently to other employees by the vacant role not being advertised, and others had been promoted with no process being followed. There was no satisfactory evidence of this; the claimant did not name the employees allegedly promoted out of the respondent's recruitment/promotion process and the evidence before the Tribunal was that there six employees acting as substitutions including the claimant. The details surrounding their substitution was unknown by the claimant and respondent's witnesses.

21. Given the process followed by the claimant in respect of his temporary promotion as manager in 2009 and the evidence of Ray Mulvey and Brian Nightingale, the Tribunal accepts on balance a temporary manager cannot be put into post without any process taking place, not least an application following a decision by the respondent to seek a temporary manager, and there is no date when the claimant could have slotted into a temporary manager position so as to crystallise the unlawful deduction claim. In oral evidence the claimant clarified the weekend work suited his lifestyle and he was on a "hope or understanding that the job would be advertised, and I'd apply and hope to get it." This is the nutshell is the claimant's case, the respondent having failed to temporarily promote him after 13-weeks in the substitute role or in the alternative, after 6years in the role.

22. In closing submissions Mr Taylor stated that the claimant should have been the temporary manager from January 2012 when the weekend post became vacant, and this was the date the unlawful deduction claim crystallised. However, this cannot be the case as the manager in question left the business in September 2014 according to the claimant's evidence, and theoretically given the fact the claimant was substituting that role, the manager could have returned to it in January 2012.

<u>Law</u>

23. Under part II of the Employment Rights Act 1996 (ERA) the general prohibition on deductions is set out. S.13(1) ERA states that: 'An employer shall not make a deduction from wages of a worker employed by him.' This prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction — S.13(1)(a) and (b).

24. The claimant, who remains employed, cannot bring a contractual claim under S.3 ETA as this can only be brought if it arises or is outstanding on the termination of employment.

25. Section 13(3) provides that where the total amount of wages paid on any occasion by the employer to the worker is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purpose of this Part as a deduction made by the employer from the worker's wages on that occasion.

26. The determination of what is 'properly payable' is relevant in this case. The approach Tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT. It must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion and this requires consideration of all the relevant terms of the contract, including any implied terms (which includes the implied term of mutual trust and confidence relied upon by the claimant) — Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714, CA.

27. The payment in question must be capable of quantification in order to constitute wages properly payable under S.13(3). In Delaney v Staples (t/a De Montfort Recruitment) [1992] ICR 483, HL, one of the reasons the House of Lords gave for deciding that a payment in lieu of wages does not constitute wages under S.27(1) ERA was that it is impossible to quantify the amount properly payable at the time of dismissal.

28. The principle that the amount payable must be capable of quantification was applied by the Court of Appeal in Coors Brewers Ltd v Adcock and ors [2007] ICR 983, CA, where it held that claimants could not rely on Part II of the ERA to claim losses resulting from their employer's alleged failure to introduce a new incentive scheme that it had promised. Since there were a number of schemes that could have been chosen using different combinations of targets and incentives, it would be impossible to say what amount would have been payable under the scheme. The payment due was therefore incapable of quantification and there was no date on which the claimants could say that the employer had made an unlawful deduction of a quantified amount from their wages, as the ERA requires. The claims were really damages claims for the loss of the chance that the claimants would have received some benefit if an appropriate scheme had been in place. The task of measuring the loss of chance was outside the jurisdiction of the tribunal because the claimants remained employed. Referring to the House of Lords' decision in the Delaney case, Lord Justice Wall (who gave the leading judgment of the Court) recognised that for there to be an unlawful deductions claim under the ERA, the complaint by the employee must be that he or she has not been paid an identified sum. There may be a dispute as to what that sum is and a number of possible defences raised requiring findings of fact by the tribunal, but the underlying premise on which such a claim is brought is that the employee is owed a specific sum in wages. In his view, Part II of the ERA is essentially designed for straightforward claims where the employee can point to a quantified loss. It was designed to be a swift and summary procedure.

Conclusion applying the law to the facts

29. With reference to the first issue, namely, whether not the claimant's wages claim was properly payable, the Tribunal found there was no express contractual right to the wages claimed at the mid point (after 1 year) and the max point (after 2 years) pay points for Grade ML4. The claimant was entitled to the minimum pay at the Grade ML4 by virtue of the fact he was at all times working as a substitute manager and not a temporary promoted manager or substantive manager. The substitute manager is contractually entitled to be paid at the entry pay point of the

scale for the roles he covered, whilst remaining at Grade OPG throughout the substitution period and this is what happened to the claimant.

30. With reference to the second issue, namely, was the respondent in breach of the implied term of trust and confidence that gave the claimant the contractual right to be promoted to a TP manager and therefore progress through the minimum/maximum pay points for a Grade M4 rather than remain as a substitute manager at the entry pay point, the Tribunal found that it was not. This was the key issue between the parties, and the Tribunal found there was no satisfactory evidence before it from which a conclusion could be drawn that the respondent either did not automatically promote the claimant on some date over a 6 year period (possibly before the expiry of 13-weeks from commencement or when the post became vacant) or advertise the vacancy.

31. Mr Taylor submitted the fist instance decision made in <u>Rogers</u> above can be differentiated from the facts in Mr Foden's case. Mr Rogers's substitution was not in relation to a vacancy and he covered a number of different roles at different times. In the claimant's case there is an identifiable vacancy "starting at the point they knew there was a vacancy and the Policy was unambiguous on this." The Tribunal had considerable sympathy for the claimant and acknowledged that Mr Taylor may have moral point to make, but this does not necessarily translate into a contractual right. At the commencement of the claimant's substitution neither he nor the respondent was aware the position would become vacant in the future; the claimant's evidence was that he did not know how long the period would be and did not ask the question. The claimant was also unclear as to when he says he should have been promoted; upon the expiry of the 13-weeks or when the position became vacant are two of the possible options.

32. The judgment and reasons in <u>Rogers</u> whilst not binding on the Tribunal are relied upon by the respondent. This Tribunal agrees with the observations on mutual trust and confidence reflects the law; Mr Taylor made no submissions to the contrary.

33. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of <u>Paul Buckland V Bournemouth University Higher Education Corporation</u> [2010] EWCA Civ 121, and this is an objective test.

34. The House of Lords in <u>Malik v Bank of Credit; Mahmud v Bank of Credit</u> [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes

place. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he see fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise. Lord Steyn's comment is particularly relevant in Mr Foden's claim as he is essentially complaining about how the respondent failed to advertise the vacant position thus preventing him from applying and taking part in a competitive process. The claimant had no guarantee in securing the position of substantive manager, and in reality his complaint concerns a lost of a chance caused by the respondent's management of vacancies for which the Tribunal has received an explanation involving re-organisations.

35. It is not disputed by the parties that the test is a "severe one" as set out in Elsevier v Munro [2014] IRLR 766 HC and Gogay v Herefordshire County Council [2000] IRLR 703 CA.

36. It is not disputed the claimant's contract of employment is the sovereign document and the claimant on the face of it has not suffered an unlawful deduction of wages.

37. As set out in the findings of fact above, there was no satisfactory evidence (apart from the claimant's say so which was not corroborated by any evidence whatsoever), that had the claimant declined the offer of substitution either at the outset or during the period he worked, he would have been adversely treated. As in the case of Mr Rogers, the claimant had a genuine degree of freedom of choice, and it suited him very well to accept and continue working in the substitute position. Objectively, this cannot amount to a breach of the implied term of trust and confidence as set out in the test provided in Malik. As in the case of Mr Rogers the claimant had made the decision not to apply for other vacant substantive posts on the basis that his working hours suited the domestic arrangements. Further, it was recognised within the respondent's employees including the claimant , that acting up enhanced his opportunity for promotion, and as he had taken on the role of temporary manager in the past, the experience he could offer was considerable.

38. Mr Rogers and the claimant put forward identical arguments concerning the respondent being required to promote without adopting any formal process. In the case of Mr Rogers there was no vacant substantive post; and as Mr Taylor correctly submitted, this fact differentiated both cases. However, this does not assist the claimant. When he accepted the substitution manager role the position was not vacant and he had no idea how long the substitution would last. The Reward Policy expressly provides "if the period of substitution is expected to last **longer than 13 weeks this should be treated** [my emphasis] as a temporary promotion and normal resourcing arrangements should apply. A common sense interpretation of "should be" suggests that this is a recommendation as opposed to an instruction such as "will be" where there may be less room for doubt. This is borne out by the complete lack

of evidence to the effect that the respondent did not promote through time served alone, but carried out a process ranging from assessing whether the role required the recruitment of a graded manger as opposed to acting up manager or substantive manager that entailed all of the considerations of a normal recruitment and managing the business.

39. There is a difference between a substitution manager, acting up manger and a substantive manager that involved different degrees of resourcing process and there was no guarantee, had the claimant applied for either a temporary or substantive promotion he would have been the only applicant, and on competition against others, successful. The Tribunal finds objectively, the respondent's failure to automatically promote the claimant into the position of acting and/or substantive manager does not amount to a breach of the implied term of trust and confidence.

40. In contrast to the claimant's position, Mr Rogers was found to have substituted in a number of different roles from 2009 until November 2014 when he commenced substituting in Dover thereon in with the result that he was 2 years in past and not 6. As Mr Taylor correctly submitted, this fact also differentiated both cases but in the Tribunal's view did not assist the claimant.

41. There was no evidence before the Tribunal that the parties had in mind the substitution would last more than 13-weeks, and the Tribunal preferred Mr Peacock's submission that the fact the substitution went on for longer than 13-weeks was not a breach of the implied term of trust and confidence. The Reward Policy relied upon by the claimant does not have contractual effect, and there was no obligation to automatically promote the claimant. As indicated above, the Reward Guide when given its natural and commonsense meaning, provides that the parties must have known at the outset the substitution period was expected to last longer than 13-weeks and they did not. The fact the position became vacant in 2012 is by the way, as the claimant is unable to establish had the respondent taken the business decision to advertise the vacancy there was no guarantee he would have succeeded in his application. There is no certainty in indentifying a place in time when the alleged break of the implied term took place, as the claimant's alleged entitlement to the wages is contingent upon a number of events occurring, not least a successful application to any promotion and there was insufficient evidence to conclude the respondent acted without reasonable cause in a manner calculated or likely to destroy or seriously damage trust and confidence. The non-contractual substitution process had been in place since the 1980's in a business involving unions and collective agreements. Employees had access via the intranet to the respondent's written policies and procedures including the Reward Policy. The claimant had volunteered to step up to the role of substitution manager because it benefitted him, and it was open to him to decline or terminate and revert to his original pay grade on less favourable hours ha he been so inclined.

Irrational, capricious or otherwise Wednesday unreasonable exercise of discretion

42. The Tribunal was referred to the principles set out in Braganza v BP Shipping [2015] 1 WLR 1661 UKSC and the definition given by Lord Diplock in Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374- "By irrationality I mean what can now be succinctly referred to as 'Wednesbury unreasonableness"…it

applies to a decision which is so outrageous in defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at" (para.23).

43. In Clarke v Nomura International plc [2000] at paragraph 40 Burton J stated "the right test is one of irrationality or perversity i.e. that no reasonable employer would have exercised his direction in that way."

44. The claimant argues that he was treated differently from other colleagues, the suggestion being the respondent's treatment of him was unreasonable i.e. one that no other employer could have arrived at. The alleged discretion exercise appears, as was in the case of Mr Rogers, to relate to whether to place the claimant into a promotion i.e. acting manager/substantive manager, and pay him the equivalent of either role. The claimant's argument was not entirely clear, his case appearing to turn on the reliance on the Policy and Guide referred to above. The problem for the claimant is the lack of evidence of any other employee being treated differently to him and the uncontroversial fact that at least 6 other employees were acting up as substitute managers.

45. The Tribunal is not entitled to substitute its view of what is a reasonable decision for that of the person who is charged with making the decision; it conducts a rationality review and it found the claimant was not treated irrationally or capriciously in contrast to other employees.

46. It was submitted the claimant was not aware of the relevant polices when he accepted the position of substitute manager, which the Tribunal found surprising given the length of time he had been employed, the fact that he had worked in the position of temporary manager in the past on a different rate of pay, had access to union advice and the intranet. Taking the claimant's case at its highest, and if the Tribunal were to accept he had no knowledge, this would not result in a finding that the respondent had acted so irrationality by not providing the claimant with a hard copy of the Policy, so as to bring it within a Wednesbury unreasonable of discretion. Nothing was hidden away from the claimant; he could have accessed the information had he addressed his mind to it. He did not being satisfied with the substitute position, and only questioned it when according to his statement, he queried why a weekend allowance was not being paid in January 2017 many years after.

47. In conclusion, the claimant has not demonstrated that the respondent's actions were capricious, arbitrary or Wednesbury unreasonable for the reasons set out above and the high hurdle required to establish the alleged breach of the implied term of trust and confidence has not been met.

Officious bystander/business efficacy test

48. With reference to the third issue, namely, did the respondent use its discretion when conferring non-contractual benefits irrationally or capriciously the Tribunal found that it did not for the reasons set out above.

49. The law set out at paragraphs 93 onwards of Rogers has not been questioned by Mr Taylor and is relied upon by the respondent. In short, a term will only be

implied where (i) it is reasonable and equitable; (ii) necessary to give business efficacy to the contract so the term will not be implied if the contract is effective without it, (iii) it is so obvious that "it goes without saying", (iv) it is capable of clear expression; and (v) it must not contradict any express term of the contract – Marks and Spencer plc v BPN Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72.

50. As in the case of Mr Rogers, the implied term relied upon by the claimant is that substitution is a temporary measure that should not go beyond 13 weeks. The Tribunal does not find the Policy can be construed in this way on a common sense and natural interpretation of the words "if the period of substitution **is expected to last longer than 13 weeks**" and "additionally, if the job being covered is vacant" refers to the parties' expectation at the outset. In the claimant's case there was no expectation the role would continue beyond 13 weeks, and there was not a vacancy at the time. Neither the Policy nor Guide can be construed to read that substitution cannot go beyond 13 weeks, the rationale behind substitution to provide cover as and when required; the business necessity. It does not state that after a period of 13-weeks an employee should be promoted either temporarily or permanently and this was not in the claimant's mind or expectation at the time or for a number of years until January 2017.

51. The claimant's contract of employment is effective without the implied term that substitution should not go beyond 13-weeks, and it is not so obvious a term so as to be "so obvious; it goes without saying." The test set out in Marks and Spencer plc cited above has not been met. It would be "tempting but wrong" for the Tribunal to take into account the benefit of hindsight i.e. that the manager was absent on two 12-month projects before leaving the business whereupon the part-time role became vacant. There was no evidence the parties had foreseen this possibility; the claimant did not know if he was going to be in situ for one week, thirteen weeks or longer and as it transpired he worked for 6 years and continuing on the basis that it suited him very well. The contract did not lack commercial or practical coherence if considered from the position of an officious bystander as opposed to the claimant, who believed it was only right and fair having been in the job for so long that he was promoted. The officious bystander or business efficacy test does not operate so as to create an implied term that the claimant should be promoted either on reaching the period of 13 weeks in post as substitute manager, or when the position became vacant.

The claimant's legal entitlement to liquidated/unliquidated damages.

52. Finally, with reference to the fourth and last issue, namely, if the Tribunal finds a contractual term exists is the wages claim capable of qualification, the Tribunal found (a) no contractual term existed, and (b) in the alternative if we are wrong on this point, the claimant was unable to point to a precise point/date in which he says he was promoted by virtue of an implied term thereby entitling him to the wages he now claims. The payments were conditional on the vacancy being advertised and the claimant succeeding in any application in respect of the substantive managerial position. In respect of the promotion to acting manager, it was conditional on a business decision being made that the post was suitable for the respondent's normal recourcing arrangements to be made. The respondent had come to the decision that

it was not as a result of the re-organisations that may have resulted in existing managers taking up the post and the claimant reverting to his original grade.

53. It has not been possible for the claimant to point to a date when he was promoted and in accordance with Delaney cited above, his claim for an incremental pay point progression does not constitute a claim for wages under S.27(1) ERA was that it is impossible to quantify the amount properly payable. It would be impossible to say, on the balance of probabilities, when the amount would have been payable had the contractual term for pay on the same terms as a temporary and/or substantive manger existed. The payment that would have been due was incapable of quantification as there was no date on which the claimant could say the respondent had made an unlawful deduction of a quantified amount from his wages, as the ERA requires. The Tribunal agreed with Mr Peacock's submission that the claim was really damages claims for the loss of the chance that the claimant would have received some benefit if the respondent had made the decision to trigger the resourcing process and decide that an appropriately graded manager should be recruited as opposed to a substitute manager.

54. .The task of measuring the loss of chance is outside the jurisdiction of the tribunal because the claimant remains employed. Lord Justice Wall in Delaney recognised Part II of the ERA is essentially designed for straightforward claims where the employee can point to a quantified loss. It was designed to be a swift and summary procedure.

55. In conclusion, the claimant did not suffered an unlawful deduction of wages and the claimant's claim brought under S.13 of the Employment Rights Act 1996 as amended is not well-founded and is dismissed.

____

17.4.18 Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON

24 April 2018

FOR THE SECRETARY OF THE TRIBUNALS