EMPLOYMENT TRIBUNALS

Claimant: Mr B Ogden

Respondent: Liverpool City Council

HELD AT: Liverpool **ON:** 6 December 2018

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: Mr D Tolcher, solicitor
Respondent: Mr T Kenward, counsel

JUDGMENT having been sent to the parties on 11 December 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claimant is a serving employee of the respondent. From a date unknown to me (but which does not particularly matter) until 1 February 2018 he was employed by an outsourcing company to which I will refer as "Amey". Prior to September 2016 he held the role of Network Manager. In September 2016 he was promoted on a temporary basis to Interim Principal Operations Manager. Depending on whose case one accepts, he either remained in the interim role, or it was made permanent, with the title of Principal Operations Manager. Both as an interim, and (allegedly) as a substantive role-holder, he received an artificial remuneration package made up of basic salary and fictitious overtime.
2. On 1 February 2018, whilst he held one or other of these roles, his employment transferred to the respondent under regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Shortly after the transfer, the respondent stopped paying the overtime element of his remuneration. The claimant raised a grievance, which was upheld in relation to his overtime pay. Almost immediately afterwards, however, the respondent

indicated to the claimant that he would no longer be employed in the role of Interim Principal Operations Manager and that he would revert to the appropriate salary for a Network Manager.

3. This claim does not impugn the respondent's decision to alter his role in this way. The claimant argues, however, that the change in his role triggered a contractual entitlement to pay protection. According to the claimant, every time the respondent paid his salary without the pay protection element, he received less than the wages properly payable to him.

The claim and the issues

4. The issues for determination in this claim have altered considerably, not just during the lifetime of the claim, but also during the final hearing itself. Shifting sands are a commonly-encountered problem in employment tribunal hearings. Departures from the claim and response are capable of causing real unfairness to respondents and claimants respectively. This is why there is an important body of case law dealing with applications to amend. It is therefore important that, before I identify the issues in their final form, I explain how they came to be defined in that way.

5. By a claim form presented on 17 May 2018, the claimant raised a single complaint of unlawful deduction from wages. His claim form complained of the failure to pay his weekly overtime and also complained about a missing 10% bonus. (By this time, his grievance had been heard. He had been retrospectively awarded the overtime payments but his grievance in relation to bonus had not been upheld.)

6. The respondent's ET3 response engaged with the claim as it was then formulated. Matters had progressed by this stage. The claimant had learned about the cessation of the Principal Operations Manager role (whether interim or substantive) and had raised an internal grievance claiming pay protection. Although strictly speaking it was not necessary to do so, the respondent anticipated that this grievance might feature in the claim and provided an outline of the respondent's position.

7. In advance of the final hearing the claimant provided a schedule of loss. The schedule made clear that the claim was being advanced solely on the basis of pay protection.

8. At the start of the hearing, we spent some time identifying the issues. Mr Kenward, representing the respondent, very sensibly indicated that he would not object to the claimant amending his claim so as to withdraw his claim for unpaid bonus and to argue that he was entitled to pay protection.

9. Mr Tolcher then began to explain how he put the claimant's case. He began by distilling the issues to one beguilingly simple question: was the claimant's Principal Operations Manager role interim or substantive? Tempted as I was to approach the hearing in this way, I resisted the temptation, because it still begged the question of how, as a "substantive" role-holder, the claimant became contractually entitled to pay protection.

10. Following further discussion, it emerged that claimant's principal contention was that his entitlement to pay protection arose from a collective agreement dated 15 August 2013 between Amey and the Unite trade union. The collective agreement

was headed, "Resolution agreement". The relevant pay protection provisions were set out in paragraph 4 of an annex headed, "Security of Employment Agreement". Paragraph 4 began:

> "Any member of staff who is redeployed into a post with a lower salary will have their previous salary protected…"

11. If the relevant provisions were incorporated into the claimant's contract of employment, those terms would have transferred to the respondent under TUPE.

12. For this strand of the claimant's case, the issues for determination were:

    12.1. Whether the relevant provisions of the Resolution Agreement were incorporated into the claimant's employment; and

    12.2. Whether the claimant had been "redeployed into a post with a lower salary" within the meaning of paragraph 4.

13. The claimant's alternative case was that he was entitled to pay protection under the respondent's own Pay Protection Policy, updated on 18 January 2017.

14. Paragraph 4.1 of the Pay Protection Policy provided (with original emphasis):

> "Where an employee is redeployed or assigned to a lower graded post under the Council's **Service Review Policy** or **Redeployment Policy,** the employee's pay will be protected…"

15. It was common ground that the Pay Protection Policy was incorporated into the claimant's contract. According to the parties, the issue was whether or not the claimant was "within scope". (I took this to mean that I had to decide whether or not the claimant satisfied the express conditions for entitlement to pay protection). The parties did not break down the issue any further than that.

16. Before I began to hear evidence, therefore, there remained an important point still to be clarified. Was the claimant alleging that his redeployment (or assignment) had occurred under the Service Review Policy or the Redeployment Policy or both? As it turned out, this was a question of some significance. The respondent had clearly expected the claimant to argue that he had been redeployed under the Redeployment Policy. They had included the Redeployment Policy in the bundle. By contrast, the Service Review Policy was not.

17. Despite the unanswered questions about the claimant's alternative formulation of his case, Mr Kenward clearly anticipated the possible lines of argument and sought to elicit relevant evidence from the claimant in cross-examination. He asked the claimant whether he had been placed at risk of redundancy, to which the claimant answered that he had not. He put to the claimant that nobody had told him that there was a service review and that his job might be changed as a result. The claimant agreed with that proposition.

18. For the respondent, Mr Davies said that no service review had been carried out in relation to the claimant's role.

19. At the beginning of the parties' closing submissions, Mr Tolcher said that he was "not making a major play for asserting that the Amey Policy was incorporated". He fell back on the respondent's Pay Protection Policy. Mr Kenward tailored his submissions accordingly. He reminded me of the oral evidence on the question of whether there had been a service review.

20. I did not always find Mr Tolcher's submissions easy to follow. One argument that he advanced was that the tribunal should not get "bogged down" in the procedures of local authorities and instead should look at their "spirit". He then made a submission which I understood to mean that, for the first time, the claimant was advancing a positive case that his alleged redeployment (or assignment) had been under the Service Review Policy. When I asked Mr Tolcher whether that was his positive case, he replied, "It would have been impractical to do a service review around one post. So we are talking about redeployment."

21. In a characteristic display of fairness, Mr Kenward informed the tribunal that he had sought copies of the Service Review Policy and offered to have them placed in the bundle. I agreed.

22. Once he had read the policy, Mr Tolcher confirmed that he was contending that the redeployment had taken place under both policies.

23. I gave the parties the opportunity to make further submissions. Mr Kenward reminded me of the oral evidence of the claimant and Mr Davies. Mr Tolcher countered by saying:

> "There was a loss of a job. It would have triggered a service review. The job he was doing at the grade he was doing no longer existed. It was a change in the structure. If we were in the position that I posit it would have triggered a service review. It could have meant that a situation was put at risk. That would have triggered the redeployment policy."

24. By the time the parties' submissions had finally ended, what I had to consider was:

    24.1. whether the claimant had been redeployed or assigned to a lower-graded post (it being common ground that if the claimant's Principal Operations Manager role was only temporary, his reversion to his substantive role would not be redeployment or assignment);

    24.2. whether that redeployment (or assignment) had been under the Redeployment Policy;

    24.3. whether the claimant ought to be permitted to argue that, additionally or alternatively, his redeployment (or assignment) had been under the Service Review Policy; and

    24.4. if so, whether that argument was correct on its merits.

Evidence

25. I heard oral evidence from the claimant on his own behalf. The respondent called Ms Black and Mr Davies as witnesses.

26. I considered documents in an agreed bundle which I marked CR1. As I have already observed, the bundle was expanded at a late stage by the inclusion of the Service Review Policy.

27. Amongst the documents in the bundle were e-mails from Ms Deborah Johnson and Mr Mark Jones. The claimant relied on the e-mails as evidence of the truth of what was stated in them. Here I had to be careful. Neither Ms Johnson nor Mr Jones attended the tribunal to answer questions. Inevitably I had to consider the impact of their absence on the weight that I could attach to their evidence. Mr

Kenward had no opportunity to test their evidence. In the end, I believed that I could still treat the assertions in those e-mails as being reliable. This was because:

27.1. they described events that were likely to be within their own personal knowledge,

27.2. they were uncontradicted by oral evidence,

27.3. their e-mails were sent in direct response to enquiries from the respondent, rather than from the claimant,

27.4. they did not appear to have any particular axe to grind, having no further responsibility either for the highways contract or for the claimant, and

27.5. I could not find any other reason why Ms Johnson or Mr Jones would have wanted to lie.

28. During the course of the respondent's witnesses' evidence, Mr Tolcher attempted to ask numerous questions about the grievance procedures and about the thought processes of the decision-makers. From time to time I questioned their relevance on my own initiative. Mr Kenward also raised objections on the grounds of relevance. Mr Tolcher was unable to explain to me how these matters were relevant to the issues I had to decide. I therefore refused to allow him to persist with asking those questions.

Facts

29. The respondent is a statutory highway authority. For a number of years until 1 February 2018, Amey provided highway maintenance services under a contract with the respondent. Amey's correct title may have been Amey Services Limited or Amey LG Limited, but nothing turns on the difference.

30. At all relevant times before September 2016 the claimant was employed by Amey as a Network Manager. The salary for that role, at the times with which this claim is concerned, was £43,820.87. He was not given a statutory statement of terms of employment. There is no evidence about what his duties were.

31. On 1 September 2016 the claimant was given a temporary promotion. The new role was Principal Operations Manager.

32. At the time of the claimant's promotion, Amey's management operated a freeze on recruiting into new roles. The claimant could not simply be promoted to a new substantive role and receive a higher salary. To circumvent this difficulty, an artificial remuneration package was devised to mask his promotion. His basic salary remained the going rate for the Network Manager, but it was supplemented by seven hours' pay per week to bridge the gap between the Network Manager's salary and that of the Principal Operations Manager. The extra seven hours' pay was described in his pay statements as "overtime". That description was false. As the claimant (and presumably his manager) knew, no overtime was in fact worked. But anyone who did not know of this arrangement, and was taking an interest in whether the recruitment freeze had been observed, would look at the basic salary on his pay slips and presume that it had remained unchanged.

33. The misleading structure of his pay package had little or no practical significance for the claimant. No other benefits (such as holiday pay or employer pension

contributions), distinguished between basic pay and overtime pay. The claimant did not mind what his pay was called; it was the overall amount that interested him.

34. The claimant's role appeared in an organisation chart in October 2016 under the role title, "Interim Principal Operations Manager". His e-mail signatures in October 2016 also included the word, "Interim" in his role title.

35. On 25 October 2016 a written explanation was provided for the overtime payments. The email stated:

> "Given the 'Fit for Future' process we are having to continue on the agreement of seven hours per week overtime for you as unfortunately any increases or new roles are suspended from Group. We can address this once the rollout phase has passed."

36. On 3 November 2016 the claimant was given written confirmation of his temporary appointment. It expressly stated, "this appointment is temporary and will require to be advertised in 2017".

37. On 17 January 2017 the claimant e-mailed Mr Jones and Ms Johnson to ask them whether or not the Interim Principal Operations Manager role would be advertised. In fact, the role was never advertised. This was because, during 2017, Amey entered into negotiations with the respondent with a view to terminating the highways maintenance contract. A decision was taken not to advertise the roles into which certain employees had been temporarily placed. There is an issue as to whether at this point the claimant was told by his manager that the role was permanent. This is a controversial finding of fact that I had to make to which I return a little later. What is clear is that following the decision not to advertise the substantive post, the claimant's opaque remuneration package continued. He was never given an official start date, in the sense that no such date was ever recorded on his records. He was never given any written confirmation that his role had been made permanent. After the alleged oral assurance he merely carried on doing the same job and receiving the same pay. He stopped asking for updates about when his role would be made substantive.

38. Part of the service provided by Amey to the respondent was to make its employees available as witnesses. Being a highway authority, the respondent from time to time faced claims under the Highways Act 1980. These claims, often called "tripping claims", were defended, partly on the basis of the measures that Amey had taken on its behalf to ensure the safety of the highway. One of the responsibilities of the claimant's role as Principal Operations Manager (whether interim or substantive) involved giving evidence about such measures. He made witness statements in which he stated his role title. In witness statements dated 19 October 2017 and 12 December 2017 he described himself as "Principal Operations Manager". The claimant's oral evidence was that, prior to making these witness statements, he had described himself in witness statements as "Interim Principal Operations Manager". I have not been shown copies of any such witness statements. Nevertheless I accept that the claimant was telling me the truth. This suggests to me that, sometime in 2017, the claimant made a conscious decision to drop the word, "Interim" from his role title.

39. At some point before February 2018, Amey's organisation charts started referring to the claimant as Principal Operations Manager, without the word, "Interim". In

reaching this finding I took into account Mr Kenward's observation that one would normally expect to see a copy of the relevant organisation chart in the bundle. This submission would have more force if Amey itself had been a party. I was able to accept the claimant's oral evidence, supported by the e-mail from Ms Johnson.

40. Not every communication sent by the claimant reflected a change to a substantive role. As late as 16 January 2018, the claimant continued to send emails with the same footer as appeared in the October 2016 e-mails. As before, his role title included the word, "Interim".

41. On 30 January 2018, with the transfer only two days away, managers from the respondent visited the Amey site to conduct one-to-one meetings with transferring employees. (The claimant's recollection is that he did attend a one-to-one meeting, but only after the transfer had already happened. On this question I think it is more likely that the transfer was just about to happen; it would make more sense for these meetings to happen in advance of the transfer so that the transfer itself would be seamless.) The claimant told the relevant manager that his salary was £43,820.87 plus seven hours' overtime per week. That was an accurate description of the funding arrangement for his salary.

42. On 1 February 2018, the claimant ceased to be employed by Amey and his employment transferred automatically to the respondent. It is common ground that, from that date, his employment was governed by a new set of policies, including the respondent's Pay Protection Policy, its Redeployment Policy and its Service Review Policy.

43. I have already quoted from the Pay Protection Policy.

44. The Service Review Policy, at paragraph 1.1, stated:

> "A Service Review is effectively a review, restructure or reorganisation. This Policy sets out the arrangements which should be followed at all times when any service area(s) is reviewed, restructured and/or reorganised".

45. Within the rubric of the Service Review Policy were various procedural requirements which were required to be followed in the event of a service review taking place. It was paragraph 1.1 that determined whether a service review had taken place or not.

46. The Redeployment Policy provided at paragraph 2.1:

> "The Redeployment Policy is designed to:
>
> - Set out which employees are covered by this Policy…"

47. By paragraph 3.1, the Redeployment Policy applied to all posts and employees within the respondent's Council, excluding 4 categories of employees. The claimant did not fall into any of those categories.

48. The scope of the Redeployment Policy was further defined in paragraphs 4.1 and 4.4:

> > "4.1 The City Council is committed to ensuring that employees who are unable to fulfil their contract of employment due to disability or who are seeking alternative employment are redeployed into suitable vacancies wherever possible."

"4.4 The Redeployment Policy applies to the following categories of employees:

Category	Length of Redeployment Process
"At risk" of redundancy	16 weeks

49. The Pay Protection Policy contained paragraph 4.1 which I have already cited.

50. From the date of the transfer, the claimant's responsibilities changed. Mr Davies, an existing manager for the respondent, arrived on site and carried out many of the management functions that went with the Principal Operations Manager role. The claimant effectively reverted to being responsible for a team of Highways Officers and liaising with the Operation Control Room to ensure that Highways jobs were being progressed. This marked a substantial reduction in responsibility from the role that the claimant had been doing with Amey for the last 17 months.

51. On 13 April 2018 the claimant submitted a formal grievance about about the 7 hours' overtime. In due course the grievance was heard by Ms Black. After making enquiries with Amey, Ms Black accepted that the 7 hours' overtime was not actually overtime at all, but part of the salary for the role of Principal Operations Manager. At that point, Ms Black believed that the claimant was still holding the role on an interim basis. She awarded the claimant his back pay by way of an honorarium. Her grievance outcome letter was dated 28 April 2016 and included the following passage:

> "…I will request that your salary be amended to the salary for the Principal Operations Manager, which is £56,967, whilst you continue to fulfil the role of Interim Principal Operations Manager. I will request that this is back dated to 1 February to reflect this."

52. The claimant indicated his acceptance of the outcome. He did not take issue with the description of his role as "Interim Principal Operations Manager". He was more concerned about his pay. His grievance had been about pay, not about the tenure of his role.

53. Ms Black's decision prompted a review of the necessity for the claimant to be employed in the Interim (as the respondent saw it) Principal Operations Manager at the increased level of pay. Mr Davies decided that he did not need a post-holder to do the role of Principal Operations Manager (temporary or otherwise), because he himself had already absorbed the management duties that went with the role. He did, however, need a person to continue doing what the claimant was actually doing. Mr Davies reached this decision without going through the formal consultation procedures required of a Service Review.

54. On 14 May 2018 the claimant was informed that the "Interim" Principal Operations Manager role had been brought to an end and that he would revert to his previous Network Manager role. He was not told that any Service Review had been carried out. He was not informed that he was at risk of redundancy or that he had been placed on any redeployment register. None of this is surprising. Mr Davies thought that the claimant's Principal Operations Manager role was only temporary and that, when it terminated, he would revert to his substantive role of Network Manager without any need for these steps to be taken. There was no

change in the claimant's day-to-day responsibilities from what they had been immediately before 14 May 2018. The change had already occurred about three months earlier when his management responsibilities were absorbed.

55. The claimant raised another grievance, this time asserting the right to pay protection. It is unnecessary for the purpose of these reasons for me to go through the procedure or the thought process by which that grievance was investigation. By the time of the tribunal hearing, the grievance had reached a Stage Three Appeal – at the two previous stages it had not been upheld.

56. That brings me now to an important dispute of fact. Had the claimant's interim role had made permanent by the time of the transfer? I am satisfied that it was. Here are my reasons:

    56.1. I accept the claimant's evidence that he was told orally by Mr Jones that his role was made permanent.

    56.2. Both Mr Jones (his manager) and Ms Johnson (of Amey's Human Resources) believed that the role had been made permanent. For the reasons I have given I felt able to rely on the e-mails in which they expressed this belief.

    56.3. In my view, the most likely explanation for the claimant's e-mail signature continuing to use the word, "interim" was that it was automatically generated rather than consciously typed.

    56.4. In my view a more telling indicator is the way in which the claimant described his role in witness statements which he was prepared to confirm on oath in court. I do accept his evidence that he changed his role description from "interim" to "permanent" in those statements.

    56.5. I have taken into account the misleading salary arrangement. Whether or not it is properly to be called a "sham" is unimportant. It is odd that a substantive role would continue to be remunerated in that way, but it was strange that it existed even for the temporary appointment. It was clearly designed to hide the true nature of this appointment from anyone who was scrutinising salaries. But the claimant's managers at Amey had just as much reason to try to hide a permanent appointment as they did for hiding a permanent one.

    56.6. There was no written confirmation of the claimant's role being made permanent. Amey is a very large organisation and would have been expected to confirm a significant change of this kind in writing. But then there was no written confirmation of his terms at the start of his employment with Amey either.

    56.7. It is a little strange that the claimant was not given a start date, but in my view that does not alter the position. The fact was that nothing had changed. The claimant was doing the same role for the same money. To the claimant and Mr Jones, it was relatively unimportant to identify the date upon which the claimant's status changed from interim to permanent.

    56.8. I also take into account the fact that the claimant appeared to accept the grievance outcome which described his role as being "interim". I accept the claimant's evidence in this regard: the key point of interest to him at that time was whether or not he was going to continue receiving the pay that he

had been used to receiving him. At that time, his pay was more important to him than the label that the respondent added to his job title.

56.9. For those reasons I do find that the claimant's role had changed to a Principal Operations Manager on a substantive, permanent basis.

57. Those are my findings of fact.

Relevant law

58. Section 13(1) of the Employment Rights Act 1996 prohibits an employer from making a deduction from the wages of a worker employed by him. The prohibition does not apply where the deduction has been authorised one of a number of prescribed ways, but there is no suggestion that any deduction was authorised in this case.

59. By section 13(4), where the total amount of wages paid to a worker on any occasion is less than the total amount of wages properly payable on that occasion, the deficiency shall be treated as a deduction from the wages on that occasion.

60. The concept of redundancy is well known to employment lawyers and to those responsible for drafting employment policy documents. The main statutory provision defining redundancy is section 139 of ERA. It reads, relevantly:

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-
>
> > …(b) the fact that the requirements of that business…(i) for employees to carry out work of a particular kind…. have ceased ….

61. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

62. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...

> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

63. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

    63.1. A careful balancing exercise is required.

    63.2. The tribunal should consider whether the amendment is merely a relabelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

    63.3. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

    63.4. The tribunal should have regard to the manner and timing of the amendment.

    63.5. The paramount consideration remains that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

64. In my view, if a party seeks to change the basis upon which he advances his case from that which has previously been understood, the tribunal should take into account the same principles in deciding whether or not that party ought to have permission. These principles are relevant regardless of whether a formal application to amend has been made.

Conclusions

65. In my view, the claimant was redeployed to a lower-graded post. His substantive role of Principal Operations Manager was brought to an end, following which he was given continued employment in the lesser role of Network Manager. That role was at a lower grade. It had fewer responsibilities and less pay.

66. I also consider that the redeployment occurred under the respondent's Redeployment Policy. What matters here, in my view, is not whether the formal

procedural requirements of the policy were observed, but whether the policy applied to the redeployment in question. Otherwise, the respondent could evade pay protection by relying on breaches of its own procedures. (I should stress that I am not suggesting that this is what the respondent was consciously seeking to do in this case.) Mr Davies decided that the requirements of the respondent's business for an employee to do the work of a Principal Operations Manager had ceased. That led him to delete what (unknown to him) was a substantive role and replace it with a Network Manager role into which the claimant was automatically aligned.

67. I have considered Mr Kenward's argument that, in substance, all that was happening was that certain duties were being removed and the supplemental pay for those duties was also being removed. In Mr Kenward's submission, this fell short of a restructure or a deletion of a role. I do not agree. If one analyses what happened as a variation of a contract, it was such a radical variation as to amount to deleting one role and replacing it with another.

68. It is clear to me that, had the claimant declined to work as a Network Manager, he would be at risk of his employment being terminated. Though he was simply informed that he would revert to the role of Network Manager, he was actually being given a Hobson's choice: he could accept continued employment as a Network Manager or there would be no other role for him. If he had no role, the sole or main reason for that state of affairs would be that his Principal Operations Manager had disappeared. Nobody needed to tell the claimant that he was at risk of redundancy: that in substance was the situation in which he found himself. The redeployment register was a completely unnecessary formality, because the role into which he was being redeployed was tailor made for him and he was automatically placed into it.

69. These findings alone are sufficient in my view to bring the claimant within paragraph 4.1 of the Pay Protection Policy. It is not therefore strictly necessary for me to consider whether the claimant also came within paragraph 4.1 by virtue of a redeployment under the Service Review Policy. Nevertheless, I decided to address these issues in case my conclusion about the Redeployment Policy is wrong.

70. The first question, therefore, is whether or not the claimant should be permitted to rely on the Service Review Policy. The circumstances in which the claimant raised the argument are unsatisfactory and a cause of understandable frustration to the respondent. The claimant's solicitor had numerous opportunities to clarify his case and, even in his final submissions, equivocated about whether he relied on the Service Review Policy or not. In my view, however, the most important questions are the extent of additional fact-finding and, even more importantly, the balance of disadvantage. In my view, the additional fact-finding exercise raised by the introduction of the Service Review Policy was relatively small and self-contained. The main issue was still whether or not the claimant's role was interim or substantive. I had to decide whether a service review took place within the meaning of the policy. On the question of disadvantage, I considered what would happen if I were to refuse permission to rely on the Service Review Policy, the claimant would be deprived of one of the two routes to pay protection under the Pay Protection Policy. I considered what disadvantage would be caused to the respondent if I were to allow permission. In the end, I considered that the disadvantage would be minimal. Both the claimant and Mr Davies gave evidence

about whether there had been a service review, and Mr Kenward had the opportunity to remind me of that evidence during his closing submissions. The meaning of the Service Review Policy was largely a matter of interpretation of the written provisions, which were set out in the bundle. I decided that the respondent had had a fair opportunity of dealing with the argument and that the balance of disadvantage lay in favour of granting permission to rely on the Service Review Policy.

71. In my view what the respondent did in substance was to carry out a service review. Without realising it, Mr Davies restructured his department by deleting one substantive role and replacing it with another. Because he was not consciously carrying out a service review, he did not comply with its procedural requirements. But that did not mean that a service review had not taken place. That service review caused the claimant to be redeployed into a lower-graded post. That state of affairs brought the claimant under clause 4.1 of the Pay Protection Policy and he was entitled to pay protection.

72. The claimant's wages continued, therefore, to be properly payable at the salary for a Principal Operations Manager. Every pay date he was paid less than that amount. A deduction was made from his wages on each occasion. Because there is no contention that the deduction was authorised, the deduction contravened section 13. The claim is therefore well founded.

Remedy

73. Once the judgment on liability was announced, the parties agreed the amount to be ordered to be paid to the claimant.

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Employment Judge Horne
25 January 2019

REASONS SENT TO THE PARTIES ON

29 January 2019

FOR THE TRIBUNAL OFFICE