**Case No: 2301831/2017**

# EMPLOYMENT TRIBUNALS

| **Claimant** | **Respondent** |
|---|---|
| Ms Viv Bennett | London Ambulance Service NHS Trust |

**Heard at:** London South **On:** 22 January 2018

**Before:** Employment Judge E Fowell
Mrs S Dengate
Ms E Thompson

**Appearances**

Claimant: Mr G McKetty of KQ Solicitors
Respondent: Mr W Dobson of Counsel, instructed by DAC Beachcroft LLP

# JUDGMENT

1. The complaints of unfair dismissal and of discrimination and harassment on grounds of race and sex are dismissed.

# REASONS

**Background**

1. We record our thanks to KQ Solicitors for acting on behalf of the claimant on a pro bono basis. Despite the considerable efforts made by Mr McKetty on Ms Bennett's behalf we were unable to uphold any of the claims.

2. Ms Bennett brings claims of unfair dismissal and of direct discrimination on grounds of race and sex, arising out of her dismissal by the Trust on 10 February 2017. She was employed as Station Administrator at their Deptford complex, and was dismissed for claiming and receiving payments to which the Trust says she was not entitled.

3. In parallel with the disciplinary proceedings there was a separate investigation by the NHS Counter Fraud Authority and Ms Bennett also brings claims of harassment on grounds of race and sex, arising out of the way in which that investigation was conducted.

**Preliminary issue – Bankruptcy**

4. The hearing was originally listed to last for seven days, but was reduced to five days shortly before the hearing. This was unknown to the parties. A further complication was that Ms Bennett was due to attend a county court hearing on the second day, to hear an application for her to be discharged from bankruptcy. It is not clear at what stage of these proceedings it became known to the respondent that she is bankrupt, but the amended grounds of resistance dated 17 August 2017 notes at paragraph 43 that a bankruptcy order was made on 25 April 2017. Accordingly, it continued, any claim for loss of earnings vests in the trustee in bankruptcy – in this case the Official Receiver – and so the claimant was not entitled to seek compensation for loss of earnings as part of her discrimination claims. That was the full extent of the challenge on this point, and so the claims were listed for hearing.

5. Given that it was expected that the bankruptcy order would be set aside by consent, the issue was at first regarded as academic. Nevertheless, in the event the bankruptcy hearing was adjourned for a further 28 days. Allegations of criminality had been raised against a third party, involved in one of the claimant's businesses, and so the police had become involved. This unexpected development had led to the adjournment. It followed that the significance or otherwise of the bankruptcy order had then to be considered on the second afternoon.

6. Contrary to the normal submissions on these occasions, the claimant's position was that it would be preferable for the employment tribunal hearing to be stayed pending the outcome of the bankruptcy proceedings: the respondent on the other hand was content to proceed.

7. Under s.306 of the Insolvency Act 1986 the estate of a bankrupt vests in his or her trustee in bankruptcy at the moment of the trustee's appointment. This includes, where a claim is for property, the right to bring or pursue legal proceedings: ss.283(1) and 436A. Where, however, a claim is personal in nature, the bankrupt retains the right to pursue legal proceedings in connection with it.

8. We considered the relevant case law. In ***Grady v Prison Service 2003 ICR 753***, the Court of Appeal held that a bankrupt employee can bring a claim of unfair dismissal since a claim for reinstatement or re-engagement is personal to the employee. But in ***Khan v Trident Safeguards Ltd and ors 2004 ICR 1591***, the Court of Appeal held that a claim involving unfair dismissal *and* discrimination "which may include but is not limited to compensation for injury to feelings' was a hybrid claim, which in principle vests in the trustee in bankruptcy. It may be possible however to limit the relief claimed to that of a personal nature, thus allowing the bankrupt claimant to pursue the appeal herself.

9. Since the present hearing is for liability only we concluded that we could continue with the remainder of the hearing, and if necessary stay a promulgation of the decision or the remedy stage, or the claim could be modified in accordance with this last authority. In the event this issue has become academic since the claims are all dismissed. Should there be

further proceedings however it will be necessary to revisit the question.

**Evidence**

10. Evidence was heard over four days from the claimant and from a total of seven managers involved with the dismissal:

    a. Graham Norton, who as Ms Bennett's immediate manager approved some of the payments in question;

    b. Peter McKenna, then Deputy Director of Operations Sector Services and Mr Norton's line manager, who commissioned the disciplinary investigation;

    c. Lucas Hawkes-Frost, Assistant Director of Operations in Sector Services, who carried out the investigation;

    d. Andrew Bell, then Acting Director of Finance, whose decision it was to dismiss Ms Bennett;

    e. Julie Cook, Senior Human Resources Manager, who provided HR support at the dismissal stage;

    f. Katy Millard, then Deputy Director of Operations for 111 and Integrated Urgent Care, who chaired the related disciplinary hearings for the managers who had approved the payments; and

    g. Tina Ivanov, Deputy Director of Clinical Education and Standards, who carried out a separate investigation into allegations of sexist and racist harassment against Mr Norton raised by Ms Bennett during the disciplinary process.

11. The claimant also supplied a witness statement from a former colleague, Sophie Haynes-Garcia, to the effect that she witnessed a conversation between the claimant and Mr Norton allowing her to claim the disputed payments. Ms Haynes-Garcia did not however attend the hearing. She had intended to come on day six of the hearing, but in view of the shortening of the hearing she was, we were told, unable to attend. We also had a bundle of documents amounting to nearly 700 pages. Having considered that evidence we make the following findings.

**Findings**

12. The payments in question were known as disruption payments, and sometimes as overtime enhancements or bonus payments. We will refer to them in the main simply as bonus payments. In contrast with overtime payments they were for a fixed lump sum, offered as an incentive so that front-line ambulance crews and Fast Response Units (FRU) - cars - would be willing to work overtime at unpopular times, such as Christmas and New Year or on busy weekends. The bonus amounts would vary from month to month, depending on the likely need, and the details were set out in monthly bulletins, specifying which shifts would attract the payment and how to claim.

13. Ms Bennett, as Station Administrator, processed these claims. A form would be filled in by the ambulance crew or FRU member specifying which shifts had been worked, and she would then check on the Trusts GRS computer system to make sure that they had worked those shifts and claimed the right amount. The details were then entered on a spreadsheet, and every month she would pass the forms and the printed spreadsheet to a manager to approve, before passing the information to Payroll. There were three managers able to sign off these forms. Mr Norton, the Ambulance Operations Manager, was the more senior of the three, and he was promoted to Assistant Director of Operations on 20 April 2015. He was supported by James Agnew and Neil Turner, who were at the time Duty Station Officers.

14. Mr Norton started working for the Trust in July 2011. Ms Bennett was already working at Deptford and was the only administrator there, although there was funding for two people. Remarkably, she was working overtime from 4 am each morning to 8 am before starting her normal day's work. This was paid at time and a half. She also frequently worked an extra 10-hour shift on a Saturday for which double-time was paid. No permission was needed beforehand for a particular shift and she simply worked the amount of overtime she chose. By way of example, page 211 of the bundle dates is a record from April 2009 and shows that Ms Bennett worked over 130 hours of overtime that month, including 10 hours each Saturday. Mr Norton made no change to this arrangement.

15. The Trust has not sought to challenge in these proceedings whether these hours were actually worked, and so we heard no evidence as to what checks were made, although we note that Mr Hawkes-Frost did make some enquiries at the outset and concluded that they could not be "satisfactorily investigated" – which we take to make that there was no evidence to challenge them. The office was open round the clock. No concern seems to have been raised by Mr Norton or the Trust generally over the extraordinarily long working hours this arrangement involved. It was understood by the Duty Station Managers that the office had the budget for two administrators and so it was permissible for Ms Bennett to receive these additional payments. With the passage of time no one appears to have thought it odd that she was arriving at work at 4 a.m. each day. She saw herself, and others saw her, as the central to the running of the station and was trusted by those above her.

16. She completed monthly forms for Mr Norton to sign off to confirm that the overtime had been worked. There was no clocking-in system and the only check on her hours was by management signing the forms she prepared. Mr Norton could not remember any details of the process for overtime payments when asked, from which we conclude that little attention was paid to it.

17. Arrangements changed in the run up to Christmas 2014 and the first bulletin we have seen is dated 17 November 2014. It was issued by the Director of Operations, a much more senior figure than Mr Norton, and made the bonus payments available to front-line operational staff and clinically qualified operational managers. This created a good deal of extra work for Ms Bennett.

18. Subsequently it was recognised (page 176) that Station Administrators were facing an increased workload as a result, and so an additional bonus payment was approved for them too. The arrangement was that there would be a one-off payment of £350 and that Station Administrators would be able to work overtime at double time for up to 15 hours over the period to 31 January 15. This second aspect had little application to Ms Bennett who was already working such overtime as she chose. No other Station Administrators were claiming overtime.

19. According to Ms Bennett, she became aware of this bonus in September or October 2014 and had a conversation with Mr Norton to see if she could claim it too: he gave her to understand that this was fine with him, using the words, "make it work for you". The witness statement of Sophie Haynes-Garcia supports this account.

20. The respondent on the other hand denies any such conversation and says that the scheme was not introduced until Christmas 2014. Further, Ms Haynes-Garcia was on maternity leave in September, and at no point during the disciplinary process did Ms Bennett suggest that the conversation was witnessed.

21. We did not find that we could place any reliance on the statement of Ms Haynes-Garcia for the reasons just given. It is also very vague about the date of the alleged conversation and gives no surrounding detail. However, it appears that some incentive scheme, over and above mere overtime rates, was introduced as early as 20 October 2014. Page 179 refers to "overtime incentives", rather than just overtime, and is stated to be for part-time staff and to apply from that date. Rather surprisingly, given her long hours, Ms Bennett was one of the beneficiaries of this scheme, receiving £500 in December. This was the first of the bonuses or disruption payments in question.

22. The key question therefore is whether Mr Norton gave any permission or tacit approval for her to claim this payment. To simply claim the payment without any such approval would be an extraordinary gamble for her to take after (at that stage) about 14 years' service. From all the evidence presented, Ms Bennett is a forthright individual who would have had no compunction about raising the subject. It was a time when all members of staff were extremely busy, and when all the frontline staff and some of the managers were claiming these bonuses. Both Mr Norton's name and Mr Agnew's names appear on the list of those claiming, reflecting the fact that they were doing extra weekend shifts in ambulances to keep the service running, and also perhaps to benefit from this bonus arrangement. Of all these people being incentivised, none was working longer hours than Ms Bennett herself; she was the one administering the payments, and she was the only one not able to take advantage of this favourable arrangement. In the circumstances it seems to us most likely that she would have raised the issue.

23. If so, was any approval given? It would be an even greater gamble to include such a claim if there had been a straightforward refusal. Our view on this point is also influenced by our overall conclusions on credibility formed in relation to later events, and we consider on balance that despite

our reservations about the evidence from Ms Haynes-Garcia, it is likely that some exchange took place between Ms Bennett and Mr Norton in or around October 2014 in which he gave her to understand that he was indifferent or would not prevent her claiming it. It is hard to be clear about the terms of the arrangement. It seems to us that Mr Norton attached little or no importance to it at the time.

24. It bears repeating that there was no real scrutiny of the actual hours worked by Ms Bennett, or the amount she was earning. Although this was a favourable arrangement, the Trust has been unable to provide any evidence to suggest that Ms Bennett did not in fact work for any of the disputed bonus shifts. These involved her being in the office for even more extensive and antisocial hours than hitherto, such as evening shifts from 1400 to midnight or from 1800 to 0400 (page 204).

25. It may be thought that there would be no advantage to Mr Norton in allowing such an arrangement, but in practice, given the demands on the local ambulance service, his interest lay in placating Ms Bennett, who was central to the running of the office. We therefore conclude that, whatever passed between them, she took it as an approval. More generally, her account is supported by the undeniable fact that Mr Norton subsequently signed the forms approving these payments. It would to some extent have been in his interests to do so and so we resolve this issue in the claimant's favour.

26. The Trust was at pains to stress during the hearing how heavy the demands on the service were at the time. We accept that. Mr Norton worked during normal office hours and no doubt longer, together with occasional weekend ambulance shifts on the front line. There would always be a Duty Service Manager or DSM in the office; either Mr Turner or Mr Agnew. Mr Turner was an Acting DSM. He had had one week's training and has not received the proper training until the following September. Another DSM was off sick during the early part of the year. There was a reorganisation under way, which meant that the previous organisational structure was being gradually altered from the top down. Not only did that mean that many members of staff were at risk of redundancy, but the hierarchy was in a hybrid state for much of this period.

27. Against that background Ms Bennett continued to work the additional bonus shifts and to make the appropriate claims as follows:

    a. In January 2015 she claimed £500, approved by Mr Norton (as already noted);

    b. There was then a further claim for £650 in January, approved by Mr Agnew;

    c. in February 2015 she claimed £950, approved by Mr Norton; and

    d. in March 2015 there was a further £500, also approved by Mr Norton.

28. We emphasise however that the rationale behind these payments, of attracting frontline staff to work particularly unattractive shifts, did not apply

in the same way to Ms Bennett. It made no difference from the point of view of her work what time of day she carried it out, but it made a big difference to her pay. If, for example, she came into work at 7 p.m. on Friday, 27 February 2015 (page 187) and worked for 10 hours until 5.30 a.m., she would be entitled an additional £200 on top of her double time. (This was much better than coming into work the following morning and doing 10 hours during the daytime). But there would be no member of staff to hand over her duties to at the end of that overnight shift. There is in fact nothing to demonstrate that she completed any such shift, or, if she was in the office overnight, that anyone in the office would be aware of why, or when she was going to go home. She was simply choosing to come in on such occasions.

29. As to record-keeping, she would complete a form confirming that she had completed the shift in question. She also gave evidence that she contacted the Resource Centre to ask them to record on the GRS system the fact that she had done so, but there was no independent check by them of the truth of this. These overtime claims would be collated, by her, and the overall figure included in the table together with everyone else's bonus claims. If any further check was called for to explain the amount claimed, it would therefore lead back to one or more forms completed by herself.

30. On April 2015, the Assistant Payroll Manager, Robert Dawson, emailed Mr Norton in the following terms:

> "… For a very long time now we have been receiving vast overtime claims from Deptford's Station Administrator, Viv Bennett. All the forms are always signed off, but she is the only person in this role that ever claims over time – and for the amount of hours that it is, it seems excessive. In March, 68 hours were claimed at time and a half, and 70 hours claimed at double. This is an extra 138 hours in addition to the 162.95 worked as a full-time for the month. There was an extra 73.5 claimed in February and an extra 60 in January.
>
> It has raised extra attention now because these claims are also being made for the bonuses too – bonuses for which the station administrator position is not applicable.
>
> Can you shed some light? Is Viv working an extra role or position? If she is, we would need this authorised through HR and it saves it being queried in the future."

31. Mr Norton received this at 11.51. He replied at 2:15 p.m. stating:

> "I was aware Viv was working overtime due to the significant increase in staff since the new rosters and work that involves. As far as bonuses I was not aware she was claiming them. There may have been something over the winter period stating they can claim bonuses (I think) but not now as I believe the bonus is only for crew staff. I will need to speak to Viv in person but that will not be until next week now."

32. This was rather guarded response given that Miss Bennett had been claiming overtime for many years at a significant level. Mr Dawson then replied:

> "There was a bonus paid out to Station admin for the work done over the

> Christmas period in relation to paying all the bonuses – that was £350 and paid in January – to date, Viv has claimed £2600 in Bonuses since January. The bonus was paid because Station admin don't have access to a bonus.
>
> "I will leave it with you – for now we will be processing all signed work for Viv until advised otherwise."

33. This exchange took place on a Friday afternoon. Ms Bennett was not at work that afternoon and so he resolved to speak to her about it the following week. Although his subsequent recollection was that he did so, we prefer Miss Bennett's recollection of this incident, which is that she came to work later that afternoon, at 6 o'clock, and that when Mr Norton noticed that she was logged in he came over to speak to her there and then. Not only that, but he forwarded to her the email chain. Since this evidence is problematical for Ms Bennett, in that it involves her being informed in the email of the concerns over the bonuses and overtime, we accept her account that she was forwarded the email and that a discussion then took place. Both agree that there was such a discussion, differing on the timing.

34. In a significant irony, not explored at the hearing, this particular evening shift is one of those for which she later claimed a bonus payment. Her claim for this is at page 196. According to this she worked until 4 a.m. the next morning and was paid double-time plus £200.

35. Mr Norton's account was that he then told the claimant she was not entitled to these bonuses. Ms Bennett has given a number of different accounts. In her later grievance statement (page 257) she described it as follows:

> "25. Between April – May 2015 I went into work to do a nightshift, logged on my pc and began to answer and send emails, Graham had forward an email he received from the payroll Manager Rob Dawson asking Graham if he knew I was. Graham came down to my office and said I didn't know you were claiming bonuses, I said,
>
> "26. "right Graham I could really be claiming and you not know when it is you who has to sign them off"

36. We struggled with this passage but concluded that the response from Ms Bennett meant, "How could I be claiming bonuses without you knowing, when you have to sign them off?" We place no particular reliance on the suggested wording, but insofar as it suggests that Mr Norton was unaware of the arrangement, we conclude that he had forgotten his earlier agreement, or did not realise it had become so extensive.

37. In the course of her disciplinary hearing (page 358) Ms Bennett added a further comment from this exchange which she echoed in evidence before us. She said that Mr Norton told her "Time to jump off the gravy train Viv, till I get this sorted." We accept that these words or something very similar was said. It reflects the sense of the email from Mr Dawson, which was as concerned with the amount of overtime as the particular question of bonuses. It also reflects subsequent events, which involved a temporary reduction in the overall amount of bonuses and overtime claimed. Had Mr Norton given a firm and definite instruction not to claim any further bonuses, this would have been something of a challenge and a rebuke, involving some tension between the two, but Mr Norton had no recollection of how

Ms Bennett reacted. Nor on either account did Ms Bennett raise the fact that she was currently engaged on just such a nightshift. Overall therefore we prefer the view that Mr Norton told her in essence to reduce her overall claims for the time being. This is also more consistent with our view that some tacit approval was given to these bonus claims in the first place.

38. Mr Norton had at this point a lot on his plate. He was going through a restructuring process, with the possibility of him losing his job. An interview which would involve a promotion, subsequently achieved, was arranged for the following Thursday, 16 April, and he took up his new appointment on Monday 20 April. After that he was located in a neighbouring building and had less day-to-day contact with Ms Bennett. We also heard that he was undergoing personal problems at the time. For whatever reason, he did not record any instructions to Ms Bennett in writing about this bonus claim, contact Payroll again to advise them what steps he had taken, or tell the Duty Station Managers to ensure that no further bonus payments were claimed. This too reflects the fact that he had given tacit approval to the claims and was unwilling to commit anything on the subject to writing. And despite been informed of the specific overpayment of these disruption payments, no steps were taken about recovery of the overpayment. HR was not contacted about any potential disciplinary issue. All this is, we find, consistent with a desire on Mr Norton's part to downplay the whole issue, which in turn is more consistent with some knowledge of these claims on his part.

39. Ms Bennett's account of this episode has not however been at all consistent. During her disciplinary hearing her trade union representative was under the impression that her position was that no such conversation at all had taken place in April. He put this to Mr Norton in her presence. It is difficult to make sense of her position at the time, and she was not asked to explain it, or why she had earlier stated in her grievance letter (quoted above) that there *had* been such a conversation. Despite some confusing indications therefore, her position appears to have been at that stage that there was a conversation, but that she was never told definitely to stop claiming the bonus payments. That much is consistent with her evidence at this hearing, but she was certainly anxious to downplay this incident, which is difficult for her to explain. It is unmentioned in her witness statement. But on any view she had been informed by the email from payroll that she was not entitled to claim these payments, regardless of what Mr Norton said to her, and yet she carried on doing so.

40. Her claim for this Friday evening shift was included in those for the month of April, and signed off by Mr Turner the following Monday, 13 April 2015 (page 193). He signed all of the subsequent claims until September. She did no further shifts at all during April and the next bonus claim was for £200 in May – a single shift. There was then a claim for £350 in June, representing two Saturday shifts on 23 and 30 May, so there was only one further bonus shift after the conversation with Mr Norton over the next six weeks period until 23 May. There were no claims in July but in August she claimed, and had approved, a further £900 in bonus payments. Then in September 2015 she claimed £1125, this time signed by Mr Agnew. This therefore represents a pattern of having reduced her bonus claims for two or three months, going to other managers for approval, then a marked

increase in claims during August and September.

41. We had no evidence about her other overtime during this period but Mr Dawson, who had obtained no response from Mr Norton following his April emails, took the matter up with HR by email on 25 August 2015. He forwarded the previous emails and noted the continuing high level of overtime, adding:

> "Over the last two years, the earnings total over £90,000 – the Station Admin role is Band 4 and attracts a maximum of £26,683 per annum."

42. No action was taken about this for a further month until a more senior member of the HR team forwarded the email chain to Peter McKenna, Mr Norton's manager, together with the over timesheets for July and August. He in turn emailed Mr Norton on 23 September asking a number of pertinent questions:

> "What bonus payments and who authorised? Who and why is she receiving double time payments and why, again who authorised? Why is she coming to work at 04.30 in the morning? Why is she working weekends 10 hour shifts? Have you got the vacancy for a second person and if so why has the post not been advertised? Who is signing off the timesheets?

43. Before meeting with Mr McKenna, Mr Norton went to see Ms Bennett and got from her the various overtime and bonus payment sheets in question. She was therefore aware that matters had taken a serious turn. By then the HR Department was involved. There was a discussion between Mr Norton and Mr McKenna about whether or not this was potentially gross misconduct on Ms Bennett's part, and whether or not to suspend her. Regardless of whether or not Mr Norton may have been complicit to any extent, he had signed some of the forms in question and so was implicated to a degree. It was therefore felt better for him not to be involved in any such disciplinary steps. The only action taken at that stage was a letter (page 217) dated 1 October 2015, to Ms Bennett, confirming the contents of the conversation on 28 September, informing her that she could not without prior approval claim any further bonuses, double time or weekend overtime and that all forms would need to be approved by Mr Norton.

44. It was around the same time, and as a result of these discussions, that the September bonus claim for £1125, which had already been approved, was intercepted. Despite this however, that amount was duly paid to Ms Bennett. Throughout the subsequent disciplinary process, confusion surrounded the amount claimed and the amount paid. It was assumed that this payment had not been made and so she had claimed a total of £5,825 and received £4,600. In fact, she received £5,825. But of this, £350 was properly payable under the scheme for Station Administrators, so the correct figure for overpayment is in fact £5,475.

45. There matters remained for several months. Ms Bennett carried on at work, coming in at 4 a.m as before, although not carrying out any weekend shifts. By December her regular overtime was reduced to two days a week. Nothing was said about any disciplinary action or any repayment. This lack

of action indicates a marked unwillingness on the part of the Trust to investigate matters. Any such investigation would necessarily expose the patent lack of scrutiny given to such claims and the extraordinary levels of overtime which Ms Bennett had been permitted to take.

46. The next documentary record is dated 27 January 2016. It is an account prepared by Mr Norton and described by him as an aide memoire to assist him in any future investigation. By then, as it records, it had been agreed that Lucas Hawkes-Frost had been asked by Mr McKenna "to look into the facts surrounding this incident."

47. According to Mr Hawkes-Frost's witness statement, he was informed in January 2016 that an investigation had been launched into these bonus payment claims by NHS Counter Fraud, following an anonymous tip-off. We conclude that it was in fact the contact from NHS Counter Fraud that prompted the Trust to take disciplinary action, and that otherwise matters would simply have continued as they were. Nothing has been disclosed by the Trust, whether in the form of emails or minutes of any meetings, to suggest the contrary or that any disciplinary steps were underway. Nor has any record been produced of this contact from NHS Counter Fraud, even to show when it occurred. In the circumstances it also seems to us most likely that it was the NHS Counter Fraud involvement which prompted Mr Norton to make his statement, and that without their involvement no disciplinary process would have been initiated.

48. It was agreed that the NHS Counter Fraud investigation would take priority. A suggestion by the Trust that they carry out investigatory interviews jointly was rejected on the basis that the NHS Counter Fraud investigation may lead to criminal sanctions and should not therefore be confused with internal disciplinary measures. It was therefore established from the outset that Counter Fraud would carry out the investigations first. No information sharing took place. We accept from this that NHS Counter Fraud is an independent body over which the Trust had no control in the exercise of its powers. Mr McKenna was not informed of their involvement until 1 March 2016, in a meeting with by Mr Hawkes-Frost, a further indication of the leisurely pace of the Trust's progress.

49. Ms Bennett, in the meantime, was not informed that either the Trust was investigating her bonus claims or that NHS counter fraud was involved. She only became aware of the latter when she received a letter from them on 19 August 2016, inviting her to an interview.

50. By then, they had interviewed Mr Norton. He then had an interview with Mr Hawkes-Frost on 9 August 2016. The main point he made in that interview to excuse his approval of the claims was that Ms Bennett had put her name at a different place in the list of names each time so it would not be noticed. He added that he was very busy at the time and accepted that he would simply have signed the form. Further, he said that Ms Bennett made no mention to him of the fact that her name appeared on the form.

51. Mr Agnew was also interviewed that day. He too said that he did not read the names of the forms. He also signed overtime forms for Ms Bennett but he knew that the depot was funded for two admin people and so he felt

there was nothing unusual about these claims.

52. Mr Turner made the same point in his interview, although he added that he asked Mr Norton if it was okay for him to sign these timesheets. This was a question about overtime claims rather than the specific bonus payments. He also made reference to the overtime culture at the time, and stated that he had raised a concern with HR when he saw one person who had been working for 19 days in a row. As to the disruption payments, he said it did not occur to him that Ms Bennett was not entitled to it and said he did not know what was agreed between her and Mr Norton – indicating that any such private agreement was sufficient authorisation in his eyes.

53. Ms Bennett had not been interviewed at this stage but may well have come to learn of this disciplinary investigation, prompting her "grievance" on 7 September 2016, which is essentially an unsolicited witness statement setting out her version of events. In this she described the "make it work for you" conversation and the April exchange, as already described. After a period of sickness absence she was eventually interviewed as part of the disciplinary process on 2 December 2016. She stood by her previous account, stating that she felt she deserved these bonus payments, and added to her account of the October conversation by saying that Mr Norton had used the more definite words, "claim it then, make it work for you". After this interview she was suspended, over 18 months after the bonus claims first came to light.

54. Her grievance document had raised another matter. At paragraph 37 she alleged that Mr Norton made sexual innuendos "with racist and sexist undertones." This was considered to be a separate and potentially serious matter, as a result of which, and after discussing matters with Ms Bennett, a separate investigation was begun. This was conducted by Tina Ivanov. It is unnecessary to say a great deal about that investigation, since it was not directly connected with the issue for which Ms Bennett was dismissed. Ms Ivanov interviewed Ms Bennett in order to get as full a picture as possible of the allegations in question and sought by various means to elicit the particulars. She tried to pin Ms Bennett down on any approximate dates or times on which particular remarks were made, without success. The main allegations were that Mr Norton had made repeated reference to wanting to bend her over the desk, and made disparaging references towards people of colour, describing them as "you lot." Pressed about the details, Ms Bennett said that the sort of remarks were a daily occurrence, but she could name no witness to support them. She did say that there were two individuals she could approach but would not give their names without having their permission.

55. Ms Ivanov then interviewed Mr Norton. She put these allegations to him to gauge his reaction and he adamantly rejected them. Despite our initial concern that Ms Ivanov had not gone on to interview anyone else to get a more rounded picture of the working environment, she gave what we regard as a satisfactory explanation for her approach. We regarded her in fact as an impressive witness. She had been very willing to receive any further particulars, but did not feel it appropriate to go fishing for further information. Such investigations are sensitive and regard has to be had to confidentiality and future working relations. She was hopeful of receiving some further

information from the claimant, but none was forthcoming. In the end she forwarded her report to Mr McKenna, recommending that there was no basis for any disciplinary proceedings. It described the information provided as vague and lacking in detail and that there was no evidence to support disciplinary action. Her letter to Mr McKenna of 1 March 2017 noted that she was awaiting contact from a witness, which is why she extended the length of the investigation to allow time for them to come forward. By then however, Ms Bennett had been dismissed. It was not suggested, and we do not find, that this investigation was drawn-out to conclude after her dismissal. We note however that Mr McKenna did not forward this report to Ms Bennett and she was never informed by the Trust of the outcome of her grievance.

56. The disciplinary hearing held by Andrew Bell took place on 6 February 2017. Mr Hawkes-Frost presented the management case and Mr Norton was put forward as a witness in support. He was then questioned by Ms Bennett's representative and denied ever agreeing that she could receive these payments. Ms Bennett was then asked further questions and there was a discussion about the alleged October 2014 conversation. Mr Bell observed that she was taking a risk in relying on an un-witnessed conversation, and at no point did Ms Bennett suggest that it had been observed by Sophie Haynes-Garcia.

57. Mr Bell concluded that Ms Bennett had been dishonest in making these claims and that it therefore amounted to gross misconduct on grounds of "theft, fraud or falsification of documents." The operative term here is fraud. The basis for that view was that she knew and understood the rules for entitlement to these bonus payments; they had been set by more senior managers than Mr Norton, so she would know that any approval by him was unauthorised. He did not form a definite view on whether or not some such conversation had taken place between her and Mr Norton, basing his conclusions on the fact that even if there had been some express or tacit approval, that would not excuse her conduct.

58. These views were communicated at a follow-up meeting on 10 February 2017 and incorporated into the dismissal letter dated 16 February, which Ms Bennett says she never received. She was told at the outcome meeting that she had the right to appeal, but no appeal was made. On Ms Bennett's case, this was partly because she did not receive the letter, and also because the subsequent emails which she sent, both to Mr Bell and to her own union representative, were incorrectly spelt, with the result that they were not received either. Whether these omissions were intentional or not, it was accepted at this hearing that the Trust did not receive any appeal from her, and so there was no appeal hearing. Ms Bennett was assisted by her Trade Union representative throughout and was told in person of her right to appeal so there was no failure on the part of the Trust.

59. Mr Hawkes-Frost's investigation report also recommended that each of the managers who had signed the bonus forms in question should be subject to a separate disciplinary process against them. This then took place, and each of them was re-interviewed. The outcome was a first written warning from Mr Norton, valid for six months. No disciplinary action at all was taken against Mr Agnew and Mr Turner. These separate disciplinary hearings

were conducted by Katie Millward. Her terms of reference were narrowly drawn, and were concerned only with the question of lax scrutiny of these claims. There was no broader consideration, for example, into the question of whether Mr Norton had agreed that Ms Bennett could claim these amounts. This was not asked. The underlying assumption therefore was that no such approval had been given, and so even when Mr Turner made reference in his interview to asking Mr Norton about whether to allow certain claims, he was not questioned in any more detail to establish whether or not this was in connection with the bonus payments or general overtime, and Mr Norton was not recalled to respond to any such claim. However, it is clear in context that he was only referring to overtime claims.

60. Ms Millward took the view that these events had occurred a long time ago and that lessons had been learnt. She also took into account, and emphasised, that Mr Norton was going through personal difficulties at the time, that it was an exceptionally busy and stressful period for the Deptford complex, and that the more junior managers – particularly Mr Turner – lacked training and support.

61. Having made those findings we turn to the relevant law.

**Relevant Law**

*Unfair Dismissal*

62. We were provided with a wide range of authorities but the following sets out the main provisions. The test of unfair dismissal is set out in section 98 of the Employment Rights Act 1996:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either [conduct] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

63. The question therefore is whether the employer acted reasonably in all the circumstances. The Tribunal need not agree with the approach taken. People may disagree about the proper course of action without either being

unreasonable. This was made clear in the case of *British Home Stores Ltd v Burchell [1978] ICR 303.*

> "...the tribunal has to consider whether there was a genuine belief on the part of the employer that the employee was guilty of the alleged misconduct, whether that belief was reasonably founded as a result of the employer carrying out a reasonable investigation, and whether a reasonable employer would have dismissed the employee for that misconduct."

64. Further, in *Iceland Frozen Foods Ltd v Jones [1983] ICR 17* it was held that:

> "…in many (though not all) cases there is a "band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
>
> …the function of the [Employment Tribunal] … is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

65. Similarly, in *Sainsbury's Supermarkets Ltd. v Hitt [2003] ICR 111* it was held that:

> "The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) apply as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."

66. We were referred by Mr Dobson to the case of ***Paul v East Surrey District Health Authority [1995] IRLR 305,*** on the relevance of comparators. According to this, at paragraph 35, "the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved." The question of double standards for different treatment but only arise where, on other occasions, similar misconduct had been dealt with differently.

67. We were also referred to two recent cases on the test for dishonesty: ***Ivey v Genting Casinos [2017] UKSC 67*** (which is not in the employment context); and ***Gondalia v Tesco Stores (EAT/0320/14)***, which is. The latter case has some parallels with the present one. It involved an employee who monitored a bank of self-service tills in a Tesco store. Customers began presenting their baskets with Easter eggs priced £1.50, which should have been marked at £1.00. Ms Gondalia then had to refer them to customer service where they could claim "double the discount", i.e. £1, under the terms of the company's policy. Despite these frequent reminders the Easter eggs remained at the same price, and at the end of her shift Ms Gondalia bought 10 of them herself and claimed the double discount. She did the same when she arrived at work the following day, with the result that using with her staff discount she purchased 20 Easter eggs for £9, a saving of £18.

68. Tesco took the view that she knew the rules about entitlement to this

discount and had deliberately exploited the situation. She protested on the other hand that she had acted quite openly and did not think she had done anything wrong. She too had 16 years of unblemished service. The EAT (HHJ Hand QC) concluded at paragraph 46:

> "46. We do not doubt that the subjective state of mind of an employee accused of misconduct is a relevant consideration. Nor can it be doubted that an objective view of that conduct will be of equal importance. …
>
> 47. Plainly the issue was the Appellant's conduct, and the question of the acceptability of that conduct. Those were matters that needed to be considered under section 98(4). Whether the word "dishonesty" is used or is not used will not necessarily be conclusive in an analysis of what sort of conduct it is. But concepts such as personal gain are invoked, issues of honesty or dishonesty may or may not arise. Where conduct is regarded as unacceptable and as leading to a loss of trust, as appears to have been the case with Mr Lane [the dismissing officer], are all matters that will need to take a place amongst the circumstances to be considered in deciding whether the sanction of dismissal was within the range of reasonable responses, which is just another way of saying whether the factors set out in the statutory language of section 98(4) have been evaluated one way or another."

69. Adopting this approach, we start with our own view of the conduct in question. The allegation for which Ms Bennett was dismissed was essentially one of fraud, which involves some element of dishonesty. Our clear view is that this was, objectively, dishonest conduct from the outset. The case presented on behalf of the claimant and repeatedly emphasised was that she had permission to be making these claims and so she was not acting dishonestly. We cannot accept that. In our view, for very much the same reasons found by Mr Bell, these were payments for frontline ambulance crew to staff ambulances for particular shifts, and which had no application for Ms Bennett's role as Station Administrator and so were payments to which she was not entitled.

70. Further, we conclude that she was well aware that it was wrong for her to make these claims. She may have felt the situation was unfair and, as we have found, tackled Mr Norton about it to obtain his approval, but she must in our view have realised that this was not in his official gift, and at best this amounted to turning a blind eye. At no time did she contact HR or payroll for any clarification of her entitlement, nor did she mention to any of the managers who signed the forms in question that her name appeared on the list. She was therefore acting surreptitiously. There is also the whole nature of the arrangement and the bizarre contrast between the role played by the ambulance crews, and her coming into work at such odd times as 6 p.m. on a Friday evening to carry out her work as a station administrator, when there was no operational requirement for her to be in the office at those times.

71. If that view is wrong for any reason, it still seems to us unarguable that from April 2015 onwards she knew she was not entitled to make these claims. Although the warning from Mr Norton may, as we conclude, have been simply to ease back on the claims, by her own admission she had the email from Mr Dawson in payroll and therefore knew the official view that she had

no entitlement to these sums. Had she genuinely believed that she was entitled to these payments we consider that she would have spoken up, and raised some independent query with HR or payroll to clarify her entitlement. She was simply, and knowingly, getting away with claims to which she was not entitled.

72. We accept that Mr Bell took the same view of the matter, and for very much the same reasons. We are satisfied therefore that he had an honest belief that Ms Bennett was guilty of this dishonest conduct, and that conduct was the reason for the dismissal.

73. The next stage is to consider whether that belief was reasonably founded as the result of a reasonable investigation. The main challenge to the disciplinary procedure was on the ground of double standards: Ms Bennett was dismissed, whereas the managers concerned received little or no punishment. We have given this careful consideration. Some features of the way in which the managers were treated give us real cause for concern. Mitigating factors were invoked in their cases, such as the delay since the incidents in question, which were entirely lacking in the claimant's case. A great deal of emphasis was placed on how busy they were, although none of them was as busy as Ms Bennett. And most significantly, no attention was paid in Mr Norton's case to the possibility that he may have given some express or tacit authorisation to these claims. Apart from the seriousness from his point of view of any such authorisation, there is a great deal of difference in terms of mitigation between an employee who simply calculates that she can put in bogus claims without being detected, and one who has formed an understanding that she will be allowed to do so.

74. We remind ourselves that in considering each step taken by the Trust we should not substitute our own view of the proper approach but should consider whether it is in the range of reasonable responses. It may, for example, have been better for the claimant and the three managers concerned to have been the subject of one disciplinary process rather than two such separate ones. However, on the information presented in late 2015 there was a strong case on the face of it against the claimant. Equally, the case against the managers appeared to be one of lax scrutiny. We cannot say therefore that commencing a separate disciplinary process against the claimant at that stage was outside the range of reasonable responses, and indeed we expect that most employers would have adopted that approach. Having formed the view that this was prompted by the NHS Counter Fraud investigation, it is all the more understandable that the Trust would have the claimant as their particular focus at that stage, but that does not involve any unfairness either.

75. That disciplinary process did address the question of whether or not Mr Norton had given the suggested permission. He was questioned about it at the hearing. The fact that he attended the hearing, and the claimant had the opportunity to put these questions, was both fair and appropriate. Also, very fairly, Mr Bell did not feel able to decide that question one way or another, and left the matter open. This is a further indication of open-mindedness. The fact that Ms Millward's later investigations did not consider that possibility does not affect the fairness or otherwise of the claimant's dismissal, since her position was very different. Here we remind

ourselves of the guidance referred to above in ***Paul v East Surrey District Health Authority:*** we cannot conclude that the case of Mr Norton and Ms Bennett are in any real sense comparable and so despite our misgivings about the disparity of treatment, that cannot affect the fairness or otherwise of her dismissal.

76. Another feature which gave us cause for concern was the delay in bringing these disciplinary proceedings. This is allied with the general unwillingness of the Trust to treat Ms Bennett's conduct as disciplinary at all, until prompted by NHS Counter Fraud. We note that a similar delay occurred in the case of ***Christou and anor v London Borough of Haringey [2012] IRLR 622,*** a case involving the dismissal of the relevant social worker and team manager following the well-publicised death of Baby P. In that case there was an initial disciplinary process which concluded with written warnings. The Council's Director of Children's Services regarded this as inadequate, and concluded that some more serious aspects had not been properly investigated. There was then a further disciplinary process resulting in the dismissal about 18 months later. The EAT rejected the appeal, saying that the ET had not erred in concluding that it was open to the respondent to conduct a second formal disciplinary process.

77. In the absence of any claim that Ms Bennett's hearing was prejudiced by the non-availability of any witness, or that records were not available, or some similar consequence of the lapse of time, we cannot therefore conclude that the delay in this case rendered the proceedings unfair; nor does the fact that they were revived by the involvement of NHS Counter Fraud mean that the Trust were not entitled to look afresh at the extent of the misconduct. In any event, this aspect was not relied on to any extent by the claimant.

78. We therefore conclude that the procedure adopted was in all respects within the range of reasonable responses, and so fair. As to the decision to dismiss, this too was within the range of reasonable responses. We remind ourselves that it is not for us to substitute our view of the seriousness of the conduct, but in fact having concluded that it was objectively dishonest, and resulted in the receipt of over £5000, even given that the claims began with some tacit approval it would be difficult to support any other view.

*Discrimination*

79. The next question is whether the dismissal was an act of direct discrimination, either on grounds of race or sex, contrary to s.13 Equality Act 2010. By s.39(2), dismissal may be an act of discrimination. The burden of proof provisions under s.136 of the Act were considered recently by the Court of Appeal in ***Ayodele v CityLink Limited [2017] EWCA Civ 1913,*** which reasserted the view that it was necessary for the claimant first to prove facts from which the tribunal could conclude, in the absence of an explanation from the respondent, that the dismissal had been tainted by discrimination. It is not enough for the claimant to show that she has a protected characteristic and was dismissed - "something more" is required; ***Madarrassy v Nomura [2007] ICR 867.***

80. This involves some consideration of what would have happened if, in short,

Ms Bennett had been a white, male. Would the outcome have been any different? Nothing was put forward to suggest that that was or might be the case beyond the fact that all of the managers were white and male and received a less severe penalty. For the reasons already given, that difference in treatment is understandable, and their positions were not comparable. Indeed, we formed the view that the difference was wholly or mainly the result of a different and more lenient attitude to disciplinary issues by Ms Millward, with her emphasis on lessons learned, rather than any inherent bias or underlying unfairness at the behest of the Trust.

81. Indeed, the circumstances appear to show that far from being discriminated against during her employment, Ms Bennett was in fact rather indulged by Mr Norton, at least until the amount of her overtime and bonus payments attracted the adverse attention of the payroll department. The focus however at this stage has to be on the mind of Mr Bell in forming his conclusions. Allegations of racist and sexist language had been made against Mr Norton, but not only were these separate from the disciplinary hearing he was concerned with, that process was still ongoing and Ms Bennett did not try to make any connection in the disciplinary hearing between this alleged misconduct by Mr Norton and the bonus question. In any event, Mr Norton was not the one making or (we find) influencing the decision to dismiss.

*82.* Hence, we do not find that the disparity of treatment between the managers and Ms Bennett amounts to the "something more" required in these circumstances.

*83.* Mr Dobson also drew our attention to ***Martin v Devonshire Solicitors [2011] ICR 352*** in which Mr Justice Underhill stated at paragraph 32:

> "It is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer with the tribunal is in a position to make positive findings on the evidence one way or the other."

84. In the present case we accept that Mr Bell's motivation was limited to the conduct in question, as set out in his dismissal letter, and there is no basis for us to conclude that the burden of proof shifts to the respondent, either in connection with the alleged race or sex discrimination.

*Harassment*

85. The final claim is of harassment on grounds of race or sex arising out of the conduct of the interview by NHS Counter Fraud. Mr McKetty conceded at the outset of the hearing that no complaint about the behaviour of the investigators was pursued, and the only remaining aspect was over the timing of it. It took place on 13 February 2017, three days after she had been informed of her dismissal. In her witness statement she noted that they had been informed of her dismissal adding:

> "54. I considered this to be continued harassment, because surely, such an interview, should have taken place after my right to have an appeal."

86. This is simply misconceived. The intention had been for her to be interviewed by NHS Counter Fraud before the disciplinary hearing, and they had first written to her inviting her to attend in August 2016. It is not the case therefore that the Counter Fraud Investigation was intended to follow the disciplinary investigation, or, given that no information was shared by the latter, that this in any way prejudiced the possibility of an appeal. Further, there was no appeal. This is in fact not an allegation of harassment at all but a complaint directed at the fairness of the disciplinary proceedings. It is not at all clear to us how having this interview on 13 February 2017 rather than earlier or later had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, and so these claims too are dismissed.

87. In concluding, we note that the NHS Counter Fraud investigation has still not concluded, even though over three years have passed since the first of the disputed bonus payments.

88. These proceedings are however concluded, and for the reasons set out above each of the claims must be dismissed.

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Employment Judge Fowell

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Date 12 February 2018