Case Number: 2205162/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr M Sawney		Government Legal Department

Heard at: London Central **On**: 2-3 December 2019

Before: Employment Judge Stout

Representations
For the claimant: Mr R Ross
For the respondent: Mr M Purchase

JUDGMENT

1. The judgment of the Tribunal is that the Respondent has not made any unlawful deduction from the Claimant's wages.

2. The claim is dismissed.

REASONS

Introduction

1. The Claimant has been employed by the Respondent since 18 January 1988. He started as an Administrative Officer (AO) and is now a Grade 7, Delivery Manager. The Respondent is the Government Legal Department (GLD), formerly the Treasury Solicitor (TSol), a non-ministerial department and executive agency that reports to the Attorney-General. These proceedings concern an Automatic Data Processing (ADP) Allowance that the Claimant received from 1 October 1992 until 31 August 2017.

The issues

2. The issue in this case is whether or not the Claimant was entitled from 29 September 2017 onwards to continue receiving the ADP Allowance. Answering this question involves the resolution of a number of sub-issues that were agreed between the parties at the outset and which may be summarised as follows:-

    (1) Was the Claimant an "existing grade 7" within the meaning of the "Trawl notice" dated August 2017?

    (2) If the Claimant was an existing grade 7, was the ADP allowance a “reserved right” to a Recruitment and Retention Allowance?

    (3) If the Claimant was not an existing grade 7, was the ADP allowance a "permanent allowance" within the meaning of the "trawl notice"?

    (4) If the claimant was not an existing grade 7, was his salary following promotion correctly calculated in accordance with the "trawl notice"?

    (5) Was there, as the Claimant contends, an implied term of the contract that the Claimant would continue to receive the ADP allowance until an express contractual variation was agreed between the parties which halted his entitlement? If so, has any such agreement being reached to date?

    (6) Alternatively, as the Respondent contends, was the Claimant's entitlement to an ADP allowance governed by paragraphs 3585-3648 of the Civil Service Pay and Conditions of Service Code (CSPCSC)?

    (7) If so, do paragraphs 3625(a) and (b) of the CSPCSC also apply, such that the Respondent had the discretion to continue paying the ADP allowance in full for up to 3 years or, indefinitely, on a mark time basis?

    (8) If the Respondent had such a discretion, did it exercise it irrationally?

(9) If the Respondent acted irrationally, could it lawfully have withheld the allowance in any event and, if so, to what extent?

The Evidence and Hearing

3. At the outset of the hearing, the question arose as to whether what have been identified above as issues (1)-(2) and (7)-(9) were issues that required amendment to the claim form or not and, if so, whether any amendment should be permitted. The Claimant argued that no amendment was necessary. The Respondent maintained an amendment was necessary, but did not object to it being permitted. For reasons given orally at the hearing, I was not persuaded that these were the sorts of points that required a formal amendment, but if amendment was required, I considered it should be permitted in the circumstances.

4. I explained to the parties at the hearing that I would only read the pages in the bundle which I was referred to in the parties' statements and skeleton arguments and in the course of the hearing. I did so.

5. I also heard oral evidence from the Claimant and from Ms Kay Watson (Head of HR Policy and Pay in the GLD) for the Respondent. They were both cross-examined.

The facts

6. I have considered all the oral evidence and the documentary evidence in the bundle to which I was referred. The facts that I have found to be material to my conclusions are as follows. If I do not mention a particular fact in this judgment it does not mean I have not taken it into account. All my findings of fact are made on the balance of probabilities.

Background

7. When the Claimant commenced employment with the Respondent in 1988 he was issued with an appointment letter which recorded among other things that the details of his conditions of service, being those applicable to all civil servants at that time, were to be found in the Civil Service Pay and Conditions of Service Code (CSPCSC) and in the Staff Handbook. At the time that the Claimant joined the civil service the CSPCSC included at paragraph 3585 and following provision for an Automated Data Processing (ADP) allowance. The CSPCSC provided in summary that ADP allowances were to be paid where two conditions were satisfied:

a. to officers of certain civil service grades up to senior executive officer (SEO) grade (but not beyond, i.e., crucially to these proceedings, not to Grade 7s) ("the grade condition"); and
b. if certain duties were being performed, i.e. where the officer had *"technical skills which are necessary for, and effectively applying to, the performance of ADP duties"* ("the duties condition").

8. Paragraph 3590 of the CSPCSC provided more detail about the duties condition and the posts which qualified for ADP allowances. It incorporated by reference other documents which, owing to the passage of time, the Respondent has not been able to locate and, in any event, included the following sentence *"in the circumstances it is not possible rigidly to define the scope of qualifying duties to a particular grade"*. In the circumstances, counsel for the Respondent sensibly indicated that he placed no reliance on the duties condition in answer to the claim made by the Claimant in these proceedings.

9. The CSPCSC also makes provision at paragraph 3625 as to what should happen if somebody transfers to duties other than ADP. This includes at paragraph 3625(a) that on transfer to a post of the same grade which does not qualify for continued receipt of an allowance an officer, whether a substantive member of the grade or serving it on temporary promotion, may retain the allowance on a *"mark-time basis"*, even if this is more than the maximum of the scale applicable to the location. At paragraph 3625(b), it provides that where an officer transfers in the interests of the department and as part of a career development plan to a non-qualifying post, the individual may continue to be paid the allowance in full for up to three years. If, however, an individual transfers to a non-qualifying post for any other reason or, at the end of three years does not transfer back to a qualifying post, the allowance may be retained on a mark-time basis until such time as substantive pay becomes more favourable.

10. Ms Watson gave evidence that the CSPCSC was replaced on 1 April 1996 by the Civil Service Management Code (CSMC). The CSMC is in her words *"a much lighter set a baseline terms and conditions the civil servants below the senior civil service"*. It does not include anything about ADP allowance.

11. The Claimant was first paid the ADP allowance from 1 October 1992. It is separately itemised on his payslips from that date. Between 1 October 1992 and September 2017 the Claimant moved role or was promoted on a number of occasions. When he first started to receive the ADP allowance he was in an Executive Officer, PC Support Manager. The Respondent's records show that the Claimant was promoted to HCA grade on 15 December 1999, and then to SEO grade on 15 November 2002. The Respondent's understanding is that throughout those operations the Claimant continued to remain eligible to receive the ADP allowance as he continued to meet both qualifying conditions for the allowance.

12. In or around late 2011 or early 2012 a potential redundancy situation arose. At that time there was discussion between the Claimant and Human

Resources (HR) as to what would happen to his ADP allowance if he was moved out of the IT department. By email of 3 February 2012, Mr Tom MacGruer purported to confirm the discussions they had had. So far as is material, his email states as follows *"when we spoke I explained that in the normal way of things people who are in receipt an allowance would typically lose the allowance (all at once or over a period of time) when they move out of the work area that attracted the allowance. In addition, they would certainly lose it on promotion or on movement to another department (subject to that new department's rules) – you understood and accepted this last part, as noted in your email below."* I interpolate here that the Claimant in cross-examination did not accept that he had agreed this point in his email below, but that seems to me to be immaterial since if the point was not made clear in discussions, it was certainly made clear in Mr MacGruer's email.

13. Mr MacGruer then went on to set out the outcome of his discussion with HR colleagues and that it had been decided that on this occasion the Claimant when moving role should retain the ADP allowance at the current level and that this would continue *"so long as you remain an SEO in TSol and where any sideways move is at the behest of TSol management, or where you are required to apply for a post as part of any restructuring situation, or where failure to apply could/would result in being in a surplus situation (i.e. you have no choice but to apply)"*. He went on, *"in the event that you move to another department as an SEO or Grade 7, or are promoted in TSol to Grade 7, the allowance would be handled in the normal way as part of that move/promotion – this is likely to be losing the allowance at that time (albeit if promoted to Grade 7 the salary increase of more than cover the loss of the allowance)"*.

14. Subsequent to this email, the Claimant was moved by management to a project manager role in the finance team in charge of managing the case management system project. Ms Watson in evidence suggested that in this role the Claimant did not qualify for ADP allowance because of the nature of the duties he was performing. However, as already noted, Mr Purchase, Counsel for the Respondent, does not rely on this point.

15. From 27 April 2015 the Claimant was temporarily promoted to a Grade 7 role. He was informed that he would from that date be paid at the Grade 7 rate of £47,557 per annum. The letter stated that this was a non-substantive promotion that it was temporary and that at the end of the promotion period he would revert to his substantive grade an appropriate rate of pay. The letter further stated that he remained eligible for substantive promotion and that is *"promotability"* would continue to be based on his substantive grade of SEO. The letter made no mention of the ADP allowance.

16. The Respondent's case is that at this point the Claimant ceased to be eligible for ADP allowance because he was in a Grade 7 role and on temporary promotion it is the Respondent's policy to pay as if it is a substantive promotion. This is set out in the Respondent's Pay and Reward Policy document. The Claimant disputes that that particular policy has ever been properly consulted upon, or published. The Respondent does not rely on that policy in these proceedings. The Respondent's position simply is that in a

Grade 7 role the ADP allowance was not payable and that accordingly it should for that reason have ceased on temporary promotion. That it did not cease is, the Respondent, says an oversight. Ms Watson gave evidence that when the person responsible for amending the Claimant's salary details on the system amended his salary from SEO to Grade 7 they should also have manually removed the ADP allowance, but they omitted to do so. There is, however, no evidence before me as to who was the person responsible at the time or as to what their reasons were for doing what they did.

17. Under the Respondent's policy temporary promotion is supposed to be just that, a temporary matter of three to a maximum of six months. In the Claimant's case it continued for some two years. I find that this does not affect the fact that it was still a temporary promotion and understood as such by both Claimant and Respondent. I was shown performance reviews during this period that show that the Claimant was well regarded by his line manager eligible for substantive promotion. Indeed, he did pass a Promotion Board during this time, but was not successful in being appointed to that particular post.

18. In August 2017 a "trawl notice" (an internal advertisement) was issued to fill a Grade 7 post within the Change Division. The post title was Delivery Manager. The Claimant applied for that post and was successful in being appointed. The trawl notice provided as follows in relation to salary:

> "Existing Grade 7s will retain their current salary, (excluding non-permanent allowances); unless their salary is below GLD's Grade 7 minimum £48,400. Any reserved rights to London Weighting and Recruitment and Retention Allowances will be consolidated with basic salary on transfer.
>
> On promotion there will be an increase of 10% or an increase to GLD's Grade 7 minimum, whichever is the highest. Permanent allowances will be consolidated following the application of the 10% increase."

19. In a letter of 21 September 2017 the Claimant was informed by the Respondent that payment of the ADP allowance should have ceased when he was moved out of an ICT role in 2012. *"However, due to the circumstances at the time it was agreed that you would retain this allowance until you either applied and wer moved into an SEO role or were promoted to Grade 7".* The letter stated that the allowance had therefore been stopped from the first available pay date following his substantive promotion to Grade 7, i.e. with effect from 1 September 2017. The letter confirmed that GLD would not seek to recover the previous overpayment of the allowance between 24 July 2015 and 1 September 2017.

20. The Claimant complained about this, first informally, and then through a grievance process. The detail of the complaint and grievance process is not material to my decision. Two points only are relevant. First, at no time during the process did the Respondent refer to or rely on the CSPCSC that in these proceedings it contends governs the payment of the ADP allowance. This is unfortunate because as the Claimant frankly acknowledged at some point in cross examination, the dispute between the parties might have turned out

differently. Secondly, in the course of two meetings between the Claimant and Ms Watson she raised the possibility of him keeping the allowance on a mark-time basis (which would have meant keeping it until salary increases caught up with the allowance). The Claimant was not interested or, at least, not interested at that stage. He maintained, as he has in these proceedings, that he should be entitled to keep the allowance.

21. The Claimant contacted ACAS on 13 April 2018 and the period of early conciliation concluded on 30 April 2018. The Claimant submitted this claim to the Tribunal on 27 June 2018.

Conclusions

The law

22. Sections 13 and 27 of the ERA 1996 provide, so far as relevant, as follows:

> **s.13 Right not to suffer unauthorised deductions**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless-
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction….
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> **s.27 Meaning of 'wages' etc**
>
> (1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including-(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise ...

23. The parties are agreed that in order for an unlawful deduction of wages claim to succeed there must be a legal, although not necessarily contractual, entitlement to a payment of a particular sum on a particular date: *New Century Cleaning Company Ltd v Church* [2000] IRLR 27 at para 43 per Morritt LJ and *Coors Brewers Ltd v Adcock* [2007] ICR 983 at para 46.

24. In this case, the Claimant raises a number of alternative arguments as to the basis of his entitlement as set out further below.

25. Insofar as those arguments depend on the written terms of contractual documentation, I must determine the meaning of those documents objectively from the point of view of a reasonable person having all the

background knowledge that would be available to the parties. The subjective intentions of the parties are not relevant: see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14 and *Globe Motors v TRW Lucas Varity Electric Steering Limited* [2016] EWCA Civ 396 at para 59. In doing so, I must bear in mind the relative bargaining power of the parties and be astute to determine the reality of the relationship which may not necessarily be properly reflected in the written documentation: *Autoclenz Ltd v Belcher and ors* [2011] UKSC 41, [2011] ICR 1157.

26. One of the Claimant's arguments rests on an implied term on the basis of 'custom and practice'. The parties are agreed as to the relevant legal principles, and I accept them to be as follows. First, a term may be implied into a contract only if it is *"necessary"* to give business efficacy to the contract or it is so obvious that *"it goes without saying"*: see *Marks & Spencer v BNP Paribas Securities services Trust* [2016] AC 742, paras 18 and 21. Secondly, a term may be applied on the basis of a course of conduct between the parties but in such cases the *"essential object is to ascertain what the parties must have, or must be taken to have, understood from each other's conduct and words, applying ordinary contractual principles"*: *Park Cakes Ltd v Shumba* [2013] IRLR 800, paras 33 and 34. The parties must be shown to be applying the term because there is a sense of legal obligation to do so: *"The burden of establishing that a practice has become contractual is on the employee, and he will not be able to discharge it if the employer's practice is, viewed objectively, equally explicable on the basis that it is pursued as a matter of discretion rather than legal obligation."* (*Park Cakes*, para 36).

27. Another of the Claimant's arguments is that the Respondent exercised a contractual discretion unlawfully. This requires me to consider whether that discretion was exercised rationally and in accordance with the terms of the contract. In *Braganza v BP Shipping Service Ltd* [2015] 1 WLR 1661 Baroness Hale expressed left open (at para 32) the extent to which public law principles apply in this context, but all members of the Court agreed (*per* Baroness Hale at para 30, Lord Hodge at para 53 and Lords Neuberger and Wilson at para 102) that at least the *Wednesbury* test applies, i.e. the tribunal must consider whether the right matters have been taken into account in reaching the decision and whether the outcome is so outrageous that no reasonable decision-maker could have reached it.

28. In this respect although the legal burden is on the Claimant to show that the contractual discretion was exercised unlawfully *"if [the Claimant shows] a prima facie case that the decision is at least questionable, then an evidential burden may shift to the employer to show what its reasons were. In such a case, if no such evidence is placed before the court, the inference might be drawn that the decision lacked rationality"*: see *IBM United Kingdom Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212 at para 57.

29. Further, in the contractual context it is not sufficient for the tribunal to find that an employer's exercise of a discretion was irrational. As a matter of contract, before an exercise of discretion will be unlawful, the tribunal must be satisfied that a lawful exercise of the discretion (eg one taking into account all relevant

factors) would not have reached the same decision. This point is made by Baroness Hale in *Braganza* at para 31. See also *No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2018] EWCA Civ 250 [2018] 1 WLR 5682 *per* Lewison LJ at paras 37-41.

30. However, even if I am satisfied that a lawful exercise of discretion would have resulted in a different outcome, that is not the end of the matter so far as an unlawful deduction from wages claim is concerned. That is because s 13(3) ERA 1996 requires that it be possible to ascertain what is the amount of wages *"properly payable"* on the particular occasion and it is only the specific *"amount of the deficiency"* which is treated for the purposes of ss 13 and 23 ERA 1996 as the deduction. This is the point made in *Coors Brewers* (ibid) at paras 68-71 *per* Chadwick LJ, on which Mr Purchase relies. Mr Purchase argued, and I accept, that the effect of this case is that unless it is possible for the tribunal to ascertain the precise sum that should have been paid there is no unlawful deduction from wages. He contended that it is not for the Tribunal to substitute its own view for that of the employer and unless the Tribunal can determine, on the balance of probabilities, that a lawful exercise of the discretion would have resulted in a particular payment, then no unlawful deduction from wages claim can be brought.

Conclusions

31. The issue for me to determine is whether the Claimant had, as at 1 September 2017, a continuing entitlement to the ADP allowance. Mr Ross for the Claimant advances arguments on a number of alternative bases and I deal with each in turn as follows:–

32. First, he argues that for the purpose of August 2017 trawl notice he was an "existing Grade 7" and therefore entitled to retain his current salary under the first paragraph in the section of that notice I have set out at paragraph 18 above. I reject that argument. The Claimant was not an existing Grade 7 because he had been told in the temporary promotion letter of April 2015 that for promotion purposes he remained in his substantive SEO grade. The Claimant argues that I should apply an objective test when reading the August 2017 notice and therefore it may not mean either what the Respondent intended it to mean or what the Claimant understood it as meaning. While I accept their subjective intentions and understanding are not relevant, the authorities require me to consider what the document means objectively taking into account the material available to the parties at the time. That includes the letter of April 2015 which makes perfectly clear that for promotion purposes the Claimant is not a Grade 7 but an SEO.

33. With regard to this first argument, I should add that the Respondent has been content for the purposes of these proceedings to treat the words of the August 2017 notice as being contractual. Although as a job advertisement, the trawl notice would not normally be regarded as constituting a contractual 'offer' capable of acceptance by the Claimant to form a binding contract, that is not an invariable rule. In this case, I am content to proceed on the basis of the

Respondent's concession that it is bound by the terms of the trawl notice as regards the issue that arises in these proceedings and that the wages *"properly payable"* to the Claimant following his substantive promotion are the wages that are calculated in accordance with that trawl notice.

34. Secondly, the Claimant's 'fallback' argument is that the second paragraph of the section of the trawl notice quoted at paragraph 18 above nonetheless entitles him to receive the ADP allowance following promotion. On its face, that second paragraph gives him no such entitlement. The second paragraph is clear that on promotion an individual should receive the higher of an increase of 10% on their existing salary or the GLD Grade 7 band minimum. As to allowances, the paragraph says that permanent allowances will be consolidated following the application of the 10% increase. That means that permanent allowances are to be added to the salary after the 10% increase has been applied, but before the comparison with the GLD Grade 7 band minimum is made. That is what the Respondent did for the Claimant in this case. (Or, at least, it has the same effect as what the Respondent did for the Claimant in this case. In fact, the Respondent applied the 10% increase to the ADP allowance as well when making the comparison, but since it was still lower than the Grade 7 band minimum, this is not material.)

35. The Claimant's argument is that the second paragraph is not to be given its ordinary, natural meaning because he says that it creates the perverse result that someone whose existing salary plus 10% plus allowance takes them over the GLD Grade 7 band minimum gets to keep their allowance, while some whose existing salary plus 10% plus allowance leaves them less than the GLD Grade 7 band minimum does not get to keep their allowance. I do not consider that this result is anomalous; nor is it any reason to read the paragraph in any way other than the ordinary way. The Respondent's policy, as Mr Purchase points out, which is reflected in and readily ascertainable from the paragraph itself, is that on promotion no one should suffer a reduction in salary and everyone should have an increase of at least 10% plus allowances. It is not anomalous that someone with a higher salary before promotion should end up with a higher salary after promotion (with or without allowances). That is simply the coherent and logical effect of the provision. Moreover, the Claimant is wrong that the part of the paragraph dealing with consolidation of allowances is 'redundant'. It was 'redundant' in the Claimant's case because his previous salary plus 10% plus allowance was less than the Grade 7 minimum. Had it been more than the Grade 7 minimum, this sentence would have applied so as to 'consolidate' the allowance with the salary going forward.

36. The Claimant argues that it must be wrong that he personally has ended up with a lower salary following substantive promotion than he had before. However, the reason for this is not principally because he was previously (the Respondent says wrongly) receiving the ADP allowance, but because prior to promotion he was acting up in the Grade 7 role. As I have already held above, it is clear that for the purposes of deciding what somebody's salary should be following promotion, it is the salary in the substantive post (i.e. the SEO role) that matters. It is as a result of applying that aspect of the August

2017 trawl notice that the Claimant ends up with a slightly lower salary following promotion than he did before. It is not because he has lost his ADP allowance (although I understand why it appears otherwise to the Claimant).

37. In the circumstances, I do not need to decide the issue raised by the Respondent's subsidiary argument that the ADP allowance was not a *"permanent allowance"* so far as the Claimant is concerned because at the time of promotion he was receiving only by virtue of a temporary and mistaken arrangement. I note that that argument is not in any event consistent with the approach taken by Ms Watson throughout, which accepted that despite the mistake the ADP allowance was properly characterised as a *"permanent allowance"* for the purposes of the trawl notice.

38. Thirdly, the Claimant argues that following the withdrawal of the CSPCSC in 1996 the fact that he continued to be paid the ADP allowance through various transfers and promotions shows that it was an implied term of the contract that he would continue to receive the allowance until an express variation agreed between the parties altered his entitlement. I reject this argument. It cannot be right that the withdrawal of the CSPCSC meant that there were suddenly no contractual terms governing the aspects of the Claimant's relationship with the Respondent that were not captured in the CSMC. It seems to me that it 'goes without saying' that when, following the withdrawal of the CSPCSC, the Respondent continued paying the ADP allowance it did so because it regarded itself as under a contractual obligation to continue making such payments, not because it suddenly became a matter of discretion. Moreover, it likewise 'goes without saying' that if anybody had turned their attention to the matter in 1996 they would have said that 'of course' the terms of the CSPCSC continued to govern both the Claimant's entitlement to, and the Respondent's obligation to pay, the ADP allowance.

39. It is not necessary in those circumstances to imply some new term that the ADP allowance was from 1996 a right to which the Claimant had a permanent entitlement to regardless of any subsequent promotion. Nor can such a term be implied from the Respondent's subsequent course of conduct in continuing to pay the ADP through the Claimant's various promotions since that date. Up until the temporary promotion in April 2015, that course of conduct is wholly and satisfactorily explained by reference to the original terms of the CSPCSC. Following the temporary promotion in April 2015, the Claimant's argument is stronger, but in my judgment, applying as I must an objective test, the fact that the Claimant had been told by Mr MacGruer in 2012 that he would *"likely"* lose the allowance if promoted to Grade 7, together with the omission of reference to the ADP allowance in the temporary promotion letter, mean that it cannot be said objectively that the continued payment of the ADP allowance between April 2015 and August 2017 appeared to be referable to any contractual obligation. The Respondent's continued payment of the ADP allowance after the temporary promotion was, objectively, as likely to be referable to an exercise of discretion or (as the Respondent maintains) a mistake.

40. In any event, whatever the position following the temporary promotion, in the light of Mr MacGruer's 2012 email it is in my judgment impossible for the Claimant to argue on the basis of custom and practice that there was an implied term that the ADP would continue indefinitely. Mr MacGruer's email makes it clear that the Respondent did not consider that it was bound to pay the ADP allowance regardless of what job the Claimant was doing or whether he was promoted to Grade 7. The implied term for which the Claimant contends is thus not consistent with the evidence.

41. Fourthly, and finally, the Claimant contends that if he is wrong on each of the above arguments then he was still entitled under paragraphs 3625(a) and/or (b) of the CSPCSC to a lawful exercise of discretion by the Respondent. He contends that, at least for the period with which I am concerned (i.e. 1 September 2017 to date) the only rational exercise of discretion under those paragraphs would have been one that resulted in the Claimant not suffering any reduction in his salary (including the ADP allowance) on substantive promotion to the Grade 7 role. I do not accept this argument either. Paragraph 3625(a) is not dealing with promotion but with *"transfer to work in the same grade"*. As Mr Purchase notes, this is to be distinguished from paragraph 3624 which does deal with *"promotion"*. Paragraph 3625(b) does not apply to the Claimant either. It applies in two situations: first, where an officer is 'transferred in the interests of the department and as part of a career development plan'. That is not the Claimant's situation because he voluntarily applied for promotion. Secondly, it may apply where *"an individual transfers to a non-qualifying post for any other reason"*, but in such cases it provides that *"the allowance may be retained on a mark-time basis until such time as substantive pay becomes more favourable"*. That is precisely the situation already covered by the second paragraph of the trawl notice that I have addressed above. In this case, on substantive promotion, the Claimant's substantive pay was more favourable because the Grade 7 band minimum was higher than his substantive SEO salary plus 10% plus the allowance. In my judgment, therefore, the discretions in paragraphs 3625(a) and/or (b) did not arise to be exercised.

42. I would add, lest I am wrong in my analysis of the effects of paragraphs 3625(a) and/or (b), that even if a discretion does arise under those paragraphs to allow the ADP allowance to continue on a mark-time basis, I find that the Respondent could rationally have refused to exercise that discretion in the Claimant's favour in this case. This is because the Respondent considered that it had overpaid the Claimant between 2015 and 2017. Although I have not been required in these proceedings to determine whether the payment of the ADP between April 2015 and August 2017 was an overpayment, it seems to me that the Respondent's belief that it was is sufficiently reasonable to form the basis of a rational exercise of discretion not to continue payment in September 2017. I should add that the fact that the Respondent was prepared to exercise discretion in the Claimant's favour to allow him to keep the ADP on a mark-time basis does not undermine this conclusion. On a *Wednesbury* test it was not irrational to refuse to continue payment.

43. Finally, at times Counsel for the Claimant appeared to suggest that even apart from paragraphs 3625(a) and/or (b) the Respondent enjoyed a discretion to pay the ADP allowance which it could only rationally have exercised in his favour. However, I asked Mr Ross whether he was pursuing such an argument and he disavowed that saying that the issue of discretion related only to paragraphs 3625(a) and/or (b) as agreed in the list of issues.

Overall conclusion

44. For all these reasons, I find that the Claimant had no entitlement to the ADP allowance after 1 September 2017. The Respondent has not made any unauthorised deduction from his wages. The claim is dismissed.

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Employment Judge Stout

Date 5 December 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

6 December 2019

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FOR THE TRIBUNAL OFFICE

Where reasons were given orally at the hearing in relation to matters of case management, written reasons will not be provided unless they are asked for by a request in writing presented by any party under Rule 62(3) within 14 days of the sending of this judgment.