



THE EMPLOYMENT TRIBUNALS

Claimant: Mr J P Raynes

Respondent: Amey Services Ltd

Heard at: Sheffield (By CVP) **On:** 1 September 2021

Before: Employment Judge Newburn

Representation:

Claimant: Mr Bronze (Counsel)

Respondent: Ms Pye (Solicitor)

REASONS

1. Judgement having been given orally on 1 September 2021, the Respondent wrote to the Tribunal and requested written reasons to be provided.
2. The Claimant submitted his claim form to the Employment Tribunal on 28 May 2021 seeking a declaration as to his correct employment particulars and made a claim of unlawful deduction from wages.
3. The Respondent resisted all the claims.

Issues

4. The central question I had to determine was whether or not there had been a verbal variation to the contract of employment in November 2018 and, if there had been a variation, the extent of this variation.
5. Specifically, was it, as the Claimant submits, an agreement that he was placed within grade 5 of the Respondent's pay structure; or was it, as the Respondent submits, an agreement to a one-off, out of cycle salary increase.
6. I needed to decide this in order to determine what, if any, sums were due to the Claimant in connection with his employment.
7. The Claimant could not succeed in his complaint that he had suffered unauthorised deductions from his wages under s.13(1) of the ERA 1996, unless he had first established what wages he was entitled to.

8. The Respondent maintained that there was no entitlement for the Claimant to have his wages increase yearly under grade 5.

Documents and Evidence

9. The case was heard in a hybrid hearing. I attended via Cloud Video Platform, and all other parties were present at the hearing centre.
10. The Claimant was represented by counsel and gave evidence in support of his claim. The Claimant called one further witness, Ms D Mitchell, his Trade Union Representative.
11. The Respondent was represented by its solicitor and called one witness, Mr K King.
12. All witnesses gave evidence in chief by way of written witness statements which had been exchanged, and I had read the same prior to hearing oral evidence. I was also provided with a joint bundle of documents running to 88 pages.
13. I made my findings of fact on the basis of the material before me, taking into account contemporaneous documents where they existed and the conduct of those concerned at the time. I resolved such conflicts of evidence as they arose on the balance of probabilities. I took into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts and documents. In addition to the evidence of these witnesses, I considered the documents to which I was directed in the agreed bundle, and references to page numbers in these Reasons relate to that bundle.
14. Finally, I received oral and written submissions from the parties' representatives, which I also considered.

Findings of fact

15. The Respondent is a company involved in infrastructure support, transport, and facilities management services in a variety of sectors. The business is divided into various operating divisions. The Claimant is employed in the highways section of the transport and infrastructure division and works on the Respondent's contract with Sheffield City Council ('**SCC**') to provide highways and street maintenance within the SCC local authority area.
16. The Claimant was initially employed by SCC to carry out highways and street maintenance within the SCC local authority area. On 20 August 2012, the Claimant's contract of employment transferred to the Respondent pursuant to the Transfer of Undertaking (Protection of Employment) Regulations 2006.
17. The Respondent adopted SCC's pay structure and spinal column points ('**SCP**'). At the time the Claimant was transferred to the Respondent, he was employed at SCP 22 of the National Joint Council for Local Government Services ('**NJC**') pay scales, which is the SCP at the top of grade 4 of SCC's pay structure. Further to the transfer, the Claimant's contractual rate of pay continued to be determined by the NJC pay scales and he did not move on to the Respondent's terms and conditions.
18. Whilst the Respondent follows the NJC SCP system, it adopts its own grading structure. There is an overlap in the Respondent's grading structure in that NJC

SCP 22 is both the top spinal point of the Respondent's grade 4, and also the first spinal point of grade 5. SCP 23 is the second spinal point within grade 5.

19. In April each year the Respondent carries out annual salary reviews with its employees in accordance with the Respondent's terms and conditions, or otherwise as part of the NJC review. As part of these reviews, employees will often move up a SCP annually until they reach the top SCP for their pay grade.
20. In November 2018, the Claimant raised a grievance with the Respondent regarding his pay (the '**2018 Grievance**'). The Claimant stated that he was being paid less than his colleagues who also transferred to the Respondent from SCC and who were carrying out the same role and on the same contract as the Claimant, but who were all on grade 5 while the Claimant remained on grade 4. A copy of the Claimant's grievance letter dated 15 November 2018 appeared in the bundle at page 47. The Respondent's evidence was that having searched its records, it did not find a copy of the 2018 Grievance letter or any paperwork related to the 2018 Grievance.
21. The Claimant is a member of UNISON and in his 2018 Grievance letter he informed the Respondent that his Trade Union representative was Ms Mitchell, and the Respondent should contact either of them should it require further information.
22. The 2018 Grievance was resolved in 2018, however the Claimant's claim was dependent upon the outcome of this grievance.
23. The Claimant claimed the outcome of the 2018 Grievance was that it was agreed he would be moved from grade 4 to grade 5, which put him in the same grade as his colleagues carrying out the same role. This would allow him to receive incremental pay increases by moving up the SCP within grade 5 until he reached parity with his colleagues who had already moved up the SCP in grade 5.
24. The Respondent submitted that the outcome of the 2018 Grievance was that it was agreed the Claimant would receive a one off, out of cycle salary increase. However, his grade would not be increased to grade 5 and he therefore remained at the top of grade 4, and was not eligible for a pay rise above the pay attainable at the top of grade 4 (which was SCP 22).
25. The 2018 Grievance was dealt with by Ms Lynch on behalf of the Respondent company. Ms Lynch was the Respondent's HR Business Partner at the time. Ms Lynch no longer works for the Respondent and did not give evidence in this matter.
26. Ms Mitchell gave evidence regarding her involvement in the 2018 Grievance. She confirmed that she had worked with the Respondent for about 7 years. During this time she had worked with many people in the Respondent's HR department, including Ms Lynch during her time with the Respondent.
27. Ms Mitchell's evidence was that she had spoken with the Claimant and understood his grievance was that he was not on the same pay grade as his colleagues carrying out the same role; she resolved this grievance with Ms Lynch directly during a telephone call.
28. Ms Mitchell was questioned in oral evidence about her discussions with Ms Lynch concerning the 2018 Grievance. Ms Mitchell stated that she remembered the

discussion well; Ms Lynch had called her on her mobile, and she was sitting at her desk in her office when she answered the call. Ms Lynch told Ms Mitchell she had received the Claimant's letter of 15 November 2018 and explained she had called to ask if they could reach a resolution regarding the same.

29. Ms Mitchell's evidence was that Ms Lynch informed her that she could not sign off on moving the Claimant to the top of grade 5, which would bring his salary directly in line with his colleagues, however she could agree to have the Claimant moved into grade 5, albeit at the bottom of that grade. This would mean the Claimant would then qualify to receive increments each year moving up the SCP of grade 5, and thereafter he would eventually reach the same pay as his colleagues who had already moved up within grade 5 enabling him to achieve parity with those carrying out the same role.
30. The Respondent submitted that the outcome of this discussion was that Ms Lynch agreed to give the Claimant a one off, out of cycle pay rise, but that he would remain within grade 4.
31. Ms Mitchell denied this. Her evidence was that the agreement she reached with Ms Lynch was clear: the Claimant would be moved to the bottom of grade 5. The Claimant had a pattern of using the grievance procedure to resolve his problems and would continue following the procedure until he felt that the issues he had raised were resolved to his satisfaction and in his oral evidence, Mr King accepted this to be the case. Accordingly, Ms Mitchell explained if Ms Lynch had simply suggested a one-off pay rise, she could not have agreed to this as this would not have addressed the heart of the 2018 Grievance; the Claimant would not have accepted this as an outcome and would have continued following the grievance procedure with the Respondent to achieve grade parity with his colleagues.
32. Ms Mitchell did not have any contemporaneous notes of her conversation with Ms Lynch.
33. The Respondent also had no contemporaneous notes from this meeting. Mr King gave evidence that he had contacted the Respondent's HR team to ask for copies of all paperwork relevant to the 2018 Grievance and HR confirmed to him that there was no documentation in respect of the 2018 Grievance.
34. Mr King's evidence was that the Respondent has rigid policies on hearing grievances and authorising out of cycle pay rises. Once a grievance is raised, the steps included lodging that grievance with HR, then obtaining internal and external advice and sending a letter to the employee inviting them to a meeting; finally, the Respondent would send a grievance outcome letter to the employee. Mr King explained he would have expected to find a record of the 2018 Grievance, notes of the meeting, a record of the outcome, and a grievance outcome letter. However, the only documentation Mr King was able to find from around the time in question which could have related to the 2018 Grievance was a letter from HR to the Claimant dated 27 December 2018 (the '**12/18 Letter**'), a copy of which appeared at 48 of the bundle.
35. The Claimant confirmed that further to Ms Mitchell's conversation with Ms Lynch, he received the **12/18 Letter**. It was headed "*Changes to terms and conditions*". The letter confirmed the Claimant's salary would be increased to £21,683.48 as of 1 January 2019. The letter also stated, "*All other terms and conditions of your*

employment remain unchanged”.

36. In January 2019, the Claimant's salary was increased to £21,683.48. The Claimant's evidence was that he had believed this pay rise had placed him at pay rate SCP 23, as had been agreed, as SCP 23 was above the highest SCP in grade 4 and represented the second SCP within grade 5. The figure of £21,683.48 was slightly less than SCP 23, by £9.52. The Claimant's evidence was that he believed that this was later rectified, and that his salary was increased to the correct SCP 23 rate. Mr King's evidence was that he had not seen any evidence to demonstrate that the figure was ever amended, and the Respondent did not believe the sum had been amended.
37. On 29 April 2019, the Respondent wrote to the Claimant confirming his salary would increase to £22,462. A copy of this letter appeared at page 50 of the bundle.
38. In April 2019, the salary for SCP 23 was £22,462, and the salary SCP 24 was £22,911. A table showing these rates appeared at page 39 of the bundle.
39. The Claimant's evidence was that further to agreement reached in settlement of the 2018 Grievance, he expected his salary to increase by moving up the SCP in grade 5, and he trusted the Respondent was complying with the terms of the agreement. As such, when he received the 29 April 2019 letter confirming he had a salary increase, he assumed that increase was as a result of being moved up to the next SCP.
40. A document dated 10 April 2018 (appearing at page 40 of the bundle), showed that further to a review of the Local Authority pay scales through collective bargaining with the NJC, the SCP were restructured. The changes came into effect on 1 April 2019. At page 41 of the bundle, a table in Annex 1 to this document showed that in April 2019, as part of this restructure, the SCP were remapped and renumbered; this meant the old SCP ('OSCP') had equivalent mapped new SCP ('NSCP') numbers. OSCP 22 would map to NSCP 12, and OSCP 23 would map to NSCP 14, which had a salary of £22,462.
41. The table in Annex 1 demonstrated that the Claimant's April 2019 increase in salary to £22,462.80 was equivalent to OSCP 23 (which was £22,462). As such, in April 2019 the Claimant's pay did not rise because of a move up the SCP within grade 5 from OSCP 23 to OSCP 24; his April 2019 pay rise was due to the review of the Local Authority pay scales.
42. The Respondent's evidence was that the Claimant's salary had been mapped to NSCP 14 (which was above grade 4) because if they had mapped it to the highest point in grade 4 (which was NSCP 13, with a salary of £22,021), the Claimant would have incurred a reduction in his salary.
43. At page 58 of the bundle, a document from 24 August 2020 demonstrated that the Respondent had carried out an annual pay review with the NJC resulting in an agreed annual increase of 2.75% for all of the Respondent's employees. At Annex 1 of this document was a table demonstrating the agreed annual increase which showed that the salary for the OSCP 23 (NSCP 14) would be increased by 2.75% to £23,080.
44. In April 2020, further to the Respondent's pay review with the NJC, the Claimant's salary was increased to £23,080 which remained in OSCP 23.

45. The Claimant's evidence was that he had not noticed that he was not receiving pay rises based on moving up SCP in grade 5 until after April 2020. The Claimant stated that upon noticing this he had attempted to contact HR in May 2020 however he was not able to speak to anyone at the time due to the impact of the national lockdown as a result of the COVID-19 pandemic.
46. Thereafter, the Claimant stated that he contacted Ms Mitchell who in turn contacted the Respondent on his behalf at the start of June 2020 via email. A number of emails were exchanged between Ms Mitchell and Mr King in which Ms Mitchell informed Mr King that the Claimant had been moved into grade 5 in 2018, describing the agreement she believed had been reached.
47. When this did not resolve the issue, the Claimant followed the Respondent's grievance procedure and on 30 September 2020 he sent an informal grievance letter. Mr Lightowler looked into the grievance for the Respondent.
48. On 4 November 2020, Mr Lightowler obtained a report from the Respondent's HR in the form of a printout showing the changes to the Claimant's salary since 2016 (page 73 of the bundle); a handwritten note on it confirmed it was created on 4 November. It listed the Claimant's pay increases; the increases between 1/1/2019 – 31/3/2020 and 1/4/2019 – 31/3/2020 were labelled "*pay increase – out of cycle*". All other pay rises were marked as "*Annual review*". At the foot of the printout, it stated that the Claimant was at "*PS group SCC4 Level 22*"; the Respondent stated that this indicated the Claimant's pay grade had not been changed as he was still listed as grade 4, on increment OSCP 22. At the date this report was produced, the Claimant was being paid at OSCP 23.
49. Mr Lightowler sent a letter to the Claimant on 6 November 2020 stating that he found that the Claimant had not been moved to grade 5 but had simply received an out of cycle pay increase in January 2019.
50. The Claimant raised a formal grievance on 10 November 2020 (the '**2020 Grievance**'), further to which the parties had a grievance hearing on 23 November 2020. Thereafter on 16 December 2020, the Respondent sent the Claimant a letter titled "*Grievance Hearing - Outcome*". This letter confirmed that the Respondent remained of the opinion that the Claimant had not been moved up to grade 5.
51. The Claimant raised an appeal against the outcome of the 2020 Grievance on 12 January 2021, and an appeal hearing was held on 12 March 2021. The outcome of that appeal was communicated to the Claimant in a letter of 18 March 2021, which confirmed that the Respondent's position was that the 12/18 Letter did not provide evidence that the Claimant's grade had been moved to grade 5 and accordingly the appeal was not upheld.

Relevant Law

Contract Formation

52. The general principles to be applied in determining whether an agreement has been made, what its terms are, and whether it is intended to be legally binding were summarised by Lord Clarke in RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] 3 All ER 1, a decision of the Supreme Court, in paragraph 45, as follows:

“The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.”

53. An agreement to vary the terms of a contract is not required to be in writing to have legal effect. Regardless of whether an employee’s statutory statement of terms and conditions is altered to reflect the change, whether there has been a consensual variation of the terms of the employment depends on the evidence in the particular case (see Simmonds v Dowty Seals Ltd 1978 IRLR 211, EAT).
54. LJ Connell Lee and others v GEC Plessey Telecommunications [1993] IRLR 383 [118] confirms that, *“Where, in the context of pay negotiations, increased remuneration is paid and employees continue to work as before, there is plainly consideration for the increase by reason of the settlement of the pay claim and the continuation of the same employee in the same employment.”*
55. In Stack v Ajar-TEC Ltd [2015] IRLR 474, the Court of Appeal found held that the absence of express agreement as to the amount of remuneration due to a company director did not preclude the existence of a contract.
56. In all cases, context is important; I am reminded by the case of Blakely v On-Site Recruitment Solutions Ltd and anor EAT 0134/17 that I must analyse all the relevant circumstances.
57. Edwards v Skyways Ltd 1964 1 All ER 494, QBD confirms that the onus of proving there was no intention to create legal relations is on the party who asserts that no legal effect was intended, and that onus is a heavy one.
58. In Judge v Crown Leisure Ltd 2005 IRLR 823, CA, the Court of Appeal held that a ‘promise’ made by a director at a Christmas party that he would eventually ensure that an employee was placed on roughly the same level of remuneration as other managers was not legally enforceable. The director had said that pay parity was likely to be achieved ‘eventually’ or ‘in due course’, which was too vague and uncertain to amount to a contractual promise and was simply a reiteration of his intention of bringing existing managers’ salaries into line with that of a new manager.

Unlawful deductions:

59. Section 13(1) employment Rights Act 1996 (‘ERA’) provides

“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. that a worker has the right not to suffer unauthorised deductions from wages.”*

Failure to provide written particulars of employment:

60. Section 38 of the Employment Act 2002 provides that where the Tribunal finds in favour of an employee in any claim listed in Schedule 5 of that Act and the employer has not complied with section 1 of the Employment Rights Act 1996 and provided the employee with written particulars of employment, the Tribunal shall make an award to the employee of a minimum of two weeks' pay, and if just and equitable, four weeks' pay.

Authority

61. I have had regard to the explanation of apparent authority set out in paragraph 21-063 of Chitty on Contracts (33rd Ed. Consolidated Main work Incorporating Second Supplement) from which the following relevant quotations come (quoted without footnotes):

“The rules as traditionally stated may however be divided as follows:

- (i) A representation must be made by words or conduct. But though such representation may be express, it may also be implied from acts of a quite general nature, e.g. putting the agent in a position carrying with it a usual authority. Such a representation may arise from a course of dealing (especially one involving regular ratification), though it has been said that authority will not readily be inferred from this.*
- (ii) The representation must be made by the principal, or someone authorised in accordance with the law of agency to act for him. A representation by the agent as to his authority cannot of itself create apparent authority. ...*
- (iii) The third party must act on the representation.*
- (iv) The authority will be that which the agent reasonably appeared to have to the third party, taking into account the manifestations of the principal, the implied authority normally applicable in the circumstances or to a person in the agent's position, or both.”*

62. I also considered the following further authorities which the parties drew to my attention:

62.1. Puntis v Governing Body of Isambard Brunel Junior School EAT/1001/95

62.2. Hershaw & Ors v Sheffield City Council UKEAT/0033/14/BA

Conclusions

63. Having regard to my findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I reached the following conclusions.
64. I found that Ms Mitchell was a credible and honest witness. The Respondent confirmed it did not forward any reason to suggest she was being dishonest in

her evidence. The highest the Respondent puts its case was that Ms Mitchell may have misremembered or misinterpreted the discussion with Ms Lynch. I do not find this to be the case. Ms Mitchell's evidence was clear and remained so further to having been tested under cross examination. Most notably of course, Ms Mitchell was the only person who could give evidence directly as to what was said in the telephone conversation with Ms Lynch, and to the substance of the agreement that was reached.

The November 2018 agreement

65. Whilst the Respondent highlighted that there was no contemporaneous documentary evidence regarding the telephone call between Ms Lynch and Ms Mitchell, it accepted that an agreement had been reached between the Claimant and the Respondent to resolve the 2018 Grievance; however, the Respondent rejected the Claimant's account of the terms of that agreement.
66. I found the Claimant's evidence put forward by Ms Mitchell regarding the contents of her conversation with Ms Lynch to be an accurate reflection of what was said in that conversation. Ms Mitchell was a credible and clear witness. Ms Mitchell confirmed that of course she did not remember the conversation word for word, however she did remember other details about the conversation which demonstrated that she had a distinct memory of it. Importantly, Ms Mitchell was clear as to the aim of that conversation, the focus of the discussions, and the outcome that was achieved.
67. I found it would have been unlikely that Ms Mitchell would have agreed to anything other than moving the Claimant to grade 5, so that he would be on the same grade as his colleagues carrying out the same job. The 2018 Grievance letter clearly indicated that this was the actual substance of the 2018 Grievance, in which he described that being on a lower grade than his colleagues carrying out the same job was "*unfair*". It was not simply that he required additional money. Accordingly, I do not find that Ms Mitchell would have accepted a one off pay rise, as this would have resulted in the Claimant rejecting that offer and the grievance procedure would have continued.
68. The Respondent had submitted that the evidence available indicated that the agreement reached between Ms Mitchell and Ms Lynch was not to increase the Claimant's grade but instead it was to give the Claimant a one off out of cycle pay increase. The Respondent's submitted that the surrounding documentary evidence supported this position as:
 - 68.1. The out of cycle pay rise did not place the Claimant into SCP 23; the payment was £9.52 short of SCP 23, and the Respondent suggested this deduction might have been done deliberately to avoid giving the impression that the Claimant had been moved up a grade;
 - 68.2. There were no documents recording the agreement reached between Ms Lynch and Ms Mitchell, and the Claimant did not raise his grievance about the Respondent's failure to raise his grade in April 2019 when his pay rise did not move him into the next SCP;
 - 68.3. The wording of the 12/18 Letter stated that "*all other all terms and conditions remained the same*" and contained similar wording to other

letters issued by the Respondent which provided recipients with a one-off pay increase only (as opposed to a grade increase);

- 68.4. The internal documentation provided by the Respondent's HR department at page 73 of the bundle reported the Claimant's pay increases between 1/1/2019 – 31/3/2020 and 1/4/2019 – 31/3/2020 as a "pay increase – out of cycle" and this report, created in November 2020, also stated the Claimant was "PS group SCC4 Level 22".
69. The Claimant had no evidence that the Respondent later rectified the issue of the missing £9.52 from his January 2019 pay in order to ensure his salary was directly in line with SCP 23. The Respondent had no evidence that the agreed pay rise was deliberately just short of SCP 23 to avoid any misunderstanding that the Claimant had been moved into a new SCP.
70. I made no finding on whether the Respondent did ever amend the January 2019 salary, as it was immaterial to my conclusions in this matter. I did note however that the January 2019 salary was significantly higher than SCP 22 (which was both the top of grade 4 and the bottom of grade 5), placing the Claimant much closer to SCP 23, well within grade 5, and certainly not within the grade 4 bracket. Furthermore, in April 2019 the Claimant's salary was increased to be exactly in line with SCP 23 within grade 5 and was not short of this grade figure. The Respondent suggested that the Claimant's salary had been mapped to NSCP 14 because mapping it to NSCP 13 (which was within grade 4) would have resulted in a salary reduction. Reviewing page 41 of the bundle however, I noted that NSCP 13 was £22,021, which was higher than the Claimant's salary at that time (£21,693) and would not have been a reduction but would have remained within grade 4.
71. I did not agree with the Respondent's conclusion that the January 2019 salary increase was made to be deliberately short of SCP 23 and I did not find that this provided any indication that the Respondent had not agreed to place the Claimant within grade 5. The Respondent's conclusion was an assumption, and I was not provided with any evidence to confirm the real reason as to why the Claimant's January 2019 salary was slightly less than SCP 23. The Claimant's January 2019 salary increase clearly took the Claimant above the level of pay for a grade 4 employee, and he remained above the top pay level for grade 4 in every pay review thereafter. If the intention of the shortfall was to deliberately ensure the Claimant's pay was short of SCP 23 so that he could not then claim he was within grade 5, then one would expect to find evidence of the Respondent having further conversations during the remapping exercise about this, and a coherent approach to keeping him below SCP 23. Nothing to this effect was put before me in evidence.
72. I did not find the fact that the Claimant had not complained about this issue until May 2020 to be evidence that supported the idea that the agreement was to a one off pay rise and not a change in grade. If the Respondent had also suggested that the Claimant was aware the agreement was a one off pay increase only, this argument would be more compelling, however the Respondent did not suggest that and did not adduce evidence to that effect. I accepted the Claimant's evidence that he had mistakenly assumed his pay increase in April 2019 was due to a move up to the next SCP, and not, as was in fact the case, due to the

remapping exercise. Once the Claimant noticed the issue further to the April 2020 pay review, he raised it in May 2020.

73. The Respondent was suggesting that if there had been an agreement to move the Claimant to grade 5, its paperwork would have reflected that; the Respondent submitted that the paperwork it did have did not reflect that, but instead indicated that a one off pay rise was agreed. In support of this, the Respondent highlighted the wording of the 12/18 Letter making no reference to a grade change and being similar in wording to other letters which the Respondent sent to employees receiving a one off pay rise. The Respondent also highlighted the HR printout which stated the Claimant's pay rises were marked as out of cycle salary reviews, and which also listed the Claimant's pay grade as "*PS group SCC4 Level 22.*"
74. The Claimant suggested that these arguments boiled down to the Respondent relying heavily on the 'infallibility' of its own paperwork. Mr King's evidence had been that there would be a significant amount of paperwork produced anytime an employee raised a grievance; the Respondent's HR team however had retained no paperwork referencing the Claimant's 2018 grievance.
75. The Respondent's paperwork regarding the 2018 Grievance was therefore not completed correctly or at all, and/or it was never filed and retained. The HR printout produced in November 2020 listed the Claimant at SCP 22, however at this time he was being paid at SCP 23.
76. In light of this, I was wary of drawing the inferences suggested by the Respondent from the documentation that was available. The Respondent also suggested this evidence would indicate that there was no intention to create legal relations between Ms Lynch and Ms Mitchell, however I have dealt with the arguments surrounding intention to create legal relations below at paragraphs 80 to 85.
77. Accordingly, having considered the evidence available I preferred the evidence of the Claimant and I found that during the November 2018 conversation it was agreed from 1 January 2019 the Claimant was entitled to be paid at grade 5 SCP 23, and thereafter each year he was eligible to move up the SCP within grade 5.
78. The Respondent had further submitted that an agreement between Ms Mitchell and Ms Lynch to move the Claimant to a new grade should fail because:
 - 78.1. there was no intention to create legal relations;
 - 78.2. the terms of the agreement would not be sufficiently certain for the Court to give meaning to them; and
 - 78.3. Ms Lynch did not have the relevant authority to authorise an increase in the Claimant's pay grade.
79. I considered these points and rejected them for the reasons set out below.

Intention to create legal relations

80. The intention to create legal relations is not often challenged in employment contexts. It is necessary to show that any variation to a contract is intended to have contractual effect by affecting the parties' rights. A distinction must be made therefore between 'off the cuff' comments which might be made at a work social event, such as was the case in the case of Judge v Crown Leisure Ltd [2005]

IRLR 823, CA to which I was referred by the Respondent, and those which are intended to create a legally binding contract.

81. The test is an objective one; viewed objectively, and considering all the surrounding circumstances, I considered whether the Respondent did intend to create legal relations.
82. I had found that the Claimant had raised a grievance and Ms Lynch contacted Ms Mitchell with the intention of resolving that grievance. It is hard to envisage a more formal setting within which it would be considered agreements made were intended to carry legal consequences.
83. Even on the Respondent's position, in Mr King's evidence it is submitted that Ms Lynch agreed a one-off salary increase for the Claimant which the Respondent was bound by and complied with. The evidence therefore indicated the Respondent did have an intention to create legal relations in resolving the 2018 Grievance.
84. The Respondent's HR Business Partner and the Claimant's Trade Union representative had discussions surrounding the Claimant's 2018 Grievance and on either parties' version of events, an agreement was reached. These represent clear circumstances in which the parties would envisage there was an intention to create legal relations. This was clear from the context and taking into account all relevant circumstances.
85. I was therefore not persuaded by the Respondent's arguments that there was no intention to create legal relations.

Certainty

86. The parties must be clear as to what they are agreeing to. A term of a contract or a variation of that term may lack contractual force because it is vague or uncertain (G Scammell & Nephew Ltd v Ouston [1941] AC 251).
87. The Respondent submitted that the terms of any contract that was made were not sufficiently clear and certain for the courts to be able to give them meaning.
88. I did not accept this argument; Ms Mitchell was available to give evidence and was cross examined on the same. Ms Mitchell's evidence was clear, cogent, and consistent. The terms of the agreement that the Claimant asserts was reached were clear, and I did not accept the Respondent's position that it was impossible to be able to give them meaning. Therefore, I did not consider that the agreement failed for lack of certainty.

Authority

89. The Respondent also raised the issue of authority, namely that Ms Lynch did not have the authority to bind the Respondent.
90. I was not persuaded by this argument. The Respondent suggested that Ms Lynch would have required a sign-off from a business director in order to agree to a change of grade for an employee or to agree to a one off pay rise. Mr King's evidence was that he spoke with the relevant business director at the time, Mr Butt, however Mr Butt was unable to remember Ms Lynch asking him to sign off on either a grade increase or a one off pay rise for the Claimant. From this, the

Respondent suggested that Mr Butt would have been more likely to remember if Ms Lynch had approached him to ask to change the Claimant's grade than he would have been to remember authorising a one off pay rise, and since Mr Butt did not remember authorising a change in grade, the Respondent argued that it was more likely that only a one off pay increase was authorised.

91. I did not find this submission compelling and was disinclined to draw an inference from Mr Butt's lack of memory that Ms Lynch did not seek authority for a grade change. Mr Butt did not give evidence on behalf of the Respondent and there were a number of alternative viable explanations as to why Mr Butt did not remember authorising a grade change; his lack of memory of Ms Lynch seeking any authorisation from him did not necessarily indicate that authority was obtained for a pay rise and not a grade change.
92. In any event, what this did indicate was that Ms Lynch had the ability to obtain authority from the Respondent where needed in order to reach agreements with employees regarding their terms and conditions.
93. The Respondent's position was that Ms Lynch agreed with Ms Mitchell to grant the Claimant a one off pay rise. By its conduct, the Respondent represented to the Claimant that Ms Lynch did have authority to make agreements which would bind the Respondent.
94. Furthermore, I found that Ms Lynch held herself out as having authority. Ms Lynch had contacted Ms Mitchell further to receipt of the 2018 Grievance in which the Claimant stated he wanted an increase to his grade, and Ms Lynch informed Ms Mitchell that she was calling Ms Mitchell in order to resolve the 2018 Grievance.
95. From these reasons I find that the Claimant and Ms Mitchell were entitled to, and did, consider that Ms Lynch had authority to enter into an agreement and to bind the Respondent to it; in reliance upon that authority, the Claimant discontinued his grievance and did not pursue it further.
96. I did not therefore accept the Respondent's submissions that the agreement would fail for lack of authority.
97. In conclusion, having considered the evidence and submissions, I found that in November 2018, a legally enforceable agreement had been made between the parties to place the Claimant within grade 5 as of January 2019 and that he was entitled to move up the SCP within grade 5.
98. The Respondent accepted that if it were the case that I found the Claimant were moved onto grade 5 in January 2019, that it was in breach of its duty under Section 4 of the Employment Rights Act 1996.

Summary

99. Pursuant to sections 11(2) and 12(2) of the Employment Rights Act 1996, I determined that the Claimant's particulars of employment would be amended to show that the Claimant's pay grade is at grade 5.
100. The parties had reached an agreement on the sums due to the Claimant if I were to find that the Claimant had been moved to grade 5.

101. I found that the Respondent made an unauthorised deduction from the Claimant's wages and was ordered to pay to the Claimant the gross sum (as agreed between the parties of) **£1,658.92**.
102. The Claimant was further awarded **£941.48**, this being 2 weeks gross pay (as agreed between the parties) pursuant to Section 38 of the Employment Act 2002.
103. This made a total award of **£2,600.88**.

EMPLOYMENT JUDGE NEWBURN

JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 16 December 2021

JUDGMENT SENT TO THE PARTIES ON
20 December 2021
AND ENTERED IN THE REGISTER
20 December 2021

Olivia Vaughan
FOR THE TRIBUNAL

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