



EMPLOYMENT TRIBUNALS

Claimant: Mr M Chipman
Respondent: Birmingham City Council
Heard at: Birmingham by CVP Video hearing
On: 2, 3, 4, 7 & 8 March 2022
Before: Employment Judge Flood

Representation

Claimant: In person
Respondent: Mr Starcevic (Counsel)

JUDGMENT having been sent to the parties on 3 December 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Complaints and preliminary matters

1. By a claim from presented on 21 July 2020 (early conciliation having taken place between 21 May and 3 July 2020) the claimant brought a complaint of unlawful deduction of wages contrary to section 13 of the Employment Rights Act 1996 (“ERA”). The claimant also contended that the respondent failed to provide him with a written statement confirming a change to his terms and conditions of employment contrary to section 4 ERA and asks the Tribunal to determine what particulars ought to have been included or referred to in a statement in accordance with section 11(1) ERA. The respondent denied that any unlawful deductions had been made and contended that its failure in relation to section 11(1) (a) relates solely to the payment of the honorarium payment paid to the claimant for additional duties from January 2018 onwards.
2. A bundle of documents had been prepared and agreed by the parties (“the Bundle”). Unless otherwise stated, references to page numbers in this document are to page numbers in the Bundle. At a preliminary hearing held on 31 March 2021 before Employment Judge Dimbylow a list of issues to be determined by the Tribunal was discussed and is recorded in a case management order at pages 136-137. The parties confirmed that this list

of issues was accurate. The claimant had submitted additional documents in advance of the hearing which were two case reports which the respondent was involved in, namely of the decision of the Employment Tribunal in *Leach v Birmingham City Council* (case number 301714/2018) and the High Court judgment in *Taylor v Birmingham City Council* (Case No:HQ17X03282). The respondent did not object to the submission of these documents but submitted that these were not legal authorities but appeared to have been submitted in relation to matters of fact and credibility. I admitted these documents. Further documents were then admitted numbered 400C1-400C26 with the agreement of both parties.

3. After a 5 day hearing, by an oral decision the claimant's complaint for unlawful deductions from wages was dismissed. I also determined that the respondent (in breach of section 4 ERA) failed to provide the claimant with a written statement of change to his employment particulars in respect of the honorarium payment from 1 January 2018 onwards. In accordance with the provisions of sections 11 and 12 ERA, the Tribunal also determined that the following particulars are those which ought to have been included in a statement given to the claimant under section 4 ERA:

"With effect from 1 January 2018, the claimant will receive an honorarium payment of £150 per calendar month in respect of additional duties he has been asked by the respondent to carry out at the Redfern Road depot namely to convey information about refuse collection services to its Head Office and to support the Depot Manager in his role as Assistant Service Manager as required.

The honorarium payment arrangement will continue in accordance with the current Honoraria policy of the respondent and will be reviewed from time to time and/or terminated in accordance with the terms set out in that policy."

4. The respondent made a request for written reasons at the conclusion of the oral judgment.

The Issues

5. The issues which needed to be determined were those which were set out at page 136 and 137 which the parties referred to throughout the hearing and both parties set out their submissions on each of these matters in written skeleton arguments and oral final submissions:

1. Change in terms and conditions of employment

1.1 Was the claimant's contract of employment amended such that the respondent should have given him a written statement confirming the amendment under section 4 of the Employment Rights Act 1996 (ERA)?

1.2 Shall the tribunal determine a reference by the claimant under sections 11 and 12 ERA?

2. Time limits

2.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 22 February 2020 may not have been brought in time.

2.2 Was the unauthorised deductions complaint made within the time limit in section 23 of ERA? The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of / date of payment of the wages from which the deduction was made etc?

2.2.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

2.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

2.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

3. Unauthorised deductions

3.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted? This includes wages, holiday pay, and pension contributions.

3.2 Were the wages etc paid to the claimant from 1 January 2018 to the date of issue of the claim form, less than the wages he should have been paid?

3.3 Was any deduction required or authorised by statute?

3.4 Was any deduction required or authorised by a written term of the contract?

3.5 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

3.6 Did the claimant agree in writing to the deduction before it was made?

3.7 How much is the claimant owed?

4. Remedy

4.1 How much should the claimant be awarded?

Schedule A2 Trade Union & Labour Relations (Consolidation) Act 1992 case

4.2 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.3 Did the respondent unreasonably fail to comply with it? The claimant asserts the grievances he raised have not been processed or finalised in a timely manner.

4.4 Is it just and equitable to increase any award payable to the claimant?

4.5 By what proportion, up to 25%?

Schedule 5 Employment Act 2002 cases

4.6 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

4.7 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

4.8 Would it be just and equitable to award four weeks' pay?

Findings of Fact

6. The claimant and his witnesses, Mr M Qudeer ("MQ") a manager in the respondent's Waste Management service area, Mr N Reid ("NR"), the respondent's Principle Operations Manager gave evidence by way of a witness statement and orally in response to cross examination, re-examination, and Tribunal questions. The claimant also submitted a written witness statement supplied by Ms L Coogan ("LC") another employee of the respondent. The respondent's witnesses Mr D Share, Assistant Director, Street Scene for the respondent ("DS") and Mr W Chivers, Service Manager with the respondent ("WC") gave evidence in the same manner as the claimant's live witnesses. I have considered the relevant parts of the Bundle that were drawn to my attention.

Credibility

7. The oral evidence given by the claimant and NR was in many respects consistent with their witness statement, the claim form and each other. I accepted much of what the claimant said and found that his recollection of events was generally good. However the claimant's recollection in particular of the meetings held and conversations that took place in January 2018 was influenced and impacted by the events that took place after this time, in particular what transpired with respect to the duties he in fact carried out at Redfern Road. The claimant was in no way a dishonest witness, but his recollection of exactly what was agreed at the time was viewed in hindsight and reflected by what he felt perhaps was fair and correct. I found NR to be wholly convincing and credible witness. I also found MQ to be a credible witness, although his evidence was of limited

relevance to the issues I had to decide in this claim. I found the oral evidence of DS to be broadly consistent with his witness statements and with the respondent's pleaded case, although his recollection of the detail was not perhaps as strong as other witnesses. The claimant asked me to take account of the comments of Employment Judge Woffenden in the decision in case number 1301714/18, in particular those at paragraphs 6.35 that the Tribunal did not find DS a "*consistently credible witness*" in that claim and 6.58 relating to the investigation carried out in that claim. I did not find this instructive on the credibility of DS more generally in this claim. There was only one particular issue on which DS evidence was key and in direct contravention with the claimant's, namely what was agreed during the meeting in January 2018. To that end, I was assisted in that regard by the evidence of WC who was also present during the meetings in question. I found WC a credible and convincing witness with a detailed and reliable recollection of events which was consistent with other witnesses and the contemporaneous documents. In reality, other than the key conversation in January 2018 as to what was agreed in the meeting, there was not that much discrepancy between the accounts of the witnesses attending the Tribunal. On this particular dispute in evidence, I tended to prefer the evidence of WC on this conversation as it has been consistent, logical and credible throughout. I found the evidence of AM straightforward, clear and honest and although she could give evidence on HR process general and her involvement in the claimant's complaint, she was not directly involved in many of the matters relating to this complaint. I also accepted the evidence of a statement submitted by LC, although she did not attend in person. Her evidence about the support she provided to the claimant around budget monitoring reports in December 2019 was not contentious or directly relevant to the main issues I had to determine in this claim.

8. On the relevant evidence raised, I make the following findings of fact:

- 8.1. The claimant has worked with the respondent council since 23 June 2002. He started in a manual role and has moved through various office positions during his career. He accepted that he had been appointed to his current role of Assistant Service Manager ("ASM") following a competitive interview process and that this would be the normal process for the respondent to follow when recruiting to a particular role. The claimant contended that there were numerous occasions when the respondent did not follow this process when appointing individuals to particular roles. We heard evidence from the claimant and MQ about this. In particular:

A Isman ("AI")

The claimant contended that following her move from the Redfern Road Acting Service Manager position in December 2017, that AI was moved into a different Service Manager position in the respondent's head office performing a role that had not been advertised. DS confirmed that AI transferred to head office following alleged intimidation as a result of the strike action, for her own protection and had been assigned duties in head office by him. He stated that on moving to head office she reverted to a GR4 ASM grade and salary when the Acting Service Manager post ended. He agreed that AI was not assigned to a particular depot and was

undertaking duties assigned to her by DS at head office. I accepted this evidence in the absence of any direct evidence from the claimant to contradict it other than his and MQ contentions and speculation about this position.

L Bessant ("LB")

The claimant contended that LB had joined as a consultant and became a project manager and then Head of Operations which was a role that had not been advertised or recruited to. There did not appear to be any evidence to support this contention save for the assertions made by the claimant. DS gave evidence that LB was a Project Manager at all times. He acknowledged that she may have used the title of Head of Operations on e mails, but this was not her title and had been since told not to use that title. I accepted this evidence.

Garden Waste Co-ordinator

The claimant contended that this was an ASM role which was subsequently changed to the role of Garden Waste Co-ordinator, but that this new role was not advertised or recruited. DS said he was not the line manager for that role but said that the person did not perform any management responsibilities which might explain why the job title was changed. I was not able to make any findings of fact about this particular role as there was no direct evidence as to what had taken place other than the claimant and MK's assertions of what they believed had taken place.

Queslit role

This was a role which the claimant contended was currently being performed by Mr R Beddowes ("RB") without advertisement and recruitment. DS confirmed that there was a vacancy at Queslit which had not been filled substantively. He said RB was carrying out duties there temporarily (as it has been difficult to find a role he could undertake due to workforce difficulties following the industrial action). He confirmed that RB had not been appointed to the post and that post and another. Again I accepted this in the absence of any direct evidence from the claimant or MQ to the contrary.

- 8.2. The claimant's current contract of employment for the ASM role was at pages 177-178. This confirmed that the claimant's salary was "*spinal column point 35 within Grade GR4*". This contract also contained a standard mobility clause at page 178 as follows:

You may be required to work at an alternative location within the Birmingham City Council property portfolio as required by your role, subject to consultation with you.

This appointment is offered subject to a mobility clause, which provides for the movement of employees to alternative work locations for business reasons.

I was during the course of evidence referred to various policies and procedures of the respondent including the Stand In Policy at pages 87-90, the Acting Up policy at pages 81-86 and the Honoraria policy at page 45-51.

- 8.3. It was not in dispute that the claimant was a good performer in his role as ASM, had no disciplinary action on his record nor a record of absenteeism.
- 8.4. Just before the events of January 2018 he was employed in the role of ASM in the respondent's Waste Management services division and was assigned to its Montague Street depot. He was looking after street cleansing in this role and reported to WC the Depot Manager at Montague Street. Each of the respondent's depots is managed by a Depot manager who has Service Managers ("SM"s) reporting to him or her and ASMs report to the SM. The Depot Managers report to the Assistant Director of Waste Management, DS. The ASM role is a Grade 4 position in the respondent's structure and the SM is a grade 6. Each ASM is generally assigned to either street cleansing or refuse collection within the structure although could be asked to do either depending on the needs of the respondent. I saw a job description for the ASM role at page 104 which confirmed that one of the duties of an ASM was to "*deputise for the service manager as required*". The claimant queried whether this was correct and whether the stand in policy would apply so that someone would be paid a stand in payment for doing this. DS confirmed that this was part of the role of the ASM as required by the job description and no additional payment would be due for doing this. I accepted this evidence.
- 8.5. The claimant had in June 2017 applied for the role of Acting SM at the Redfern road depot but was unsuccessful. AI was appointed to the role but subsequently left the Redfern road depot to take up a position at the respondent's head office in Margaret Street (see para 8.1 above).

January 2018 changes

- 8.6. DS explained that at the end of 2017, there were some operational difficulties within the Waste Management function. There had been industrial action which had just come to an end which had caused severe disruption to services. DS described the situation at the Redfern Road depot as being unstable and one of the service managers there (the Acting SM AI), had to be removed from that role because of intimidation related to the strike action. This left only one SM in position at Redfern Road at the time. DS explained that also at the end of 2017 snow had caused further disruption to services. DS stated that a significant number of collections had not been completed across the city and in various depots, but there was a particular problem with the Redfern Road depot as there was a lack of visibility as to the precise position of the performance of collections. I accepted this evidence of the background to the events in this claim.
- 8.7. DS held a meeting with WC (who was SM at the Montague Street depot) and Dave Miller (who was another SM) in the first week of January 2018. During discussions about the issues at Redfern Road, WC suggested to DS that the claimant (who was ASM reporting to WC at his depot) would be a good person to assist with the flow of information back to head office. WC explained that the claimant was a very good ASM and he thought that the claimant would be ideal to attend the Redfern Road depot to assist and feedback on the daily issues to Head Office. This was agreed to by DS and

WC then telephoned the claimant to discuss this.

- 8.8. The claimant agreed that in January 2018, whilst out on his rounds, he received a phone call from WC who asked him to come back to the Montague Street depot to speak to him. He said that on his return, WC told him that he and WC “*needed to go to head office as they had an opportunity for me and that all would be explained when I got there*”. WC’s recollection of the conversation is a little different as he says that he told the claimant that there were some issues with communication at the Redfern Road depot and asked whether he would be prepared go to work there. WC said he told the claimant at the time that this would put him “*in good stead for the future*”. He then said that the claimant then agreed to go to head office with him. The claimant said he did not recall WC saying this at the time. On balance I prefer the account of WC that he explained to the claimant before travelling to Head Office what the purpose of their trip there was, as the purpose of the call was to determine whether the claimant would be prepared to go to Redfern Road at all, before travelling to Head Office to discuss it.
- 8.9. The claimant travelled to head office with WC and together they met with LB who was a Project Manager working in the waste management division. I did not hear directly from LB but the evidence suggested she was in either a grade 5 or grade 6 role within the respondent. DS attended towards the end of this discussion, as he was in another meeting at the start of the conversation with the claimant.
- 8.10. The claimant contends that during this meeting he was informed by LB and DS that the respondent would like the claimant to go to the Redfern Road depot to “*take over the refuse collection section as they were not confident with the information that was being relayed back to head office with the statute of collections*”. In his witness statement the claimant gave evidence that “*there was talk about a grade 6 payment but until that could happen then they would pay me an honorarium and backdate the payment*”. However in response to cross examination the claimant stated that there was not just talk but a verbal agreement at this time that he would be paid at grade 6 level but in the meantime would be paid an honorarium. The claimant said on a number of occasions that at no point during this meeting was he told that he should go to Redfern Road depot as an ASM with additional duties.
- 8.11. WC’s account of the meeting was that LB explained to the claimant that there was a lack of communication coming out of the Redfern Road depot and that the respondent needed a manager to go in there and to then liaise back with Head Office to provide true information as to what was going on. WC said that no other duties were discussed and agreed with the claimant. He stated that there was no discussion or offer regarding a change of grade for the claimant whilst he was present. He said that DS then joined the meeting and again explained the problem as regards information and that the claimant was needed to assist with the flow of information. He said that the claimant then asked whether there would be any extra “*pennies*” in it for him and at that point he left the discussion, which carried on only for a few minutes more after this point as he shortly after left with the claimant

to travel back to Montague Street depot.

8.12. DS evidence was that during this conversation the claimant agreed to be transferred to work at Redfern Road depot continuing his role as ASM but was asked to carry out additional duties, namely the reporting back of information to Head Office and in return for the extra duties he would be paid an honorarium. He said that there was a "*management shortfall*" at the time as there was only one SM in position and that the depot needed managerial support and leadership and direction, but this did not mean the claimant was asked to carry out the SM role. DS said that he did not ask the claimant to take over the refuse collection service but to support the depot manager NR and to provide support and visibility to Head Office so they could make the right decisions. He said that no offer or discussion of a grade 6 position was made but could not recall whether the claimant was informed that he would remain in his grade 4 post. He explained that he did not at this stage know how long he would need the claimant to carry out this role and he saw it as a short term temporary solution to get the refuse collection information flow back on track as the service was in turmoil at the time.

8.13. On the balance of probabilities I prefer the evidence of WC and DS about what was discussed and agreed in this meeting. In particular I find that:

- a) The claimant was not instructed by DS to "*take over*" the refuse collection service but was asked to carry out particular duties to convey information about waste collection services back to Head Office. The claimant and both NC and DS are clear that the issues around the flow of information were discussed in this meeting. The claimant confirmed that he understood that management had a problem with Redfern Road and that there were not confident that information was being relayed back correctly. Both NC and DS were clear that the claimant was not asked to take over refuse collection. The claimant does make reference in his email of 22 October 2018 (page 294) to being asked to "*take over*" the role of SM for refuse collection and the claimant is correct that in DS's e mail of response (page 294) DS does not comment on or dispute this statement specifically. However the response of DS makes reference to GR6 roles being advertised and that the claimant can apply for whichever service area he wants to. DS does not confirm what the claimant says about taking over a SM role but rather the context of the response as a whole suggests differently i.e. that the SM roles for both areas of service at Redfern Road were being advertised and that the claimant could apply for either one.
- b) There was no agreement that the claimant would carry out the role or have the job title of SM either on a permanent or on an acting basis. In his evidence the claimant does not suggest that it was ever said to him that he would be in the role of a SM or Acting SM. He is very clear that it was not expressly mentioned that he would be in the ASM role with additional duties (and I accept that this was the case). However neither was it mentioned or agreed that he would be placed in the role of SM or Acting SM. It appears to be only once the claimant moved to Redfern Road and starts to carry out some duties that he makes the

assumption that he is in fact carrying out a SM role (supported by the change of job title on the respondent's SAP system and the day to day activities he becomes involved in). I was not satisfied that the claimant had shown on the balance of probabilities that this was discussed and agreed verbally during this meeting or after this time.

c) There was no agreement that the claimant would be moved to a grade 6 role and paid at a grade 6 salary at this or any other time in the future. Both NC and DS were clear that grade 6 was not discussed. The claimant in his witness statement only mentions "talk" of a grade 6 although this position was strengthened in cross examination and in submissions to that it was expressly agreed with LB only that he was paid the honorarium pending the authorization of a grade 6 salary being confirmed at which point he would receive back dated pay. Other than what the claimant now says in oral evidence, there is no other credible evidence to support the contention that such a verbal agreement took place about grade 6 pay and I do not find it credible that this was agreed at the time. In particular I make this specific and important finding of fact because:

- The claimant and all witnesses agreed that standard process for moving employees to a new grade was that an advertisement, interview and selection process took place. Whilst the claimant tried to lead evidence about deviations to this process, I was not satisfied that any of the examples the claimant pointed to showed a consistent practice which would suggest or support his view that this took place in his particular case.
- The claimant was not provided with any written confirmation of the agreement he says was put in place that his pay would increase significantly at some point in the future. For such a key decision to award the claimant a significant pay rise which was to be backdated pending mere formalisation of his appointment, it is not plausible that no written confirmation would be made of this by anyone, or indeed sought by the claimant.
- The respondent puts in place arrangements for the payment of an honorarium which starts to be paid. Whilst the claimant contends that this was essentially a 'stop gap' whilst the full appointment to grade 6 was being authorised, the payment and receipt of this honorarium is not entirely consistent with an agreement to pay an increased salary and then pay the claimant back pay.
- When the claimant writes to DS (page 294) to query what his position is or should be he mentions the honorarium not being paid. He does contend that he has fulfilled the duties associated with a SM and goes to state he is "*asking it I can be paid at the appropriate rate*" (my emphasis). If it was the case that it had been expressly agreed and approved that he would be paid at a grade 6 salary (including back pay) it is not plausible that the claimant would not have mentioned this highly important and relevant point here. Moreover he would not be asking if he could be paid at the appropriate rate but stating that he is entitled to such pay and insisting that the agreement is honoured. This is not how the claimant puts it at all.

- The claimant was instructed by WC not to use the title of SM. If appointment to SM had been agreed in January 2018 it does not seem logical that WC would later inform the claimant he must not use that title.
- The claimant applies for the vacant grade 6 role when it is advertised. There is no correspondence or evidence in the file that the claimant raised with anyone at this time that it had already been agreed verbally in January 2018 that he had been appointed to a grade 6 role. If that agreement had been in place, it is inconceivable that the claimant would not raise it with anyone before the interview.
- The claimant does not mention any previous agreement that he had been appointed to the grade 6 role when he makes his first complaint to the respondent about the interview and recruitment process for that role in December 2018 (page 199-189). This complaint focuses solely on the questioning at interview and perceived unfair advantage of another candidate. It does not make any reference to the claimant's now stated contention that he had already been appointed to that post and it was just a question of formalising it. If this had been the case, it is implausible the claimant would not mention this point to in the written complaint made.

d) The claimant agreed with DS and LB that he would be paid an honorarium payment of £150 per month following his transfer to Redfern Road to carry out the additional duties. Although the claimant denies that he agreed to this at the time (suggesting that the honorarium was temporary pending the increase in salary and payment of back pay), both DS and JC evidence was that this was agreed at the time and I prefer their evidence. This is not least the case because the claimant was as a matter of fact paid the sum of £150 as an honorarium moving forward. This was sporadically paid (and sometimes with delay) but it was paid and no increase in salary was ever paid.

8.14. Following the discussions at Head Office, the claimant returned briefly to Montague Street depot to inform his colleagues he would be transferring to Redfern Road and the drove straight to Redfern Road depot. He met with the Depot Manager, NR when he arrived. NR did not know in advance that the claimant would be coming to work at his depot and the claimant said that he informed NR that he had been "*sent by head office to take over refuse collection*". NR gave evidence which I accepted that in the absence of any instruction from his managers about the claimant transferring to him he asked the claimant initially to cover refuse collection although because of his background in street cleansing he was useful covering that position as well. It appears to me that both the claimant and NR operated on the basis that the claimant would cover duties that would have been done by an SM or acting SM, albeit that there was no formal agreement in place that the claimant would be appointed to the role. The claimant from this point on started reporting back to LB on the state of play with missed collections and vehicle issues and had 1:1 meetings with LB during this period and I saw meeting requests confirming that this was the case. On a day to day basis he reported to the depot manager, NR. DS confirmed that after the claimant started to work at Redfern Road, the situation with

collections improved and the clarity of information was much better.

- 8.15. The claimant said that as far as he was concerned that from the first day at Redfern Road depot, he was entitled to be paid the salary as a grade 6 SM, which was the amount that had been paid to the previous Acting SM, IA. The claimant was expecting that something would be confirmed in writing to him but gave evidence that he was a patient person and expected that the respondent would honour the verbal agreement and pay him the correct rate of pay and back pay further down the line. I was not entirely convinced by this statement and find that if there had been such an agreement the claimant would have raised and had this confirmed to him at a much earlier stage.

Change of job title on SAP

- 8.16. In mid-January 2018, the claimant noticed that his job titled had changed on the SAP HR system to that of SM and his line manager was shown as NR. It is not clear who adjusted the job title on the SAP system but some form of HR process was required in order to make this change. The claimant pointed to pages 167 and 168 as evidence of previous forms authorising changes to title being submitted (although he did not draw any of the respondent's witnesses attention to such forms and so we do not have the respondent's evidence on what these documents are). It does not appear that any such forms were completed (or at least were not in the Bundle) for any of the changes made in January 2018 or later regarding the claimant. AM's evidence was clear and convincing and I accepted this that a change of job title on SAP could take place without a concurrent move to that role from a contractual or pay grade/salary perspective. If there were to be a contractual change to grade or salary, then there would be a further action from the HR Operations team to issue the appropriate contractual documentation confirming a change to pay/grade and authorising payroll changes. It could be the case that an individual was shown on the SAP system for the purpose of structure that there were in a particular role but had not been actually appointed to that role for pay and terms and conditions purposes. Her evidence on this matter is also supported by the documents at pages 170-174 which appear to be letters issued to the claimant following the changes in role related to the forms completed at pages 167 and 168. No letters e mails or any communications were issued to the claimant confirming any changes in role, duties or remuneration for an SM role.

- 8.17. The claimant's pay slips for this particular time (page 403 onwards) show that he continued to be paid at his normal rate of pay as a grade 4 employee. The pay slips do not appear to record a change of location from Montague Street. At the end of February 2018 he was paid two sums which were identified as 'JE Hon'; £150 as an honorarium payment for February and £145.16 as an honorarium payment for January (which the claimant accepted was a pro-rated payment from the date he moved to Redfern Road). That payment was paid again in March although does not appear to have been paid in April (just the sum of just £5 being paid), May, June or July. The claimant received payment for these missing months in his August pay slip (page 410) together with the August payment of

honorarium. It appears to have been missed again and not paid between September 2018 and March 2019, finally being paid to the claimant as retrospective payments in April 2019. The claimant does not appear to have submitted a formal complaint about either the failure to pay the honorarium on time or indeed more significantly to pay him the difference in pay between his current rate as a GR4 employee and the increased salary he says he was entitled to as a GR6 employee. The claimant acknowledged in cross examination that the difference between his GR4 salary and the GR6 salary was in the region of approximately £1500 a month.

8.18. On 8 February 2019 the claimant received an e mail attaching a training plan from V Farnell (page 181-186) which was also copied to DS. This contained details of training courses the claimant could attend (some of which were noted as applying to GR6 only) and referred to the claimant's position being an "Act up" SM at Redfern Road. DS did not query this e mail at the time and told us that whilst he did receive this, he had no recollection of reading it and it is likely that he did not read or open the attachment as he was not the claimant's direct line manager. I accept that the claimant was undertaking training courses that would ordinarily have been provided to someone in the role of SM.

8.19. The claimant told us that in February 2018, the Service Manager that had been responsible for street cleansing at Redfern Road took voluntary redundancy. He said he was summoned to Head office again and asked by LB and DS to 'take over' street cleansing in addition to his duties in refuse collection. The claimant said that in August 2018 he was asked again by DS to take over refuse collection department at Redfern and he did so. DS says he has no recollection of such discussions but only recalls asking the claimant to support the depot manager NR providing support where needed under NR's direct control and working across both streams. I preferred DS evidence on this point. It is clear that there was a significant lack of clarity about the tasks that the claimant was being asked to perform and that NR and DS perhaps had a different view as to the claimant's role and duties at this time. The claimant at this time appears to have been using on a regular basis the job title of SM. The claimant says he was informed by NC at some time in 2018 not to use the title of SM. NC gave similar evidence that it was brought to his attention that the claimant had been using this job title and so he informed the claimant he should not use this title and the claimant stopped doing this. NC said he could not remember when precisely this was but that this was definitely before the recruitment exercise for the service manager role so must have been before the end of 2018. I accepted NC's evidence on this point which was broadly consistent with the claimant's.

8.20. In October 2018 the claimant e mailed DS about his position (page 294). He stated:

Could you please clarify what role you would like me to undertake at Redfern Road Depot. I am more than happy to undertake either of the GR6 Service managers position. Since being asked to take over the role of the Service Manager for Refuse Collection in the first week of January this year

I believe that I have taken over and fulfilled all of the duties and responsibilities associated with the post. So I am asking if I can be paid at the appropriate rate as since I came to Redfern they continually do not pay me the honorarium and for the second month running I have yet to receive the honorarium payment (this makes it five times this year). I would welcome your thoughts with regards to my position and could you please let me know what title I am supposed to be using in my current role.”

8.21. DS replied the next day as follows:

I have spoken to Rob yesterday. He has confirmed that the disciplinary has now concluded. I can therefore advertise both GR6 positions at Redfern. I will complete the necessary forms and get the advert out this week.

The priority at the moment is refuse collections but when the advert is released you should apply for whichever service area you want.

Let me sort out your payment it is wrong it has been missed. The problem with the title is that we chose you and did not advertise the post, therefore no one else had the opportunity to apply for it. I will remedy this now.

Thanks for what you are doing I will sort out why you have being paid.

8.22. The claimant pointed out that DS did not dispute what he said in his e mail about being asked to take over the role of Service Manager in January 2018 and also did not dispute that he had been carrying out the duties and responsibilities associated with the post. This is correct. The claimant said he had questioned the role at this time because he had been told not to use the job title of SM, although there was no confusion on his part that he was in fact performing this role. I did not find this a particularly credible explanation. The claimant also said that this email was in fact a complaint about the failure to pay him the £1500 additional each month that he said he was entitled to as a SM. DS contends that he was in replying to the claimant's email confirming that the post of SM had not been recruited into but that this would now be advertised and the claimant was free to apply for either position. He also confirmed that when responding as to sorting out the claimant's "payment", he was referring to the honorarium, as the claimant had stated that this had not been paid five times this year. Despite being an attempt to clarify the position with the claimant, it is clear that both the claimant and DS appear to be at cross purposes in this correspondence. This exchange of e mails did not relate to the non-payment of grade 6 salary since being in the role nor make any reference to back pay being agreed at the start. In my view if this had been expressly agreed earlier, as the claimant contends, the claimant would have mentioned this agreement specifically during this e mail.

8.23. On 1 November 2018 the respondent posted a advert for role of Acting SM at Redfern Road depot. The claimant and 2 others (MQ and also RB, who was at that time working at head office and was a Unite representative) applied for the role. The claimant was asked why he applied for the role if he believed that he had already been appointed into the role and was carrying it out. The claimant said that he thought it was just a tick box

exercise formalising his position rather than a genuine selection exercise. Whilst I accept the claimant believed this was the case, this was not correct. On 19 December 2018 the respondent held interviews which were attended by the 3 candidates. The claimant was very unhappy about the interview held with him and said that during the interview it was clear that the questions had been tailored towards one of the candidates RB, as questions were asked around the respondent's memorandum of understanding ("MOU") that had recently been agreed with its trade union. The claimant felt that RB as a trade union representative had direct knowledge about this that other managers would not. MQ said he also had a similar experience of his interview and he too felt that RB had an unfair advantage. Whether or not that is the case is not a relevant matter for the matter of this claim so I have not considered it further.

8.24. On the evening of his interview, the claimant submitted a complaint about scoring process to R James, Acting Corporate Director ("RJ") (page 188-189). This complained about "fundamental flaws" in the selection process, in particular referring to questions about the MOU and also waste management and the claimant stated in here that he felt the outcome of the interview was a foregone conclusion. The claimant did not in this e mail complaint say anything about what he says was the agreement he had with DS/LB/WC regarding the SM role at Redfern Road. When challenged on why not, the claimant said he did not think about doing it. A complaint was also made about this selection exercise by MQ and he gave evidence about this to the Tribunal. However as the substance of this complaint is not of direct relevance to this claim, I have not considered it further. The claimant submitted a SAR the next day, 20 December 2018 (page 191) relating to the shortlisting and interview process.

8.25. Upon receipt of the claimant's complaint, on 21 December 2018 M Crump from the respondent's HR team ("MC") was asked by RJ to carry out a review of the recruitment panel decision. He e mailed RJ and DS with his conclusions on that matter (shown at pages 192-194). This concluded that the appointment of the candidate that had been selected at interview (RB) was safe and that the interview had been fair and reasonable. It suggested a draft response to the complainants informing them of this conclusion. I saw a response to this recommendation from RJ on the same day who then suggested that the respondent hold off making an appointment until the matter had been discussed (page 195). On 31 December 2018 MC sent an e mail to the claimant which dismissed his complaint and informed him that the appointment decision had been appropriate and that he had been unsuccessful in his application. The claimant replied that same day informing MC that he had not at that time been informed he was unsuccessful so was shocked by his e mail but also said he had not been asked by anyone for the reasons he had complained (page 201).

8.26. On 1 January 2019 the claimant sent an e mail (page 204) to B Hughes (DS's PA) re a meeting he was due to attend in which he stated "*As I am no longer the Service Manager at Redfern Road, should I attend this meeting or is the new Service Manager supposed to attend.*" This confirms that at least from 1 January 2019 the claimant was aware that he was not in the role of SM at Redfern Road. The claimant then decided to return to

Montague Street to take up his duties as an ASM. When challenged why this was done if he felt he was already appointed to that role, the claimant said he did this at this time because he had not been paid the grade 6 wages whilst at the Redfern Road depot. I was not convinced by this explanation and find that the claimant returned to Montague Street as he had been informed he had not been appointed to the vacant SM post. He carried out duties at the Montague Street depot for approximately a week. During that week he was instructed by WC to return to Redfern Road to assist as before, and refused in the presence of his trade union representative.

8.27. The claimant was subsequently asked by NR to go back to Redfern Road and carry on as before. NR explained that he had been asked by DS to make this request to the claimant and was told at this time by DS that the claimant was an ASM +, that is an ASM with added duties, and it was at this time NR was informed that the claimant was being paid an honorarium, because DS asked NR to renew it. NR gave evidence that he must have communicated this to the claimant at the time as he would not have asked him to return to Redfern Road without being clear what was required. He also explained that DS had told him that recruitment to the substantive post had been put on hold. NR said that at this point, he had assumed that the claimant was being paid an act up payment as the previous incumbent of the Acting SM role, AI had been. I entirely accepted the evidence of NR about this conversation and find that the claimant was informed at this stage that he was being required to move to Redfern Road to carry out the duties of an ASM with additional duties and for those duties he would be paid an honorarium. Nothing was confirmed in writing with the claimant at this time.

8.28. The claimant then pursued his complaints further with the assistance of his trade union. There is little written evidence of this process and it appears that no written complaint was submitted. In approximately April 2020 as part of later investigations DS was asked to provide a chronology of events from his perspective which he did in a document shown at pages 198-200. This records that on 5 February 2019 DS attended a meeting where the claimant's request to be placed into post of Acting SM was rejected because the claimant had failed the recruitment process and was not fulfilling all the parts of the SM role. The claimant does not recall attending this meeting and said that he did not request to be put into the post at this time. I find that this meeting may well not have involved the claimant personally as at this time the claimant's complaint was being pursued by his trade union representatives on his behalf. On 19 February 2019 DS records attending a further meeting where a decision was taken to stop the recruitment of the SM role started in December 2018 and that the claimant would continue in his ASM role with payment of honorarium of £150 pm. A further meeting appeared to have been held on 20 March 2019 where DS informed the claimant he could not be slotted into the SM role as his application was unsuccessful and appointment to that post was delayed in any event. The claimant said that he recalls this meeting as this is when he was informed that he was not entitled to a grade 6 payment because he was not in control of the budget. Once again there appears to have been miscommunication between the claimant and DS during this meeting.

- 8.29. The claimant complained on 10 April 2019 and upon not receiving a complaint sent a further email on 1 May 2019. This email was shown at page 208. In this email the claimant complained as follows:

My GR7 Line manager has been off work since March and I have been running both sections refuse collection and street cleansing with little support. I think that this is totally unacceptable for me in my position as a GR4 to be covering both GR6 posts at Redfern road when you currently have people being paid at a GR6 level who are 'not 'taking on the full duties of a Service Manager but you are expecting me 2 pay grades below them to do more than what they are currently doing. Can you please clarify exactly what role you wish for me to undertake whilst I am at Redfern Road depot Is it as a GR4 ASM with restricted GE duties as specified in writing or as the GB acting up properly with the right pay

If I do not hear from you by Friday 03rd May 2019 then I will be returning to Montague Street back to my substantive post as an ASM.

- 8.30. The claimant was asked about why he sent this email if he maintained the view that he was already performing the GR6 role and entitled to the payment. He said it was because he was not receiving the recognition of pay of a GR6 that he referred to himself as a GR4. However I found this a puzzling email to send as once again the claimant does not make any reference to what he now says was a verbal agreement that he would be appointed to the GR6 role from January 2018.

- 8.31. On 10 May 2019 the claimant attended a meeting with DS, B Hughes, N Holland and Z Hunt (HR) (minutes at page 209). During this meeting the claimant raised the fact that he had been told at a previous meeting that he could not be appointed to a GR6 position because there was no budget for this. DS clarified that it was because a recruitment process had been carried out and the claimant had been unsuccessful and so it was “*not possible to put someone into a position without successful recruitment*”. The claimant raised the argument that his post was a development opportunity and so he should be put on to the lowest spinal pay rate for the grade he was developing into. DS said it was not a development opportunity (which would also require a recruitment process). He explained the respondent's view that the claimant had been asked to support at Redfern Road and his additional work would be recognized by way of an honorarium payment, but that to appoint the claimant permanently a recruitment process would have to be followed.

- 8.32. The claimant at this stage raises it appears for the first time that he was seeking payment at grade 6 level from the time he moved to Redfern Road depot in January 2018. Following a discussion about the transfer and how it had taken place DS set out his understanding of this, which was broadly that following a recommendation from senior managers that the claimant had been recommended to support at Redfern Road depot and would be paid an honorarium to do so. He confirmed when it was challenged by the claimant that this had not always been paid, that this would now be extended. DS also informed the claimant that the post had not been

recruited to (despite what the claimant had been informed by MC at the time) and that the post was withdrawn before it was offered to anyone. The claimant told DS that he was covering “all duties” as NR was currently off sick and was told by DS that he should not be carrying out these duties and that other employees should be providing support. The claimant asked whether he could be paid stand in allowance and DS informed him this could only be paid for a maximum of 28 days. The meeting ended with Z Hunt saying she would investigate further to see what next steps would be and DS informed the claimant that there would be recruitment through the forthcoming restructure but not until September of 2019.

- 8.33. On 8 August 2019, the claimant submitted a request to HR Operations shared e mail address asking them to confirm what his job title is. A response was sent by a HR Services Advisor that his job title is recorded as Service Manager on SAP (page 214). A further response was provided to the claimant on 12 August 2019 (presumably when he asked who changed this job title) which confirmed:

“Looking at the structure records, they show that on 1/1/18 you transferred from the Area Accounts Manager 70055021 in Business Development to fill the Service Manager role 70356684 In the Redfern Road Service Team 380050451 reporting to Mr N Reid”.

- 8.34. The claimant was e mailed by T Moffat of HR (“TR”) on 17 July 2019 (page 223) who asked him to submit further evidence as to how he said he had been fulfilling the role of SM. This appears to have been instigated by a review of outstanding employee relations issues headed by L Ariss (“LA”) of HR. The claimant replied that day supplying detailed information on all the aspects of the SM job description he felt he was fulfilling and also suggested that a different job description had been supplied as to the one supplied when he had applied for the SM position the previous December. He again stated in this e mail that he moved to Redfern Road after DS had asked him to ‘take over’ refuse collection and stated that despite DS denying that the claimant was doing the SM role has been invited to meetings for SM since. This was forwarded by TM to LA on 8 August 2019, with TM asking her to respond to the claimant. There is no further correspondence after this, although it appears that attempts were made by LA to arrange a meeting with the claimant as this is referenced in later correspondence (see e mail from TM of 4 November 2019, page 237 and meeting requested decline by the claimant of 25 October 2019 (page 235) referred to in the e mail of 30 October 2019 (page 234-5).

- 8.35. On 27 September 2019 the claimant submitted a grievance and confirmed that he had done so by emailing his union representative S Harding (page 219). On 19 November 2019, the claimant resubmitted his grievance copying RJ as no response had been provided (page 232). RJ replied on 25 October 2019 and asked the claimant to resend his original e mail as it did not appear to have been received, and reminding him that grievances should go first to the line manager (page 233). The claimant sent a screen shot of his grievance to TM on 5 November 2019 (page 236). The claimant chased again for a response to his grievance to RJ on 14 November 19 (page 239) and confirmed that he had resubmitted his

grievance via the HR system on 19 November 2019 (page 240). The various grievances then appear to have gone astray and there is correspondence regarding where they have got to during the course of December 2019. The claimant was asked to submit his grievance as a word document and on 6 January 2020 the claimant put a grievance in writing by email (page 247).

8.36. This grievance complained that he had been doing his role at Redfern Road for over 2 years stating that his job title was changed to SM on 1 January 2018. The claimant restated his position that he had not been asked by DS to go to Redfern road as an ASM with additional duties. The claimant did not refer in this grievance to any verbal agreement between himself and LB, DS or WC about the arrangements he now says were in place. Despite acknowledging this and confirming that something would be set up within the next 14 days, the claimant heard nothing further and so he chased again on 24 January 2020 (page 248). His union representative wrote again further to complain about the lack of response on 10 February 2020 (page 250). On 28 February 2020 the claimant submitted a grievance against TM (page 251) and on 16 March 2020 his union representative further chased for progress (page 252). On 6 April 2020 an e mail was sent to the leader of the Council by the claimant's union representative (page 256) again chasing the grievances. A further e mail was sent on 14 May 2020 reminding the respondent of their responsibilities under the ACAS code of practice (page 260). It is clear that the respondent failed to progress the claimant's grievance in a timely manner at this time and there does not appear to be an explanation for this unreasonable delay.

8.37. AM became involved with the claimant's grievance in approximately June 2020 and started to investigate the matters the claimant was complaining about. I saw a number of e mails where she is in contact with various managers of the respondent asking them for their views on the matters complained about. In particular I saw an e mail from NR to AM on 16 June 2020 when he responded to her question about whether the claimant was doing 100% of the Service Managers role and he responded "*I would say he is as much as any of the other Service Managers*" and went on to explain that there were two service manager vacancies and the claimant moved between both roles as needed (page 266). AM contacted the claimant on 18 September 2020 confirming that she was looking into his outstanding complaint and setting out her understanding of the position (page 278) to which the claimant further responded with his view (page 276-277).

8.38. On 21 September 2020 AM wrote to the claimant to inform him that she was happy to work to try and resolve the matter, but that it could not be accepted as a grievance, as it related to pay (page 284). AM continued to look into the matter and asked for further information from the claimant as part of the process. On 21 September 2020 he provided a response to questions she had posed about the circumstances of his move to Redfern Road (page 288-289). The claimant repeated his assertions regarding the transfer to Redfern Road stating that at no point was he informed he was transferring with an ASM with additional duties and that DS had not denied at the time he was covering the SM position. He confirmed nothing was provided in writing. Again the claimant did not state that there had been an

express agreement that he would transfer in the grade of GR6 Service Manager and that a honorarium would be paid until his pay could be formalised (at which back pay would be paid) as he later and now contends. He further contended that as the role had been confirmed as a development opportunity he should be paid at the rate for the GR6 role.

8.39. AM provided her final response to the complaint on 13 November 2020 (page 355-357). She concluded that the claimant had been asked to work from Redfern Road as support was required, and in return was paid an honorarium payment. She concluded that after the claimant's unsuccessful application for the vacant SM role, management decided not to appoint to this position; and that it was then agreed that the claimant could carry on as an ASM at Redfern Road performing additional tasks whilst continuing to receive an honorarium payment. She concluded that the claimant had not been appointed to the SM role as it was still vacant and that the claimant was not entitled to a grade 6 salary as a development opportunity or otherwise. She stated that the term 'development opportunity' may have caused some confusion but it did not mean someone was carrying out a role of a higher grade. The claimant was not given the right of appeal against this decision. AM acknowledged in cross examination that the claimant's complaint had taken longer than it should have done.

8.40. The proposed restructure in waste management has still not taken place and the role of SM at Redfern Road remains vacant. DS explained that this was partly due to the pandemic which had caused a delay. He also explained that he had not progressed with the recruitment of SM at Redfern Road depot because of the complaints raised at the time and these ongoing Tribunal proceedings.

8.41. It is clear to that the claimant has been carrying out many of the tasks that the SM would have carried out at Redfern Road had he/she been formally in place. I was shown various structure charts which identified the claimant as SM and correspondence including a letter regarding key worker status during the Covid 19 pandemic which also identified the claimant in this position in the structure. I was shown an e mail chain from 23 December 2021 from L Williams another senior manager in the organization which attached structure information which identified the claimant as "Acting Service Manager" (page 400C24). The claimant and NR appear to regard the claimant as the de factor SM or acting SM in the Redfern Road depot and he clearly carries out many activities of that role. However this has never been agreed as a change in role and the claimant has never been appointed to that position through the respondent's processes. The claimant made a number of references to the act up policy of the respondent but it does not appear that this was ever discussed or agreed with the claimant in respect to this position so appears to be of limited relevance to the claim.

8.42. On May 2020 ACAS early conciliation was commenced by the claimant which ended on 3 July 2020. The claimant presented his claim for on 21 July 2020.

The Relevant Law

9. **Section 1 of the ERA** provides that where an employee begins employment *“the employer shall give to the employee a written statement of particulars of employment”* and that this *“shall be given not later than two months after the beginning of employment”*. The particulars required to be given by section 1 include the scale or rate of remuneration or the method of calculating remuneration, the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals), any terms and conditions relating to hours of work holidays and holiday pay, incapacity for work due to sickness or injury, including any provision for sick pay, and any other paid leave, pensions and pension schemes, any other benefits notice periods, job titles, duration or employment, place of work and collective agreements.
10. **Section 4 of the ERA** provides that any changes in the contractual terms or in other matters of which written particulars must be given under section 1 must also be the subject of a written statement given to the worker at the earliest opportunity and in any event not later than one month after the change.
11. If an employer fails to provide such a statement under section 1 or 4 ERA above, an employee may make a reference to the Tribunal in relation to such failure under **section 11 of the ERA** asking the Tribunal to determine the particulars should have been included in such a statement. On such a reference, if a Tribunal determines particulars as those which should have been provided, those particulars shall be deemed to have been provided by the employer. Under **section 12 (3) of the ERA** a Tribunal determines particulars were not provided by an employer, it shall make a declaration to that effect.
12. Where no express term has been agreed, a Tribunal may imply a term after considering all the facts and circumstances of the relationship between the employer and the employee concerned - Mears v Safecar Security Ltd [1982] ICR 626. If there has been no express or implied agreement upon a particular term, the tribunal has no power to invent a term for the parties where none was agreed - Eagland v British Telecommunications plc [1993] ICR 644
13. In addition under **section 38 of Employment Act 2002** if an Employment Tribunal makes a finding in favour of an employee in a number of specified claims specified in Schedule 5 to that Act (including for unfair dismissal and unlawful deduction of wages) whether or not it make an award to the employee in respect of those claims, and in so doing finds that the employer was in breach of its **section 1 or 4 ERA** duty when the proceedings were begun *“the tribunal must...increase the award by the minimum amount [2 week’s pay] and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount [4 week’s pay] instead”*. This does not apply if there are *“exceptional circumstances which would make an award or increase.....unjust or inequitable”*.
14. A reference to an Tribunal under section 11 ERA (for determination of written particulars) is not one of the claims specified in Schedule 5 and

therefore does not trigger the right to an award - Scott-Davies v Redgate Medical Services 2007 ICR 348, EAT.

15. **Section 13 ERA** provides that a worker has the right not to suffer unauthorised deductions from their wages. The relevant sections are set out in full below:

“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.*
- (2) *In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—*
- (a) *in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
 - (b) *in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
- (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.*

16. **Section 23 ERA** provides a right for a worker to present a complaint to Employment Tribunal that their employer has made an unlawful deduction from their wages, contrary to **section 13**.

17. **Section 27 ERA** defines wages as (amongst other matters):

“(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,”

but excluding (amongst other items):

“(c) any payment by way of a pension, allowance or gratuity in connection with the worker’s retirement or as compensation for loss of office,”

18. There must be a legal entitlement to amount to wages properly payable,

although this does not necessarily need to be a contractual entitlement - New Century Cleaning Co Ltd v Church [2000] IRLR 27.

19. However the Tribunal's jurisdiction does not extend to a potential entitlement under a quantum meruit claim following the decision of the EAT in Abellio v Thomas [2022] EAT 20. Such a claim must be brought in the civil courts.
20. In Adcock v Coors Brewers Ltd [2007] EWCA Civ 19, [2007] IRLR 440, [2007] All ER (D) 190 (Jan) the Court of Appeal held that jurisdiction under Part II of the ERA is limited to claims that a specific amount of money by way of wages is owing and jurisdiction does not extend to an unquantified claim in relation to an unidentified sum.
21. In the combined appeals of Agarwal v Cardiff University and Tyne & Wear Passenger Transport Executive v Anderson [2018] EWCA Civ 2084, [2019] IRLR 657 the Court of Appeal affirmed that the employment tribunal can, if necessary, construe and interpret the claimant's contract of employment including identifying any applicable implied terms in determining whether there had been an unlawful deduction from wages.
22. Mr Starcevic summarised the relevant principles of contractual law relating to a variation of contract quoting from Chitty on Contracts in his skeleton argument.

Conclusion

23. Based on my findings of fact above, I have approached the conclusions by looking first at the key issues of whether any unauthorised deductions were in fact made as identified at para 3 of the List of Issues set out above, namely:

3. Unauthorised deductions

3.1 *Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?*

24. In order to succeed in his complaint of unlawful deduction of wages, the claimant must show that he was entitled to the wages he says were deducted. The claimant says he is owed the shortfall in wages between a grade 6 SM rate of pay and the rate of pay he actually received as a grade 4 ASM. Therefore in accordance with section 13 and 27 ERA he must show that the grade 6 SM rate of pay amounted to "wages properly payable" to him from January 2018 onwards. The claimant contends that from January 2018 onwards he was entitled to grade 6 SM pay because his contract of employment was varied by verbal agreement in January 2018 so that from January 2018 onwards he was contractually entitled to be paid at the rate of pay of a grade 6 service manager. The respondent's position that there was no verbal or any other agreement to vary the claimant's contract of employment in January 2018 to entitle him to be paid at the rate of a grade 6 SM. The respondent contends that the only variation agreed at this time was that the claimant would be paid an

honorarium of £150 per calendar month for carrying out additional duties (still as an ASM) at the Redfern Road depot.

25. Therefore the key question is what was agreed between the claimant and the respondent in January 2018. My findings of fact above were that there was no agreement that the claimant would be moved to a grade 6 role and paid at a grade 6 salary at this time or at any time since (paragraph 8.13 (c)). I have applied the settled law as to whether a contract has been varied as summarised by Mr Starcevic in his skeleton argument. I have reached the conclusion that on an objective standard and on the balance of probabilities the claimant has not been able to show that there was an agreement that he would be paid at the higher rate. Dealing with the arguments the claimant makes in his skeleton argument in turn:

25.1. The claimant makes reference to the respondent not adhering to a verbal agreement with LB made on 4 January 2018. However I have found as a fact that there was no verbal agreement in place to vary the claimant's contract made at the meeting in January 2018 with LB or anyone else (see paragraph 8.13 above).

25.2. The claimant is correct that DS had the authority to appoint the claimant to an SM role and the respondent may in the past have appointed to roles without the advertisement and process having taken place. However this does not change the clear finding of fact in this claim that there was no such verbal agreement to appoint the claimant to the SM role (paragraph 8.13).

25.3. The job title of the claimant being changed on the respondent's HR system does indeed support the claimant's argument that he was appointed to that role. However the change on the SAP system was not conclusive as I have found as a fact that this system does not always reflect the contractual position (see paragraph 8.16 above). It is clear than many of the respondent's managers regarded the claimant as the SM at the Redfern Road depot and treated him as if he were performing that role (see paragraph 8.41). However as a matter of fact I have found (on the balance of probabilities and taking into account all the other relevant factors referred to above) and concluded that the claimant was not appointed to that role by DS, LB or anyone else.

25.4. The fact that the claimant was offered a training and development plan and carried out training courses that were aimed at grade 6 employees only, also supports the claimant's contentions, but again is not conclusive as to whether the claimant had in fact been appointed to the grade 6 role. It is clear that the claimant was carrying out a number of the duties that would have been carried out by someone appointed to this role. My conclusion on the facts remains that there was no agreement that the claimant was appointed to this role.

25.5. The 1:1 meetings held with LB at head office following the claimant's move to Redfern Road are also not of assistance in determining whether the claimant's contract of employment had been varied in January 2018 appointing him to the SM role. The claimant had been tasked with a

particular role on his move to Redfern Road which was to report back to head office on the state of collections. These 1:1 meetings taking place in this manner, if anything supports the contention that additional duties had been agreed with the claimant, rather than an appointment to the SM post.

- 25.6. The reference to the claimant as SM in official letters and management structure supports the claimant's contention that he was to all intents and purposes regarded by other employees and managers within the respondent as being the SM at Redfern Road. This is undoubtedly the case, but it does not change the fact that there was no contractual agreement between the respondent and the claimant that he would in fact be appointed to that post.
26. Although I was not addressed specifically on this point, the claimant appeared to be arguing that as he was carrying out duties of an SM, using this title, had the title on the SAP system and was regarded by various managers as being in that role, that there was some sort of implied agreement with the respondent appointing him to the SM role and contractually entitling to a grade 6 salary. The problem with this argument is that the claimant has never been paid a grade 6 salary and even if the claimant was carrying out all of the duties of this role from the start, the respondent's senior management has not accepted that he has been appointed to the role nor paid him at the commensurate level. The respondent's conduct does not indicate agreement by its actions to the particular change in contractual terms and conditions the claimant is contending. Indeed the respondent has consistently indicated to the claimant that it does not regard him as having been appointed to the SM role. Merely carrying out the duties of a role of itself, does not entitle the claimant to contend that he is contractually entitled to the terms and conditions that might have been attached to that role were there an agreement with the employer that he was actually appointed to it.
27. I also accept the submissions of Mr Starcevic in respect of any other entitlement the claimant might have to be paid the wages of a SM under a quantum meruit or other type of quasi contractual claim. It is clear from the case of *Abellio v Thomas* above that the Tribunal does not have the jurisdiction to determine a claim for quantum meruit under part 11 of the ERA. Such a complaint could only be brought in the civil courts.
28. The claimant is in essence running the argument that he should be paid at the commensurate rate for a SM, as he has in practice carried out the duties of that role. This is more an argument as to the fairness of the respondent in asking the claimant to carry out duties for which he regards himself as not being properly remunerated for. He compares himself to other SMs and contends that as he is effectively carrying out the same duties that they are, that he should be entitled to be paid at the same rate. However this is not a basis for a claim for unlawful deduction of wages which must be based on some entitlement to be paid at the rate of pay claimed, not simply what is fair and reasonable.
29. Dealing with the next issue listed at the List of Issues at 3.2 above, namely whether the wages etc paid to the claimant from 1 January 2018 to the date

of issue of the claim form, less than the wages he should have been paid, as I have found that the claimant was not entitled to be paid a higher rate of pay, then he has not been paid less wages that he should have been paid from 1 January 2018. From this date he has been paid the wages he is contractually entitled to as a grade 4 ASM together with the honorarium of 150 per calendar month for carrying out additional duties at the Redfern Road depot. As no deductions were accordingly made, the questions set out at paragraphs 3.3 to 3.7 and at paragraph 4.1 below are no longer relevant.

30. In addition as no award will be made to the claimant in respect of any unlawful deduction of wages complaint, it is not appropriate for me to consider any uplift to an award under Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 relating to potential breaches of the ACAS Code of Practice on Disciplinary and Grievance Procedures. I would note that the respondent does appear to have failed to follow its own internal grievance procedures in a number of respects by failing to deal appropriately and in a timely manner with the claimant's grievance raised on 27 September 2019. The claimant did not receive a substantive response to this grievance until AM's response on 13 November 2020. On any account, this is far too long and if the claimant had been successful in his complaints for unlawful deduction of wages, it is likely that I would have determined that this was an unreasonable failure to comply with the ACAS Code and may have led to a decision that it was just and equitable to increase the award payable to the claimant to a significant degree. The grievance process adopted by the respondent in this claim was confused and chaotic with a number of people having involvement but no manager taking ownership of the complaint until the involvement of AM in September 2020. To her credit AM investigated it thoroughly at this stage, despite not treating it as a grievance under the respondent's procedure. There seems to be no reasonable excuse why it took so long for a response to be provided before this time and I would suggest that the respondent may wish to reviews its own procedures to ensure that such a long delay does not occur in the future.

31. Having considered and determined the substantive unlawful deductions complaint, I went back to consider the other complaints that are before the tribunal in relation to the change to the claimant's terms and conditions of employment in January 2018 set out in the List of Issues above, namely:

1. Change *in terms and conditions of employment*

1.1 Was the claimant's contract of employment amended such that the respondent should have given him a written statement confirming the amendment under section 4 of the Employment Rights Act 1996 (ERA)?

32. As I have found that there was no change of terms and conditions in relation to a salary increase and change of grade to a grade 6 SM, there was no requirement to provide a statement of change in respect to such matters under section 4 ERA. I also accept the respondent's contentions that the additional duties he was tasked with at this time, asking the claimant to report back to the respondent's head office and to support the

depot manager as required did not require a written notification of change under section 4 ERA. Whilst it is not part of the claim before the Tribunal, it does appear to me that it may be sensible for parties to consider whether the claimant's precise situation should be regularised and recorded moving forward so that he is clear exactly what duties he is required to carry out as an ASM with additional duties in the Redfern Road depot, as the communication on this by all relevant parties has been far from ideal.

33. The respondent conceded that in respect to the payment of the honorarium from January 2018 onwards it was required to provide a section 4 statement of change of employment particulars to the claimant. I conclude that is correct and the respondent should have provided the claimant with a written statement confirming the amendment to his employment under section 4 ERA and so is in breach of that provision. I then went on to consider the matters relating to that failure to provide a written statement as set out in the List of Issues above, namely:

1.2 Shall the tribunal determine a reference by the claimant under sections 11 and 12 ERA?

34. There has been a breach of section 4 ERA in relation to the payment of the honorarium from January 2018 onwards and a reference has been made to the Tribunal under section 11 ERA. I have determined that the respondent ought to have included particulars of change as respects to the payment of the honorarium from January 2018 onwards and taking into account the guidance above and based on my findings of fact at paragraph 8.13 (d) above, I exercise my power under section 12 (2) to confirm those particulars are as follows:

“With effect from 1 January 2018, the claimant will receive an honorarium payment of £150 per calendar month in respect of additional duties he has been asked by the respondent to carry out at the Redfern Road depot namely to convey information about refuse collection services to its Head Office and to support the Depot Manager in his role as Assistant Service Manager as required.

The honorarium payment arrangement will continue in accordance with the current Honoraria policy of the respondent and will be reviewed from time to time and/or terminated in accordance with the terms set out in that policy.”

35. Dealing with the issue identified at paragraph 2 of the List of Issues relating to jurisdiction, as I have not determined that any deductions have been made, it is not necessary to determine whether the unauthorised deduction from wages complaint was made within the time limit set out in section 23 ERA. There were no deductions and so no series of deductions the last of which was brought in time. I did not need to consider this further.
36. I have finally considered the provisions of section 38 Employment Act 2022 to determine whether the claimant is entitled to any remedy in respect of the failure of the respondent to provide him with a statement of change to particulars in respect of the payment of the honorarium. There is an additional right to a remedy from a tribunal where a claim has been brought

within the list of jurisdictions in Sch 5 to EA 2002 (which includes a complaint for unlawful deduction from wages). Where under such a claim the tribunal finds for the employee, whether or not it makes an award in respect of that claim, and where when the proceedings were brought the employer was in breach of the duty to give written particulars, the tribunal will make an award of 2 weeks' pay unless it would be unjust and inequitable to do so, and may if it considers it just and equitable in all the circumstances make an award of 4 weeks' pay (as referred to above).

37. It is clear that the respondent was when these proceedings were begun in breach of its duty to give a written statement of change to those particulars as I have identified above. However as the claim before the Tribunal of unlawful deductions from wages has not succeeded, the Tribunal has no power to make an award to the claimant in respect of such a failure under section 38 Employment Act 2002. It is clear from section 38 (2) (a) the Tribunal only has the power to make such an award if the employment tribunal finds in favour of the employee even if no award was made. The claimant's complaint for unlawful deduction of wages has not succeeded and I have not found in his favour in this regard and so I have no power to make such an award, despite the respondent's initial concession (which it subsequently confirmed was made in error) that such a sum may be payable. There is simply no power to make such an award in the absence of a successful claim.

38. Finally, the claimant said during his evidence and during his final submissions that had the respondent written to him at the time in January 2018, then this whole dispute may never have happened. I entirely agree with the claimant and the respondent's failures to communicate effectively and clearly has been a contributing factor in misunderstandings having arisen. It appears to me that the respondent might be wise to try to regularise the claimant's current position as to duties so it is clear what is expected and required of him moving forward.

Employment Judge Flood
23 March 2022