STO

Case Number: 3200575/2016

EMPLOYMENT TRIBUNALS

Claimant: **Jamil Ahmed**

Respondent: **The London Borough of Tower Hamlets**

Heard at: **East London Hearing Centre**

On: **30 November - 1 December 2016, 6 - 7 February 2017 & 2 March 2017 (in chambers)**

Before: **Employment Judge O'Brien**
Mr L Purewal
Mr T Brown

Representation:

Claimant: Mr Faruk of Counsel

Respondent: Ms Palmer of Counsel

RESERVED JUDGMENT

1. **The claimant was fairly dismissed and his complaint of unfair dismissal is dismissed.**

2. **The claimant's complaint of race discrimination fails and is dismissed.**

3. **The claimant's complaint of unauthorised deductions from wages fails and is dismissed.**

REASONS

1 The claimant was employed by the respondent from 1 November 2002 until his summary dismissal on 25 January 2015. In a claim presented to the Tribunal on 18 June 2016, the claimant complains of unfair dismissal, race discrimination and unauthorised deductions from wages (a failure to pay an increment to the claimant's hourly rate in respect of his driving a 7.5 tonne vehicle).

2 At a closed preliminary hearing before Employment Judge Foxwell on 15 August 2016, the issues were agreed as follows:

Unfair Dismissal

2.1 What was the reason for dismissal? The respondent says misconduct, which is a potentially fair reason.

2.2 If the respondent has established a potentially fair reason for dismissal, was it fair to dismiss for that reason having regard to the test of fairness contained in s98(4) of the Employment Rights Act 1996 (ERA)?

2.3 If the claimant was unfairly dismissed, would he have been dismissed in any event if a fair procedure had been adopted and, if so, when?

2.4 If the claimant was unfairly dismissed, did he contribute to his dismissal by his own conduct?

Race Discrimination

2.5 Did the respondent treat the clamant less favourably than it would have treated a white employee in the same or similar circumstances by dismissing him and was that difference in treatment because of race? The claimant relies now on only one actual comparator: Jane L Jones, a white British member of the respondent's Corporate Department.

Unauthorised Deductions from Wages

2.6 Did the respondent fail to pay an increment to the claimant's hourly rate as a Youth Worker which was lawfully due in the period between June 2014 and his dismissal representing 128 hours in the sum of £738.56. Each party provided a spreadsheet to the Tribunal, setting out what that party contended should have been paid to the claimant against what the party contended had in fact been paid.

PROCEDURAL MATTERS

3 The claimant confirmed at the preliminary hearing that his race discrimination claim was limited to the act of dismissal. However, on 5 September 2016, he notified the respondent and the Tribunal that he wished also to allege discrimination during and before the respondent's investigation into his misconduct. The respondent confirmed on 17 October 2016 that it objected to the claimant amending his claim.

4 The application was pursued at the beginning of the hearing and was resisted by the respondent. After hearing argument from both parties and deliberating, the Tribunal refused to grant permission to the claimant to amend his claim. The Tribunal applied the principles in **Selkent Bus Company v Moore [1996] IRLR 661**. It noted that the additional allegations would have been well out of time had they been pleaded in the

original claim form and were still very poorly particularised. For instance, the claimant alleges that Mr Gowan's investigation was an act of discrimination because he failed to question the white payroll manager; however, there is not and has never been any suggestion that the payroll manager should have been investigated or disciplined for their part in the events for which the claimant was dismissed. Therefore, permitting the amendment would impede rather than further the just disposal of this claim. In any event, the essence of the claimant's race claim remains that he was dismissed in circumstances when a white employee would not have been dismissed. In addition, the claimant gave no adequate explanation for why the additional allegations could not have been included in his original claim form or why the application to amend could not have been made earlier. Overall, the Tribunal concluded that the balance of prejudice clearly favoured refusal of the application.

5 The claimant had failed to produce a written witness statement as directed by Employment Judge Gilbert in her order dated 3 August 2016. Mr Faruk asked permission for the claimant to rely instead on the following documents as comprising his written evidence: the summary of his claim submitted with his ET1 (pages 34-37 of the Bundle); his 'Grounds for Discrimination' (pages 57-59); his schedule of loss (pages 60-62); his response to the respondent's grounds of resistance (pages 123-132); and his written submission for appeal (pages 567-591).

6 Mr Faruk explained that, save for representation at the closed preliminary hearing before Judge Foxwell and at this final hearing, for which he had been directly instructed by the claimant, the claimant had been acting in person. The respondent did not suggest that it would suffer any material prejudice if the claimant was permitted to rely on the identified documents in lieu of a witness statement, and so the Tribunal considered that it was in the interests of justice so to allow.

7 At the reconvened hearing in February 2017, it was agreed that a number of additional documents could be added to the bundle, such as relevant pay scales for the respondent's employees, emails from Damian Kennedy (of the respondent's payroll department) explaining the pay rates received by the claimant. Also added to the bundle by agreement were copies of those documents relied upon by the claimant in lieu of a written witness statement with cross-references to pages in the agreed bundle added.

8 The claimant also produced a witness statement for the reconvened hearing. However, he sought to rely on the statement in addition to the selection of documents previously identified, rather than instead of them. The Tribunal considered that permitting the claimant to add to his written evidence would impede the just disposal of this case and refused permission. He also sought to rely on a recent Freedom of Information request and response and his email to the Tribunal dated 30 January 2017 covering and explaining that document. It did not appear to the Tribunal that these documents were probative of any issue in the case and permission was refused.

EVIDENCE

9 The Tribunal heard evidence from Tony Gowan (investigating officer), Andrew Bamber (chair of the disciplinary panel) and Councillor Danny Hassall (chair of the appeal panel) on behalf of the respondent. They each gave oral evidence based on written

witness statements. On behalf of the claimant, the Tribunal heard from the claimant himself, giving evidence on the basis of the documents identified above, and Neal Smith (union representative) giving evidence on the basis of a statement provided during the disciplinary and appeal process (page 592 of the Bundle).

FINDINGS OF FACT

10 The Tribunal took into account the witnesses' evidence, the documents to which it was referred and the representatives' submissions, whether or not specifically referred to in this judgment, and made the following findings of fact resolving any issues on the balance of probabilities.

11 The claimant was employed by the respondent from 1 November 2002 until his summary dismissal 25 January 2016. He was employed latterly as a youth worker and as a complaints and information administrator. The claimant would often drive a 7.5 tonne vehicle during his shifts as a youth worker.

12 The claimant was awarded a VRQ level III diploma in youth worker practice on 10 September 2012. Around this time the claimant raised without success the issue of being paid at an increased rate for his driving.

13 On 10 July 2013, the claimant and Saifur Rahman Khaled met. The coming reorganisation of the Council and was discussed and the claimant understood that, if he applied for and got a more senior position in the Youth Service in the reorganisation, due to occur at the end of 2013, Saifur Rahman Khaled would back date the claimant's increased pay rate to the date on which he received his VRQ level III. However, the claimant did not apply for a more senior role in the reorganisation.

14 In January 2014, it was agreed between the claimant and Saifur Rahman Khaled that he should claim 40 hours' additional pay at the rate of £14.40 per hour in that month's timesheet, in lieu of unpaid additional pay for previously undertaken driving duties. The claimant did so and certified on the timesheet that the details therein were correct. The timesheet was countersigned by Sadequr Rahman, who annotated in manuscript that 40 hours should be paid at £14.40, and it was further countersigned by Dinar Hossain.

15 The claimant continued to drive but without receiving any extra pay until March 2014 when he refused to drive any longer. He did not drive again until August 2014 when it was agreed between the parties that the claimant would be paid at the youth worker in charge rate when driving.

16 Each of the timesheets for August to December 2014 were annotated for the hours to be paid at £14.56. This was misinterpreted by payroll as an instruction to pay that number of hours at £14.56 in addition to the claimant's contracted hours in his contracted role. The claimant, therefore, received approximately twice as much as he ought to have expected in the corresponding payslips.

17 The claimant did not inform the respondent of the overpayment until he met with Sadequr Rahman on 12 May 2015. In a statement to the investigating officer dated 2

September 2015, Sadequr Rahman stated that the claimant had not mentioned the overpayment until he was shown documentary proof of it. The claimant had, however, complained by email to SU on 2 March 2015 about not being paid at the driver's rate of pay for February 2015.

18 The respondent's overpayment policy including included the following paragraphs under the heading 'employee responsibilities':

> '2.1 Employees are responsible for checking their payslips and it is assumed that they are able to determine that an overpayment has occurred. The exception is where the amounts are too small to significantly affect the net pay.
>
> 2.2 Where an employee is aware that they have been overpaid, but fails to notify their Line Manager or the Payroll Section, it is considered as fraud under the Council's Disciplinary Code.'

19 Following the claimant's meeting with Sadequr Rahman, there followed negotiations regarding the overpayment. The claimant accepted that he had been overpaid in the months in question but contended that it was more than extinguished by the respondent's failure to pay him for his driving duties. The negotiations ceased on 15 June 2015, when Trevor Kennet sent the claimant and email in the following terms:

> 'Dear Jamil,
>
> We have discussed your request for a £2000 payment for past duties being undertaken by you with the agreement of previous managers.
>
> As explained in our meeting there appears to be no evidence whatsoever to support your claim so therefore I am not in a position to approve your request.
>
> I offered to you in good faith as a gesture of goodwill to clear the debt of £844.20, which has been over paid to you so that we could move forward, which you declined.
>
> You will therefore need to make arrangements with HR to repay the above amount. As agreed in our meeting future duties around driving the vans will be agreed and paid in accordance with the correct rate using the HR self-service system.'

20 At around this time Andrew Bamber conducted a one-to-one with TK, during which TK told him about the claimant's case. Andrew Bamber was already implementing a wide-ranging investigation into improper practices and overpayment issues in Youth Services. He therefore instructed TK that it was inappropriate to resolve the claimant's case administratively and instructed Tony Gowan to investigate.

21 Having been briefed orally, Tony Gowan had drafted his own terms of reference and an investigation notification letter to be sent to the claimant. The letter did not suspend the claimant, albeit that it was described inaccurately as a suspension letter in the investigation report. We find that this was simply a typographical error and nothing sinister. The letter, dated 10 August 2015, detailed the following allegations of gross misconduct: irregularities concerning the number of hours claimed; dishonesty against the council (falsification of timesheet); submitting false pay claims for personal financial gain; and breaching the Council's code of conduct.

22 Paragraph 2.3 of the respondent's disciplinary process states:

> 'The whole process must be given a high priority by the manager and the employee concerned. The time required to complete an investigation will depend upon the complexity, the individual circumstances of the case and the issues involved. The investigation should normally be completed within 20 days of the decision to conduct an investigation being notified to the employee. If necessary, a further 10 days will be allowed and the employee will be notified of this. If it is clear that the investigation will take longer, for example if a crucial witness is sick or outside agencies' reports are needed, further extensions may be necessary. In this event a revised date will be set for completion and the employee informed. A decision to take or not to take disciplinary action must be made with the minimum delay and communicated to those involved.'

23 Paragraph 2.4 of the procedure states that:

> 'No disciplinary action will be taken without a prompt and thorough investigation into the circumstances (this will normally be undertaken by the employee's manager) and a hearing which will be held by a manager designated by the Corporate Director or Service Head.'

24 At around this time there were 18 or 19 investigations being undertaken into misconduct in the Youth Service, all but 5 of the subjects of which were Bangladeshi. These investigations resulted eventually in 5 dismissals, in each case of a Bangladeshi employee. Around 80 to 90% of the entire workforce of the Youth Service was Bangladeshi.

25 During the investigation, the claimant admitted filling out his January 2014 timesheet with hours not worked in that month but explained that this had done been done with the agreement of Saifur Rahman Khaled. He also admitted to knowing in December 2014 that he had been overpaid but that he had not informed management.

26 A disciplinary hearing took place on 25 January 2016. The claimant repeated his explanation about how he came to fill out the January 2014 timesheet. He also admitted that he had discovered that he was being overpaid in December 2014 but had not told management until Sadequr Rahman raised it with him in April 2015. It was submitted on his behalf that the claimant had believed that the overpayment was back to pay that he was owed from 2002.

27 The claimant told the disciplinary panel that he was not aware that the overpayment policy required him to bring any overpayment to his manager's attention. He also claimed not to be sure as to whether he'd signed a copy of terms and conditions when he started with the Council. He did not say in terms that he had been unaware of the existence of the overpayment policy, and accepted in evidence before the Tribunal that he was aware of the overpayment policy although he did not recall ever having read it.

28 After deliberation, the disciplinary panel concluded that the claimant had been dishonest and that the allegations were made out. He was dismissed without notice, and the outcome was confirmed by letter dated 3 February 2016. The letter confirmed his right to appeal within 10 working days of receipt of the letter.

29 The claimant exercised his right to appeal and submitted very comprehensive grounds, all of which were considered by the appeal panel. However, the appeal panel, chaired by Councillor Hassell, dismissed the appeal on 5 October 2016, finding that the decision to dismiss had been fair and reasonable in all the circumstances.

FURTHER FACTS RELEVANT TO CONTRIBUTION AND/OR DISCRIMINATION

30 The claimant was aware of each instance of overpayment shortly after the money arrived in his bank account. He had noticed within days the respondent's failure to pay him for driving duties in February 2015, and clearly monitored his pay closely.

31 He knew that these were not payments made in respect of back pay for driving duties. Unlike his January 2014 timesheet, the claimant had not added hours and had not been told by management that any agreement had been reached otherwise to make any back payments.

32 Instead, the claimant knew that he had been overpaid by mistake. However, he considered that the respondent owed him significant sums in back payments and decided to keep the money.

33 On 24 February 2016, Jane Jones attended a disciplinary hearing in respect of two instances of misuse of a disabled drivers' 'blue badge', said to be fraud, a breach of the Council's Code of Conduct, actions bringing the Council into disrepute and a serious breach of trust and confidence. The panel, comprising Graham White, Kate Bingham and Fatima Shuaibu, found the allegations of gross misconduct to be made out. However, the panel took into account her mitigation, remorse shown during the hearing and the responsibility she had taken for the misconduct, and issued a final written warning of 18 months' duration.

THE RELEVANT LAW

Unfair Dismissal

34 Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed. Section 98 ERA provides:

'(1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

…

(b) relates to the conduct of the employee,

…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

…'

35 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

36 Where the reason for dismissal is conduct, the Tribunal will consider whether the employer held a genuine belief in the employee's guilt, reached on reasonable grounds following a reasonable investigation. As said in **British Home Stores Ltd v Burchell [1978] IRLR 379**:

> 'What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of

> being 'sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter 'beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion.'

37 The question in each respect, and in respect of the sanction of dismissal, is whether the employer acted within the range of reasonable responses.

38 Should an employee be unfairly dismissed, the Tribunal may nevertheless reduce both basic and compensatory awards to reflect the employee's culpable and blameworthy conduct. In respect of the compensatory award, the conduct must have caused or contributed to the dismissal (s123(6) ERA), and in respect of the basic award the conduct must have occurred prior to dismissal or notice of dismissal (if given) and it must be just and equitable to make a consequential reduction (s122(2) ERA).

39 In addition, if an employee is unfairly dismissed by reason of a procedural defect, the Tribunal may make a reduction in compensatory award to reflect the chance that he would have been dismissed had a fair procedure been followed, pursuant to s123(1) ERA and the authority of **Polkey v AE Dayton Services Ltd [1987] IRLR 503**.

Race Discrimination

40 A person directly discriminates against another if because of a protected characteristic he treats that other less favourably than he treats or would treat and other people (section 13 of the Equality Act 2010 (EA)). Race is a protected characteristic.

41 Section 23 EA provides that 'on a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to the case.'

42 Pursuant to section 136 EA, if there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision of the Act, the Tribunal must hold that the contravention occurred unless the employer can show to the contrary.

43 The key question is why the treatment complained of occurred. A Tribunal must be alert to the fact that individuals will rarely admit to discriminatory behaviour event to themselves and draw whatever inferences are appropriate from secondary findings of fact (**Igen Ltd v Wong [2005] IRLR 258**). However, as observed in the case of **Madarassy v Nomura International plc [2007] IRLR 246**, it is not sufficient to show merely a difference in treatment and a difference in characteristic; there must be 'something more' to indicate a connection between the two.

Unauthorised Deductions from Wages

44 Pursuant to section 13 ERA, an employee is the entitled not to suffer unauthorised deductions from his wages. Where the total amount of wages paid on any occasion by an employer to the employee is less than the total amount of the wages properly

payable on that occasion after deductions, the amount of the deficiency shall be treated as a deduction made by the employer from the worker's wages on that occasion (s13(3) ERA).

45 Pursuant to section 23(4A) ERA, an employment tribunal is not to consider so much of a complaint of unauthorised deductions where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint. Section 23(4A) does not apply to certain statutory payments, but does apply to the payments claimed by the claimant.

CONCLUSIONS

Race Discrimination

46 The claimant alleges that he was dismissed because he is Bangladeshi. He relies on Ms Jones as an actual comparator. However, none of the panel in Ms Jones's disciplinary hearing formed part of the panel in the claimant's disciplinary hearing. Whilst it is correct that the respondent is vicariously responsible for the decisions of each of the disciplinary panels, it cannot be said that Mr Bamber's panel treated the claimant any differently to Ms Jones because of race; they did not subject Ms Jones to any treatment at all. It has not been argued, and indeed there is no evidence to support such a submission, that the respondent applies a discriminatory disciplinary policy; therefore, Ms Jones is an inappropriate comparator.

47 Even assessing the claimant's case on the basis of a hypothetical comparator, the claimant has produced no evidence to suggest that a non-Bangladeshi employee would have been treated any differently in the circumstances he found himself. All that Ms Jones's case discloses is a difference in treatment and a difference in ethnicity from the claimant. At the time that the claimant was being investigated and then disciplined, two white males, one white female, 12 or 13 Bangladeshi and two other BME employees were being investigated, of whom five 5 Bangladeshis (including the claimant) were eventually dismissed. It was common ground that 80 to 90% of youth services employees are Bangladeshi. The Tribunal finds there would be no inference to be drawn from these statistics.

48 The claimant makes many complaints about the unfairness of the procedure; however, as will be seen from our conclusions below in respect of unfair dismissal, any failures were of form rather than substance and certainly not sufficient to take the process outside the range of reasonable responses. Even if there had been a material unfairness, it would still not have been sufficient to raise an inference of race discrimination in the present circumstances.

49 In other words, the tribunal concludes that the burden has not shifted to the respondent to prove a non-discriminatory reason for its dismissal of the claimant. Even if it had, the tribunal is entirely satisfied that the reason for the claimant's dismissal was his conduct and nothing to do with his race. It follows that the claimant's complaint of race discrimination fails and is dismissed.

Unfair Dismissal

50 The disciplinary panel decided to dismiss the claimant because he had completed a timesheet knowing that it did not accurately record the hours that he had worked in January 2014, and because he had received overpayments which he had failed to report for at least three months. Further, the panel believed that the claimant had thereby been dishonest and/or should be treated as having been dishonest. These were the reasons for the panel deciding to dismiss the claimant and are properly considered matters of conduct. The respondent has, therefore, proved a potentially fair reason for dismissal.

51 The claimant makes a number of criticisms of the investigation, which can be summarised in essence as: lack of independence from the disciplinary decision maker; failure to follow the respondent's procedure; failure to take into account all relevant information.

52 Whilst Mr Gowan and Mr Bamber were each ex-police officers, the Tribunal accepts that they did not know each other when they were both serving, and finds nothing to suggest a lack of independence prior to Mr Gowan being appointed the investigator. Moreover, the Tribunal was satisfied that Mr Gowan undertook the investigation independently from any influence of Mr Bamber. The Tribunal finds nothing inappropriate in Mr Gowan drafting his own appointment letter or indeed the notification of investigation sent to the claimant under Mr Bamber's signature. The tribunal accepted the respondent's witnesses' evidence that Mr Gowan had been orally appointed and then drafted the letters accordingly.

53 The tribunal finds there to be nothing sinister in the fact that Mr Gowan's investigation report made reference to a suspension letter, whereas the notification of investigation did not suspend the claimant. This was manifestly a typographical error and nothing of significance.

54 It would appear that some evidence, in particular the witness statement of Sadequr Rahman, arrived after the end of the initial 20-day period for investigation provided by the respondent's disciplinary process. However, we accept Mr Gowan's evidence that he was aware from a conversation with Sadequr Rahman what such a statement would say. The Tribunal notes from the record of interview, that Mr Gowan was somewhat robust in his questioning of the claimant; however, the claimant was accompanied throughout by Mr Smith of Unison and there is no suggestion that he made any complaint at the time. Certainly, the tribunal does not find that any material unfairness arose. Ultimately, any failures were failures of form rather than substance, caused no prejudice to the claimant, and certainly did not render the investigation outside the range of reasonable responses.

55 Turning to the grounds upon which the disciplinary panel found that the claimant had misconducted himself, he had admitted completing the timesheet and failing to notify a number of overpayments. The panel was also aware of the terms of the overpayment policy and also had evidence from Sadequr Rahman in respect of both which can be summarised as follows: the claimant had alleged that he been driving for a number of years and had been told he would be paid in respect of those duties; Sadequr Rahman advised him that he would only deal with the period during which Sadequr Rahman had

personal knowledge of the claimant's driving; Sadequr Rahman signed off the January 2014 payslips showing additional hours on the basis that Saifur Rahman Khaled had said it was the only way the claimant could be paid; at a meeting on 12 May 2015, the claimant did not mention any overpayments until Sadequr Rahman had produced documentary evidence of the same upon which the claimant asked ‘why you asking me?’ and then said ‘I can't pay just do what is best’.

56 Manifestly, there were reasonable grounds of the panel to conclude that the appellant had filled out a timesheet knowing the hours in it to be inaccurate and to have known about overpayments but not informed management.

57 Whilst the panel indicated its outcome letter of 3 February 2016 that there was no evidence to substantiate the claimant's claim that management had requested him to submit a false claim form in January 2014, it is clear from the summary above of Sadequr Rahman 's evidence that there did appear to have been some agreement between Sadequr Rahman, Saifur Rahman Khaled and the claimant that the January 2014 timesheet should be used as a vehicle for claiming pay for driving duties. If this had been the only allegation facing the claimant we would have concluded that dismissal did fall outside the range of reasonable responses. However, the claimant had also received a series of significant overpayments. The overpayment policy, of which we find the panel could reasonably expect the claimant to have been aware, made clear the steps that had to be taken on receipt of an overpayment and also the consequences of not reporting an overpayment: the respondent would consider such a failure to be fraud. In any event, the claimant gave no good reason for failing to report the overpayment.

58 The Tribunal reminded itself that it only has to consider whether the sanction of dismissal fell within the range of reasonable responses open to an employer in the circumstances and must not substitute its own view of an appropriate sanction. We are so satisfied. It follows that the claimant's dismissal was fair.

59 Even if the Tribunal had found that there were material irregularities in the Respondent’s procedure, we are satisfied that they made no difference to the outcome. The respondent would still have concluded that the claimant failed to report significant overpayments until challenged by Sadequr Rahman despite knowing about them for several months, following any fair procedure, and would still have dismissed him.

60 Furthermore, we find that the claimant was well aware at the time that he received the overpayments that they were not payments in respect of back pay. We do not accept that he was aware only in December 2014 of the overpayment. We note that he was aware within days of an underpayment of pay in February 2015 and find that he was in the habit of monitoring how much went into his account. We find that he was equally aware of the overpayment shortly after each was made. The Tribunal finds that the claimant was aware of the overpayment policy and that, even if he had not read it, he could reasonably have been expected to have read it. Therefore, the Tribunal finds that the claimant did in fact misconduct himself when he failed to report the overpayments to the respondent. Had the Tribunal found the claimant's dismissal to be unfair, it would have found that he contributed significantly to his dismissal, and any basic and compensatory award would have been reduced by 75%.

61 The Tribunal would, however, comment that it was disappointed by the lack of governance exhibited by the respondent in respect of the claimant's duties and remuneration. It is accepted by the respondent that there came a time when the claimant was entitled to be paid for driving duties at the higher rate, but even then there is no documentation. Had the respondent's management of the claimant been more effective, it is possible that the circumstances which gave rise to the present action might not have arisen. That said, it remains the case that the claimant failed to act honestly when such circumstances did arise.

Unauthorised Deductions from wages

62 The Tribunal notes first of that any claim for unauthorised deductions from wages is time-barred in respective any deductions prior to June 2014. In any event, the Tribunal is satisfied that an express agreement to pay an enhanced rate of pay was reached only in August 2014. There is, however, an issue over whether the agreement concerned only the period of time during which the claimant was actually driving the vehicle in question (30 minutes at the beginning of the shift and 30 minutes at the end of the shift), or extended to the entire shift during which the claimant was driving.

63 The Claimant asserts that it was agreed that he would be paid at an enhanced rate for the entirety of the shifts in question on the basis, he argues, that he was in charge of the vehicle throughout. Of course, the respondent has failed to call any evidence from those with whom the appellant reached his agreement. Moreover, as can be seen from the timesheets in respect of which the claimant was overpaid, his managers had authorised payment of the enhanced rate for the entirety of the claimant’s shifts. On balance, therefore, the Tribunal is satisfied that the agreement reached between the parties at the material time was that the claimant was contractually entitled to be paid at a youth worker in charge rate for any shift throughout which he was the driver and in charge of the vehicle.

64 That said, from any outstanding payment in respect of such duties must necessarily be deducted any overpayment received by the claimant. The tribunal does not understand the claimant to be arguing to the contrary and does not find that the claimant could reasonably so argue.

65 The claimant now accepts that the difference between youth worker rate and youth worker in charge rate at the material time comprised £3.80 per hour. Even assuming that the claimant drove and/or was in charge of the 7.5 tonne vehicle on every shift from August 2014 until February 2015 after which he stopped driving again, his claim comprises 52 hours in August 2014, 52 hours in September 2014, 56 hours in October 2014, 48 hours in November 2014, 56 hours in December 2014, 52 hours in January 2015, and 56 hours in February 2015, making a total of 372 hours. Therefore, on the face of it, the claimant was underpaid £1413.60.

66 However, the claimant was also overpaid £479.75 basic pay plus £81.08 London weighting in each of of August, September, October and December 2014, making a total overpayment of £2,243.32. Therefore, even disregarding the payment made by the respondent in respect of the January 2014 timesheet, the claimant’s claimed

underpayment is more than extinguished by the overpayments he received and which he has made no attempt to repay.

67 Therefore, there is no net unauthorised deduction from wages and that claim fails and is dismissed.

Employment Judge O'Brien

30 March 2017