THE EMPLOYMENT TRIBUNALS

Claimant: **Mr GJ Dring**

Respondent: **Newcastle upon Tyne Hospitals NHS Foundation Trust**

Heard at: **North Shields Hearing Centre** **On:** **7 & 8 January 2020**

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimant: **Ms A Rumble of Counsel**
Respondent: **Mr R Gibson (Solicitor)**

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant's contract claim that the respondent was in breach of his contract of employment in that during the period from 14 May 2018 until the termination of his employment on 1 March 2019 it had not paid him his correct salary by reference to Step Point 8 on Band 5 of the relevant NHS pay scale is not well-founded and is dismissed.

2. The claimant's alternative claim that in these same circumstances the respondent made an unauthorised deduction from his wages contrary to Section 13 of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

Representation and evidence

1. The claimant was represented by Ms A Rumble of Counsel who called the claimant to give evidence.

2. The respondent was represented by Mr R Gibson, Solicitor, who called to give evidence several employees of the respondent as follows: Ms C Mann, Senior HR Manager; Ms TAM Lynn, HR Manager; Ms JM Amos, Senior Sister Emergency Department; Ms A McNab, Matron Emergency Department; Mr EJ Dick, Junior Directorate Manager of Medicine.

3. The Tribunal also had before it an agreed bundle of documents comprising approaching three-hundred pages.

The claims

4. The claimant's claims were as follows:

   4.1 The respondent breached his contract of employment in that from the time he assimilated onto the Agenda for Change ("AfC") terms and conditions of employment he was not paid the appropriate salary in accordance with the AfC salary scales.

   4.2 In the alternative but in the same circumstances, the respondent had made an unauthorised deduction from his wages contrary to Section 13 of the Employment Rights Act 1996 ("the 1996 Act").

The issues

5. At a private preliminary hearing conducted on 12 September 2019 the issues in this claim had been identified as being as set out below. At this hearing before me, however, at the conclusion of the evidence and prior to the representatives making submissions, the claimant's representative clarified that the claimant did not seek to make anything of the contention regarding the oral express term that he had previously said had been given to him because it was now clear that what was said to him by Ms Mann and Ms McNab was an expectation and not an agreement. That previous issue is shown below in italic print, the issues remaining for my determination being in ordinary print as follows:

   5.1 Did the terms set out in paragraph 9 of the claimant's particulars of claim entitle the claimant, as of right, to be paid at pay point 8 of the pay scale applicable to Band 5?

   5.2 In the alternative, *was it an express term of the claimant's contract of employment that he would be "put on a scale point commensurate with his experience"? If so:*

5.2.1 *Did that term entitle the claimant as of right to be allocated to pay point 8 of the pay scale applicable to Band 5?*

5.2.2 *If not,* did the respondent act irrationally in allocating the claimant to pay point 3 of the pay scale applicable to Band 5? If so, what pay point would the claimant have been allocated to if the respondent had acted rationally?

Findings of fact

6. Having considered all the evidence before me (documentary and oral), the submissions made on behalf of the parties and the relevant statutory and case law (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the facts set out below either as agreed between the parties or found by me on the balance of probabilities:

6.1 The respondent is a well-known employer within the NHS of significant size and resources.

6.2 The claimant is a registered nurse who commenced his employment with the respondent on 23 March 1998. At that time he and all similar employees were employed on nationally agreed pay scales known as Whitley Council scales. That those scales were no longer fit for purpose was highlighted by such matters as the significant number of equal pay claims pursued in respect of the public sector generally.

6.3 The Whitley Council scales were replaced by AfC, which was effective from 1 October 2004. Understandably, implementation took some time but was all-but concluded within the respondent by September 2005 albeit with pay increases being backdated to 1 October 2004 for those who had assimilated onto the new pay scales.

6.4 A key aspect of the implementation of AfC was to move employees across from their Whitley Council pay scale to their AfC pay scale. That process was described as assimilation.

6.5 In essence, an employee was to move horizontally from their Whitley Council salary onto the point on the AfC scale that was equivalent to the salary received under the Whitley Council regime or, if there was no such equivalent, to the next higher salary point. This was provided for in Section 46 of the AfC handbook of 27 September 2012 (42) which is headed "Assimilation and Protection". Paragraph 46.9 of that Section provides as follows:

> "An employee's current pay for the purposes of assimilation to the new pay spines and bands, referred to below as "basic pay before assimilation", is their annual full-time equivalent basic pay on the effective assimilation date…."

Paragraph 46.12 of that Section provides, amongst other things, as follows:

> "The rules for assimilating staff to the new pay bands are as follows:
>
> > - where basic pay before assimilation is between the new minimum and maximum of the new pay band, staff will assimilate to the next equal or higher point in the new pay band; ….." (45).

6.6 At the time of assimilation, the claimant worked in the Emergency Department and was paid on the highest point (point 5) on scale E of the Whitley Council Clinical Grading Structure (54a): ie. he received an annual salary of £22,725.

6.7 On assimilation, the Whitley Council Scales D and E were replaced by Band 5 of the AfC.

6.8 For the purposes of the assimilation process, employees were invited to agree a new job description that, as is typical in such circumstances, had been prepared to reflect the role and responsibilities of the post and not the particular attributes of any employee filling such post. In agreeing that job description for the post employees were also to agree the new salary band and salary point ascribed to that post. Given the delay in assimilation, employees were assured that they would receive back-pay in respect of any increases in salary from the date of assimilation post-dated to 1 October 2004. Employees were informed, however, that if they had not agreed the new job description and, therefore, had not agreed to assimilate by 31 May 2007, they would lose their entitlement to such back-pay. This approach to implementation was agreed between the respondent's managers and the representatives of its employees who comprised the Pay Negotiating Group (54d).

6.9 Further, if employees did not agree to assimilate on the new job description and, therefore, the AfC terms and conditions, as was their entitlement, their terms and conditions of employment would continue to be in accordance with the Whitley Council.

6.10 The claimant (and two other employees) did not agree the new job description and commenced, as they were entitled to, the formal Failure to Agree Process. In this respect a meeting with the claimant took place on 9 May 2007 but no agreement was reached. Due to what the claimant has described at the hearing as a family crisis having a massive impact on his personal and work life he says that he has lost the will to pursue the case further and so the process stopped in August 2007. The circumstances of the other two employees are not relevant to the decision of this Tribunal: suffice it is to say that one was promoted and the other left the employment of the respondent and, therefore, the issue of assimilation for them became irrelevant.

6.11 Thus the claimant remained employed by the respondent on Scale E of the Whitley Council scales. As the claimant understood would be the case and had been agreed between employer and employee representatives within the Pay Negotiating Group he received neither pay progression nor any pay increases. Had he agreed to the job description offered and been assimilated to Band 5 he would have progressed (subject to satisfactory appraisals) up the pay points of that Band 5 until he reached the maximum at point 8 of Band 5, which is also referred to as being spine point 23.

6.12 Although the claimant thus continued to be employed on his contract of employment incorporating the Whitley Council terms and conditions he was allowed to take holiday calculated as if he had been assimilated to the AfC terms and conditions.

6.13 In October 2016 the claimant applied for and was granted a career break from 21 November 2016 to 19 November 2017, which was subsequently extended to 8 April 2018. During that break he secured employment as a unit manager of an Emergency Room in Saudi Arabia. A career break does not constitute a break in service. As such, when the claimant returned to work for the respondent on 9 May 2018 it was to his previous pay in accordance with Scale E of the Whitley Council pay scales of £22,725 (182).

6.14 Shortly after his return the claimant sought to assimilate onto the AfC pay scale (133) and at a meeting on 6 June 2018 agreed the Band 5 job description that had previously offered to him. At that meeting he asked if he could be placed on the maximum salary point of Band 5 and receive back-pay. He received no assurances in respect of either request but was told that back-pay was unlikely (134).

6.15 At this stage some fourteen years had passed since AfC had been implemented. The claimant was in the unique position of being the only employee of the respondent who had not assimilated: indeed the parties were agreed that he was probably the only such employee in the entire NHS.

6.16 In the circumstances, the respondent, primarily in the shape of Ms Mann with input from Ms Lynn, needed to consider how to assimilate the claimant from the Whitley Council pay scales to the AfC pay scales. By this time Section 46 had been removed nationally from the AfC handbook (strictly that Section is now said to be “Unallocated”); the reason being that it related to assimilation and protection and it was thought that no employees required either.

6.17 Section 46 was, however, the only formal process available to guide the assimilation of the claimant. That process had been used for all other employees for the purposes of assimilation and would have been used for the claimant had he assimilated when it was in force.

6.18 As indicated above, the claimant's annual salary based on the Whitley Council scales, was £22,725. There was no precise equivalent salary on the Band 5 of the AfC scales but points 1 and 2 on that band (by now referred to as step points rather than scale points) both provided for a salary of £23,023. A strict application of Section 46 would, therefore, have moved the claimant across to that salary resulting in an increase to the claimant of some £300.00 per annum.

6.19 Given, however, the accepted significant experience of the claimant and the fact that there were no issues regarding his performance, Ms Mann decided to exercise discretion to offer the claimant assimilation to the next step point 3 within the Band 5 with a salary of £23,951, to be back-dated to the date of his initial request for assimilation on 14 May 2018. The claimant was advised of this decision by letter of 4 September 2018 (138), which was followed by the issue of a new contract of employment (141).

6.20 The claimant was dissatisfied with this decision for several reasons including as follows: if he had been assimilated in 2004 he would have probably reached the top point 8 on Band 5; his peers doing the same work as him were paid at that point; he had received encouragement from his managers, Ms Amos and Ms McNab, giving rise to an expectation on his part that he would be assimilated onto point 8.

6.21 As such, by e-mail to Ms Mann on 17 November 2018 (162) he raised a formal grievance (154). Amongst other things he stated that he wished for his skills and 20 years' experience in the A&E Department and his loyalty to that Department to be recognised. He agreed that at least initially his grievance should be dealt with informally (160). Ms Mann considered the claimant's grievance but ultimately rejected it having decided that "the transitional arrangement as set out in the national terms and conditions of service" had been followed (158).

6.22 By e-mail of 18 January 2019, the claimant requested that his grievance should proceed to a formal hearing, which was to be conducted by Mr Dick. On 24 January 2019 Mr Dick wrote to the claimant inviting him to the grievance hearing on 8 March 2019.

6.23 Before that hearing could take place, however, the claimant resigned from his employment on 4 February 2019 giving four weeks' notice with the last day of his employment being 3 March 2019. Nevertheless, the claimant wrote to say that he would still like his grievance to be heard (169a) and, on advice from HR, Mr Dick proceeded with the grievance hearing. At that hearing, Mr Dick was accompanied by an HR officer, the claimant was accompanied by his RCN representative and Ms Mann responded to the claimant's grievance on behalf of the respondent (172/178).

6.24 Primarily, the claimant contended that the new pay scale found at Annex 2 of AfC (59) superseded the transitional assimilation process in the former Section 46 of the AfC handbook; although he did not specifically refer to that Annex during the grievance hearing. The new scale at Annex 2

introduced an approach whereby the appropriate pay point for staff would be assessed to reflect their years of experience and, given that the claimant had more than seven years' experience as a nurse, he considered that he should have been assimilated onto point 8 (spine point 23) at the top of Band 5 with a salary of £29,608. He asserted that Ms Amos and Ms McNab had both indicated to him that they would support him in this respect.

6.25 After the meeting Mr Dick made further enquiries. Ms McNab informed him that she had not made any commitment or given any undertaking as to the pay point to which the claimant should be assimilated not least because she was in no position to do so. Ms Amos told Mr Dick that she would have thought that the claimant would have been at the top of Band 5 but had given him no undertaking to that effect.

6.26 Mr Dick decided that assimilation was a technical process that had been correctly followed and he could not change the decision that had resulted. There was no discretion within the process to allow him to do so even if he had wished to recognise the claimant's continuous service. Mr Dick wrote to the claimant on 22 March 2019 (179) confirming his decision. As the claimant was no longer an employee of the respondent he had no recourse to appeal against Mr Dick's decision.

Submissions

7. After the evidence had been concluded, the parties' representatives made submissions, both orally and in the very helpful written skeleton arguments that each of them had prepared, which addressed the matters that had been identified as the issues in this case. It is not necessary for me to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made, together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to my decision. That said, the key points in the representatives' submissions are set out below.

8. The respondent's representative made submissions including as follows:

8.1 The claimant asserts that the respondent should not have used Section 46 as it had done and should have taken advice. It is to be inferred that he contends for a different process but that has never been articulated. Section 46 had been removed because it was no longer required as everyone else had assimilated but having been removed does not mean that it is no longer applicable.

8.2 The claimant seeks to rely upon the introduction to Annex 2 that "pay points are expressed in terms of years of experience required to attain the level of pay. This is measured in years to anniversary of appointment". He suggests that "appointment" means appointment as a nurse rather than appointment to a pay band but that makes no sense as it contradicts paragraph 1.17 and

Annex 23 of AfC. The whole point of Annex 2 is that it does not come into play until the employee has undergone transition.

8.3 An exercise of discretion must not be undertaken irrationally or perversely: Clark v Nomura International plc [2000] IRLR 766. The respondent had applied a nationally agreed set of terms and conditions that contains mandatory provisions. The witnesses were all clear that the decision upon which pay point an employee should be placed starts was the pay the employee had received before appointment. From there the claimant was uplifted by two points so got a pay rise. That could not be irrational.

8.4 The claimant's contractual entitlement was to assimilate at step point 2 on Band 5 – £23,023. In fact he was assimilated on step point 3 on Band 5 – £23,951 as a result of the proper exercise of managerial discretion. There was no contractual entitlement to assimilate the claimant as he alleges.

9. The claimant's representative made submissions including as follows:

9.1 Although, not having assimilated, the claimant remained on Whitley Council terms with regards to pay, he benefited from other terms and conditions under AfC such as annual leave. This resulted in him being placed in a unique 'hybrid' type contract.

9.2 Section 46 was unallocated at the time of the claimant's assimilation in September 2018. It was no longer a term of the employment contract and has been superseded several times within the new AfC terms since 2012. Its purpose was to move individuals horizontally and provide like-for-like pay. There was no way that it could apply to the claimant in 2018 and, therefore, the respondent's decision was irrational and further advice should have been sought. It is accepted that NHS England has no overriding input into the respondent but the claimant was in an extremely unique position – an anomaly. The rational option would have been to seek to speak to those who had put the national system in place. It was accepted that Ms Mann had authority but she should have sought further guidance on using Section 46 in 2018.

9.3 Even if Ms Mann was correct to use Section 46 she did not do so as, if she had done, the claimant would have been at pay point 1. That was clearly not the appropriate point for the claimant and she added discretion despite there being no provision to do so. She used Annex 2 to place the claimant in the new AfC Framework. That clearly refers to years of experience. The claimant accepts that it relates to years of experience in the Band but he has 14 years' of the exact equivalent experience in Bands D and E as he was fulfilling the exact requirements of the post. He was at the top of Band E and had nowhere else to go. Ms Mann created a system of her own: in combination with the Section 46 process she used the most recent pay scales in Annex 2 rather than the corresponding pay scale to section 46 from 2012. That process was a breach of contract, unsupported and irrational in all the circumstances: Brogden v Investec Bank plc [2014] EWHC 2785. Annex 2 should have been used in its entirety and, given its natural meaning the claimant would have been allocated to the top point 8

of Band 5 by right. This is because Annex 2 states that "pay points are expressed in terms of years of experience required to attain the level of pay. This is measured in years to anniversary of appointment". The claimant has 20 years of experience as an appointed nurse in an equivalent Band and therefore would be at the top of Band 5, which indicates 7+ years of experience. That is the interpretation that a "reasonable person" would have taken the terms within Annex 2 to have meant. Having applied section 46, Ms Mann then upgraded the claimant but assimilation is a technical process and does not allow room for discretion. That is irrational as, in accordance with the decision in Braganza v BP Shipping Ltd [2015] UKSC 17, account needs to be taken of the rationality of the process as well as the outcome.

9.4 The objective of AfC is "equal pay for work of equal value". Had the claimant been assimilated onto the AfC terms and conditions in 2000, it is likely that he would have reached the top pay point of Band 5 by 2018 but his progression was frozen at Grade E pay of £22,725 since 2002. This does not correspond with that objective and the ethos of the AfC terms and conditions which form part of the claimant's employment contract.

9.5 The approach of purely putting someone on a scale point on the basis of their previous salary is questioned as that cannot be the intention of the system. It is appreciated that Ms Mann has the authority to apply the system but it is a national system. It is illogical and unequal to put someone at the entry-level point if they have a wealth of experience in an equivalent banding system to Band 5 and more experience than others at a higher point. That cannot be the system that NHS England sought to introduce in AfC. Although acknowledging that there was no evidence to support this submission, the system allows discretion to consider experience, reviews, salary and the like.

Consideration: application of the facts and the law to determine the issues

10. The above are the salient facts and submissions relevant to and upon which I based my Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

11. Although the claimant's claims have been advanced in the alternative, his representative clarified that his was primarily a contract claim.

12. Clearly the starting point for any assessment of each of the claimant's claims is to determine what are the relevant provisions of his contract of employment. There is no dispute between the parties that the claimant was appointed on 23 March 1998 on a contract of employment that incorporated the nationally agreed Whitley Council terms and conditions of service; neither is it disputed that he continued on that contract until at least the introduction of AfC within the respondent, effective from 1 October 2004 but not fully implemented until the following year.

13. On the evidence available to me I am also satisfied that the claimant actually continued on that contract of employment until he entered into the new contract on 6 September 2018, albeit with a start date 14 May 2018 (141). This accords with

the agreement between the relevant managers of the respondent and representatives of its employees within the Pay Negotiating Group that although employees could decline to assimilate on the new job description and, therefore, onto the AfC terms and conditions, their terms and conditions of employment would continue to be in accordance with the Whitley Council.

14. I do not accept the submission made on the claimant's behalf that the mere fact that he took holiday calculated by reference to the AfC terms and conditions meant that he was on some type of 'hybrid' contract. There is simply no evidence of that. As to the number of days' holiday the claimant was allowed to take, I accept the evidence of the respondent's witnesses that that arose from a simple error of it being assumed by whoever was responsible that as all other staff had by then been assimilated onto the AfC terms and conditions and were entitled to such holiday, the claimant would by then similarly have assimilated and therefore gained an equivalent entitlement. I am satisfied that that did not constitute a hybrid arrangement or an amendment to the claimant's contract of employment.

15. The next question is whether, when the claimant did assimilate to the AfC terms and conditions, he was transferred across onto the correct salary point within the correct salary Band. There is no dispute as to the latter point that the claimant was correctly assimilated onto Band 5; the difference between the parties is that the claimant contends that given his years of experience he should have been assimilated onto salary point/step point 8 whereas he was in fact assimilated onto salary point/step point 3.

16. That was determined by Ms Mann as the claimant accepts she had the authority to do. She came to her decision by applying Section 46 of the AfC Handbook of 27 September 2012. I am satisfied that Ms Mann was right to apply Section 46 and in doing so she did not act perversely or irrationally, and I am not satisfied that no reasonable employer would have done the same. That Section contained the nationally agreed process that had been used for all other employees for the purposes of assimilation and would have been used for the claimant had he assimilated when it was in force. Further, it was the only objective process available to guide Ms Mann. I do not accept the claimant's contention that she was wrong to apply it because by that time it had been unallocated or removed from the handbook. I am satisfied that that had occurred for the simple reason that it dealt with the assimilation and protection of employees and it was thought that it was no longer required either because employees had, for example, left their employments or been promoted or, wrongly as it turns out, that everyone who might potentially need to be assimilated had by then done so. It is reasonable to infer that the Section would not have been removed in this way if it had been recognised that there were employees such as the claimant who had not assimilated. To the contrary, I am satisfied that it would have continued to be contained in the handbook in order that it could be applied should any employee seek assimilation and, therefore, in those circumstances it would have been used by Ms Mann.

17. Neither do I accept the claimant's contention that Ms Mann was wrong or acted irrationally by not seeking advice from NHS England or otherwise outside respondent, or that no reasonable employer would not have sought such advice.

The representatives were agreed that there is no direct relationship between NHS England and the respondent, which is a self-governing, autonomous NHS Foundation Trust. NHS England is an advisory body and if there are to be national negotiations in respect of pay they are often undertaken between that organisation and the Department for Health. It cannot dictate to the respondent and there is no requirement on the part of the respondent to take advice from it or elsewhere.

18. Likewise, I do not accept the claimant's contention that, for the purposes of his assimilation, Ms Mann was wrong or acted irrationally by transferring him onto the salary scales provided for in AfC, or that no reasonable employer would have done so. Similarly, I do not accept that Ms Mann created a system of her own. I am satisfied that she used and applied Section 46 and while it is right that for those purposes she used the current salary scales, that was not creating a system; the system was provided for in Section 46. One wonders what salary scales she should have used if not those current ones; it is surely not suggested that she should have used the scales current at the time that AfC was brought into effect in 2004 or amended scales introduced thereafter; for example the scales in place in September 2012 which was the last time that Section 46 appeared in the handbook.

19. Applying those scales (I repeat it being accepted that it was right that the claimant, being at that time paid by reference to Band E of the Whitley Council scales should be assigned across onto Band 5) the question for Ms Mann, and therefore for me, is onto what salary point the claimant should have been placed.

20. The claimant contends that the identification of the correct salary point ought to have been determined by applying Annex 2 in its entirety and relies particularly on the introductory words to that Annex "pay points are expressed in terms of years of experience required to attain the level of pay. This is measured in years to anniversary of appointment". In this respect he also suggests that "appointment" means appointment as a nurse. I accept the submission on behalf of the respondent, however, that that cannot be right. Paragraph 1.17 of that Annex refers to advancement to the next pay step point being "dependent on the length of stay at each page step point within each band" while paragraph 10 of Annex 23 clearly refers to the pay step date being the anniversary of the date "the individual commenced employment in the current band".

21. On the evidence available to me, I am satisfied that Ms Mann was correct to identify the salary point by applying Section 46. As set out above, Paragraph 46.12 of that Section provides, amongst other things, as follows:

> "The rules for assimilating staff to the new pay bands are as follows:
>
> - where basic pay before assimilation is between the new minimum and maximum of the new pay band, staff will assimilate to the next equal or higher point in the new pay band; ….."

22. At the time of the claimant's assimilation in 2018, his "basic pay before assimilation" did fall "between the new minimum and maximum of the new pay

band" (i.e. Band 5) and, therefore, applying the above paragraph, the claimant was to assimilate "to the next equal or higher point in the new pay band".

23. As also set out above, before his assimilation, the claimant's annual salary was £22,725. There was no equal salary point on that new pay band and, therefore, the alternative of the next "higher point" fell to be applied. That point, whether by reference to point 1 or 2 on Band 5 provided for a salary of £23,023 to be payable. I am satisfied, therefore, that it would have been entirely proper for the claimant to be assimilated onto one of those two points at that salary. That was his contractual entitlement.

24. Instead, however, Ms Mann decided that in light of the appellant's fairly extensive experience such a small increase of £298 was inappropriate and, therefore, exercised discretion to assimilate the claimant onto step point 3 bringing a salary of £23,951. I do not accept the submission on behalf of the claimant that for Ms Mann to exercise discretion in this way amounted to her not applying Section 46 or that for her to exercise discretion amounted to her acting irrationally, or that no reasonable employer would have done as she did.

25. I acknowledge the submissions made on behalf of the claimant as to the objective and ethos of AfC and the presumed intention of the new approach that that introduced. The claimant's claims are, however, based upon or related to his contractual entitlement, which is what I need to consider rather than such matters of principle.

26. I have touched above on the question of whether Ms Mann on behalf of the respondent acted irrationally. Addressing that question more generally, it was held in Clark that 'test' or 'threshold' to be applied when considering the exercise of discretion was one of perversity or irrationality and that a tribunal cannot substitute its own view reasonableness but can only interfere if the exercise of discretion was such that "no reasonable employer would have come to such a conclusion"; this approach being approved and adopted by the Court of Appeal in Horkulak v Cantor Fitzgerald International [2005] ICR 402.

27. I accept the submission on behalf of the claimant that in accordance with the decision in Braganza account needs to be taken of the rationality of the process as well as the outcome but having done so I am satisfied that it cannot be said, in respect of any of the decisions taken by Ms Mann or other managers of the respondent in relation to the claimant that they acted perversely or irrationally or that no reasonable employer would have acted in the way that they did whether that be in relation to the decision to apply section 46, to use the current pay scales contained in Annex 2 or in the exercise of discretion to place the claimant on the salary point one above the point on which he would have been placed had that Section been strictly applied so as to reward his long service with the respondent.

28. In summary, therefore, the claimant has failed to discharge the burden of proof upon him to satisfy me that the respondent did not correctly assimilate him onto the AfC salary scales and, therefore, that he was entitled under his contract of employment to anything more than the salary that he received.

29. In conclusion, I address the issues set out at the beginning of these Reasons in respect of which I am satisfied as follows:

    29.1 The terms set out in paragraph 9 of the claimant's particulars of claim did not entitle the claimant, as of right, to be paid at pay point 8 of the pay scale applicable to Band 5.

    29.2 The respondent did not act irrationally in allocating the claimant to pay point 3 of the pay scale applicable to Band 5.

30. The above being so, I find that neither the claimant's contract claim nor his claim that the respondent made an unauthorised deduction from his wages is well-founded and both are dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 27 January 2020

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