



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4103101/2019**

**Hearing Held at Aberdeen on 24 June 2019**

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**Employment Judge A Kemp**

**Ms Mary Gifford**

**Claimant  
Represented by:  
Mr B Nichol  
Solicitor**

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**Shetland Care Attendant Scheme**

**Respondent  
Represented by:  
Mr C Robertson  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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1. The claimant was unfairly dismissed by the respondent and she is awarded the sum of SEVENTEEN THOUSAND EIGHT HUNDRED AND SIXTY TWO POUNDS SIXTY FIVE PENCE (£17,862.65).

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2. The respondent made unlawful deductions from the wages of the claimant and she is awarded the sum of ONE THOUSAND, TWO HUNDRED AND TWENTY EIGHT POUNDS AND NINETY FOUR PENCE (£1,228.94).

3. The claim under section 104 of the Employment Rights Act 1996 does not succeed and is dismissed.

## REASONS

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### Introduction

1. The claimant made a claim of unfair dismissal against the respondent on the basis that she had been constructively dismissed in the circumstances, that she had been victimised after raising a grievance and Tribunal proceedings, and had suffered an unlawful deduction from her wages. The Claim was denied in its entirety. The Tribunal proceedings referred to had been the subject of a Judgment by me dated 18 December 2018 in which I had determined that the claimant had not been dismissed as at that stage. Mr Nicol had appeared for the claimant at that hearing and again at the present hearing, but Mr Robertson, now appearing for the respondent, had not done so earlier.

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2. Following the hearing of the evidence in the case I considered the evidence as to remedy. The claimant had spoken to a schedule of loss in her evidence very briefly. She was not cross examined in relation to it. It appeared to me however that the calculation of the basic award was in error, and that there were inconsistencies in the details provided for loss alleged to have been incurred. I asked that a message be sent to the parties' solicitors with regard to that, which was done on 25 June 2019. Extended correspondence then followed, during which the claimant revised the sums sought by email of 26 June 2019, accepting that the basic award was at the lower sum that I had calculated it to be, but the respondent did not initially accept the revised figures for the compensatory award. In the absence of agreement a further hearing was fixed for evidence to be led on that matter on 26 September 2019. The respondent by email of 12 September 2019 agreed the sums sought by the claimant. The hearing on 26 September 2019 was discharged thereafter. I was then in a position to conclude this Judgment.

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## Issues

3. The following issues require to be considered:

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- (i) had the respondent dismissed the claimant under section 95(1)(c) of the Employment Rights Act 1996 (“the Act”)?
  - (ii) If so, was it unfair under section 98(4) of the Act?
  - (iii) Had the claimant been victimised for raising a grievance and Tribunal proceedings under section 104 of the Act?
  - (iv) Had there been a deduction from the wages of the claimant in paying her Statutory Sick Pay and not full pay from 1 December 2018 under section 13 of the Act?
  - (v) What remedy ought to be afforded to the claimant in the event that any claim succeeded?
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## 15 Evidence

4. The Tribunal heard from the claimant, and from Mr Alex Miller the Vice Chairman of the respondent. Documents were spoken to from a single bundle the parties had prepared. The evidence on loss has been referred to above.

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## Facts

5. The claimant is Ms Mary Gifford. Her date of birth is 6 February 1963. She was employed by the respondent, then called Crossroads (Shetland) Care Attendant Scheme, as a Manager/Co-ordinator on 4 August 2003.

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6. The claimant is a registered nurse, having been so for 32 years, and also has a management qualification. She worked for the respondent for 20 hours per week. For the remainder of the time she worked on occasion as a bank nurse.

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7. The respondent is a charity, run by a board of directors. It provides respite care for those who themselves care for others. It has about 30 employees, with two

in a managerial and administrative role being the claimant and her colleague Mrs Kate Fraser.

5 8. The claimant received a Statement of Terms and Conditions dated 11 August 2003, which confirmed her role as Manager/Co-ordinator.

9. Clause 2 stated:

10 “You are required to carry out the duties set out in the attached Job Description and any other related duties as required by the Management Committee and which is deemed to form part of this Statement.”

10. Clause 10 provided:

15 “Sickness and other absence  
Should you be unable to attend your normal place of work due to sickness, disability or any other reason, you shall inform the Chairman as soon as practicable before your normal start time on the first day of absence and, where applicable, thereafter provide the appropriate written sickness report/medical certificate.”

20 11. A Job Description was provided, which set out the overall purpose of the post as being “To be responsible for the day to day management of the scheme, including service delivery, recruitment, training and management of staff and volunteers, operation of administration and finance systems.” It set out more detailed duties and responsibilities for the management of the business of the  
25 respondent. In practice the claimant did manage all of the other staff, including Mrs Fraser.

30 12. Mrs Fraser held the title of Office Manager/Assistant Co-ordinator. A Job Description for that post was provided. The role was “to report to and assist the Co-ordinator on all matters relative to the administrative aspects of the Scheme and also provide a back-up to the Co-ordinator to cover annual holidays and sick leave, and will provide regular weekly work duties as delegated by the Co-

ordinator”. She also prepared the payroll for the respondent, and had primary responsibility for financial matters. The reference to “Co-ordinator” was to the role of the claimant, whose full title was as above.

5 13. Mrs Fraser generally covered the work of the claimant when the claimant was on annual leave or off sick.

14. The claimant was the registered manager for the respondent with the Scottish Social Services Council, and with the Care Inspectorate. Together with  
10 Mr Alec Miller the Vice Chair of the respondent she was authorised signatory for Disclosure Scotland in respect of the care of vulnerable adults and children.

15. Mrs Fraser passed a managerial qualification known as SVQ4 and sought a pay rise in light of that. The precise date of that qualification was not provided  
15 in evidence. The claimant was informed by Mrs Fraser of the intention to raise that issue at a meeting of the directors of the respondent to be held on 17 April 2018. The claimant did not have any opposition to the request by Mrs Fraser for a pay rise. At that point, the claimant was Mrs Fraser’s line manager.

20 16. The meeting on 17 April 2018 duly took place, and was chaired by Mr William Henderson, the Chair of the respondent. Both the claimant and Mrs Fraser were in attendance. Under “Any other competent business” of the agenda, Mrs Fraser raised the issue of her wages, and sought an increase. The Chairman Mr Henderson asked whether the claimant and Mrs Fraser were  
25 willing to work as joint managers. That had not been something that had been raised with the claimant before, nor had it been raised as a possibility with other directors, including Mr Miller who was present. Mr Henderson proposed that the job titles of both posts be changed to “Joint Co-ordinator”, with effect from 1 April 2018, and therefore retrospectively. That was unanimously agreed by  
30 the Directors at the meeting.

17. The claimant was unhappy with the changes proposed. She had until that point been the sole manager.

18. The proposed change to the claimant's terms and conditions of employment was (i) to the title, being changed to "Joint Co-ordinator" (ii) line management responsibility, no longer including Mrs Fraser and (iii) duties she had formerly carried out alone being carried out with Mrs Fraser, the detail of which was not provided to the claimant.
19. The claimant was not aware of what changes would be proposed to her own duties and responsibilities but considered that there would inevitably be a division of them between her and Mrs Fraser. She did not know how the joint role with Mrs Fraser was intended to work. There was no consultation with her in relation to either the principle or detail of the change to her role.
20. She was not happy with what had occurred, which had been raised with her at the meeting with no fore-warning, and therefore no consultation. She had not been prepared to address the issue at that stage.
21. She discussed matters initially with Mr Miller, the Vice-Chairman, on 10 May 2018. He sought advice from Voluntary Action Scotland, an umbrella organisation of which the respondent was a member, and after doing so, on 24 May 2018 met the claimant again and suggested in accordance with the advice that he had received that if she was unhappy she raise a formal grievance.
22. The claimant then raised a grievance, by letter which is undated but which was delivered on or about 29 May 2018. She did so under the Grievance Procedure of the respondent. That procedure had three stages, the first being providing a written grievance, the second being a meeting with a manager, and the third being an appeal. Her grievance was that the change had been proposed without consultation with her, and amounted to a breach of contract.
23. There was no stage 2 meeting held with the claimant under that procedure, in breach of it. Mr Henderson, as Chair of the respondent wrote on 7 June 2018

to reject the grievance. It stated, "It is not for a member of staff to dictate how a board should conduct its business.....I am disappointed you feel so aggrieved." There was an offer of having a matter in relation to her concerns on the next agenda for a Directors' meeting.

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24. The claimant appealed that decision by letter of 13 June 2018. It was heard on 26 June 2018. The claimant was accompanied at the appeal hearing by Mr L Irving who tabled a detailed written submission on her behalf.

10 25. The decision of the appeal was intimated by letter of 8 July 2018, which rejected the appeal, and added "After a review and joint agreement on relevant/shared duties and responsibilities, new contracts of employment will be issued to the joint co-ordinators as soon as possible."

15 25. There was no attempt at any stage thereafter by the respondent to seek agreement with the claimant on sharing of duties and responsibilities, and no such contract of employment was issued to the claimant, and her agreement on duties or responsibilities was never sought.

20 26. After being absent on two weeks' annual leave following the appeal decision the claimant commenced a period of sick leave. She was certified as unfit for work with the respondent on account of "work stress" from that date onwards. The claimant commenced sick leave on 30 July 2018 which continued until the termination referred to below.

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27. When she commenced the period of sick leave, she was maintained on full pay by the respondent. She was not informed that that was either discretionary or provided on a goodwill basis.

30 28. When the claimant and Mrs Fraser had earlier been absent by ill health, in 2017 and 2018 respectively, they had been maintained on full pay for the duration of their absence, one month in the case of the claimant and three months in the case of Mrs Fraser. When the claimant's predecessor Mr Molloy

was absent for a year in about 2001, he was provided with full pay for six months and half pay for six months.

- 5 29. Mrs Hughson of Shetland Voluntary Action, a group of voluntary organisations on Shetland of which the respondent was a member, informed the claimant that the respondent had adopted the sickness and bereavement policy of Shetland Islands Council, as had other voluntary sector employers on Shetland, which provided for six months' full pay and six months' half pay for those absent through ill health.
- 10 30. The claimant continued to work on as a bank nurse on occasion in the period after 30 July 2018. She was advised that it was helpful to her mental health to do so, and that the reason for her being unfit to work was her concerns over the changes being proposed to her working conditions.
- 15 31. On 28 August 2018 the claimant presented a Claim Form to the Tribunal alleging that the respondent had dismissed her. The claim was opposed by the respondent. A hearing into the claim was held on 19 November 2018.
- 20 32. In about December 2018 the respondent decided to seek occupational health advice in relation to the claimant's absence from work. They were concerned that she was unfit to work for them, but not other parties. They instructed Shetland Health Board to carry out the assessment. Shetland Health Board informed the respondent by email on 4 January 2019 that they would offer the claimant an appointment on 10 January 2019, but the email to the respondent was not received by them. The claimant was not informed of the proposed appointment on 10 January 2019 and accordingly did not attend it.
- 25 33. On 7 January 2019 Mr Miller telephoned the claimant. He informed her that there had been a discussion with Mr Duncan a finance officer at Shetland Islands Council that provided the majority of the funding for the respondent, and that as a result her pay would reduce to statutory sick pay (SSP). The
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claimant was surprised by that discussion, and angry that this was being imposed on her.

5 34. On 10 January 2019 the board of directors of the respondents met. Mr Miller reported the conversation that he had had with the claimant on 7 January 2019. In doing so, he claimed that she had used foul language. The claimant had not done so.

10 35. The meeting discussed the respondent's financial position. They were projecting a deficit of about £10,000 for the financial year due to end on 31 March 2019. The meeting considered in addition that (i) the claimant was certified as fit for work at other employers (ii) she had, as they believed it, not appeared for an appointment with occupational health that day, 10 January 2019, and (iii) that according to advice from a representative present from  
15 Shetland Voluntary Action, as the claimant's contract of employment did not provide specifically for sick pay, they were able to pay her statutory sick pay. In light of that, Mr Henderson the Chair of the respondent proposed that the claimant be placed on SSP with effect from 1 December 2019. The minute of the meeting recorded that the decision was made to do so, and that that  
20 decision was unanimous.

25 36. That decision was communicated to the claimant by letter dated 11 January 2019, from Mr Miller. It referred to the decision "this morning", but which was in fact taken the previous day. It referred to her having had five months' full pay which was said to be "a generous goodwill gesture, this in the context of a project currently operating at a deficit and under budgeting pressures from funders." She was therefore paid SSP from 1 December 2018, and her payslip for that was enclosed.

30 37. The claimant's net pay for November 2018 was £1,221.99, and was paid at the end of November 2018. Her net pay was normally at or about the level of £1,100 to £1,200 per month. It was normally paid at the very end of a month, or the first or second day of the next month. It was paid by cheque.

38. On 20 December 2019 Judgment in the claim made by the claimant was issued to the parties, dismissing it for the reasons there set out.

5 39. The claimant's net pay for the month of December 2018 was received by her on 12 January 2019, about ten days late. It was in the sum of £499.20. It had been calculated on the basis of SSP and included an income tax rebate.

10 40. On 21 January 2019 the claimant wrote to the respondent to tender her resignation on notice of one month. She alleged that she had been constructively dismissed by the decision to reduce her pay to SSP, without notice and backdated to 1 December 2018, which she alleged was itself a breach of contract, and that "coupled with events over the last 10 months have made my employment with Shetland Care Attendant Scheme untenable."

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41. The claimant's employment with the respondent terminated on 19 February 2019. She was paid at the level of SSP until that date. Her period of certified absence continued until March 2019.

20 42. On 21 March 2019 Mr Henderson wrote to the respondent's care attendants stating "I write to advise that Mary Gifford has resigned from her post as joint managing directors of Shetland Care Attendant Scheme (SCAS) with effect from 17 February 2019. Karen Fraser, joint manager, has been covering Mary's post for almost 12 months, while Mary was on extended sick leave...."  
25 The claimant had been absent on sick leave since 30 July 2018. She had not been provided with any document stating her role as joint manager.

43. The respondent's accounts for the financial year to 31 March 2019 disclose a deficit of expenditure against income of £10,436. In the previous financial year  
30 the deficit had been £2,417.

44. The claimant's earnings with the respondent for working 20 hours per week were £1,383.12 gross, £1,154.79 net per month, the equivalent of £319.18

gross and £266.49 net per week, exclusive of pension provision. Following the termination of employment she applied for a nursing role for which she was not successful, and for roles as a relief school cleaner and relief care at home worker, for which she was successful.

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45. The claimant took up an appointment as a Relief School Cleaner with Shetland Islands Council with variable hours. The position commenced in November 2018. She took up a further role with the same employer as Relief Social Care Worker on 4 February 2019. She had a further role as personal assistant to Ms Kay Tulloch in May and June 2019.

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46. The claimant's net earnings as relief cleaner were £148.94 in February 2019, £52.90 in March 2019, nil in April 2019, £52.9 in May 2019 and nil in June 2019. Her net earnings as relief social care worker was all in May 2019, including earlier work, and was £710.73. The net earnings as personal assistant totalled £57.40. The claimant worked 26.75 hours as a care worker in June 2019, and was estimated to have net earnings from that of £400 paid in July 2019.

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47. The difference between the claimant's pay at SSP levels from 1 December 2018 to date of termination is £1,228.94.

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48. The claimant was a member of the Shetland Islands Council pension scheme. Under that scheme, employer pension contributions are 20% and employee pension contributions are 6%. The pension loss that the claimant suffered in the period from termination of employment to 20 November 2019 is £2,400.

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### **Submissions for claimant**

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49. Mr Nicol asked me to accept the claimant's evidence. He argued that the claimant's contract of employment had been terminated by the material changes to her title and duties, and by the unilateral and backdated imposition

of SSP when her entitlement was to the Shetland Islands Council policy provision which had been adopted and implemented of six months' full pay and six months' half pay. He also alleged a breach of the implied term as to trust and confidence by (i) the demotion in April 2018 (ii) the failure to follow the grievance policy (iii) the backdated reduction in pay to SSP level. He argued that they did undermine trust and confidence, that the claimant had resigned in response to that, and did not delay in doing so. He referred to section 95(1)(c) of the Employment Rights Act 1996, and to the cases of **Western Excavating v Sharp**, **Malik v BCCI** (both of which are referred to below) and **Woods v WM Car Services [1982] IRLR 413**. He referred to Mr Miller's evidence that the backdating was entirely inappropriate, and that he had not agreed with it.

50. He argued that a factor in the decision to reduce pay was that she had made a grievance and then pursued a claim to Tribunal. The decision had been made at the next board meeting after the Tribunal decision was issued. The respondent had made no attempt to contact the claimant to discuss issues, and based their decision on her not attending an appointment she had not known of.

51. With regard to pension provision, the contribution of the employer had been given in evidence at 20%, and the figure for loss was no less than £2,400.

52. The issue as to remedy was the subject of further correspondence as set out above.

### **Submissions for respondent**

53. Mr Robertson invited me to dismiss the claim. He argued that there had been no demotion, that the claimant's contract, job description and salary had not changed. There had been a minor change to job title and structure. The grievance had been reasonably handled and any issue remedied by the appeal. There was no contractual entitlement to sick pay, and it had been

discretionary. The decision to pay at SSP levels had been taken for the reasons in the minute of the meeting and not because of the grievance or tribunal claim. He referred to the test in *Western*, and argued that there had been no fundamental breach of contract. He argued that there had not been victimisation. He asked me to prefer the evidence of Mr Miller.

54. He did not make any submission with regard to remedy, and agreed the figure of pension loss at £2,400.

55. The issue as to remedy was the subject of further correspondence as set out above.

## Law

56. Section 95 of the Act provides, so far as material for this case, as follows:

### **“95 Circumstances in which an employee is dismissed**

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(a) The contract under which he is employed is terminated by the employer (with or without notice)....”

57. Section 98 of the Act provides, so far as material for this case, as follows:

### **“98 General**

(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—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

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.....  
(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.”.....

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58. Section 104 provides that an employee shall be regarded as unfairly dismissed if the reason, or if more than one the principal reason, for the dismissal is that the claimant brought proceedings to enforce a relevant statutory right, or alleged that the employer had infringed such a right.

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59. Section 13 of the Act makes provision for a right not to suffer a deduction from wages, with exceptions listed in section 14. Wages are defined in section 27 to include “any sums payable to the worker in connection with his employment... whether payable under his contract of employment or otherwise”. The right to make a claim to a Tribunal is provided for in section 23.

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60. The onus of proving a dismissal where that was denied by the respondent falls on the claimant. From the case of ***Western Excavating Ltd v Sharp [1978]***

**IRLR 27** followed in subsequent authorities, in order for an employee to be able to claim constructive dismissal, four conditions must be met:

- (1) There must be a breach of contract by the employer, actual or anticipatory.
- 5 (2) That breach must be significant, going to the root of the contract, such that it is repudiatory.
- (3) The employee must leave in response to the breach and not for some other, unconnected reason.
- (4) She must not delay too long in terminating the contract in response  
10 to the employer's breach, otherwise she may have acquiesced in the breach.

61. In every contract of employment there is an implied term derived from **Malik v BCCI SA (in liquidation) [1998] AC 20**, which was slightly amended  
15 subsequently. The term was held in **Malik** to be as follows:

“The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

20 62. In **Baldwin v Brighton and Hove City Council [2007] IRLR 232** the EAT held that the use of the word “and” following “calculated” in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be “calculated or likely”. That was reaffirmed by the EAT in **Leeds  
25 Dental Team Ltd v Rose [2014] IRLR 8**:

“The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the  
30 relationship of trust and confidence, then he is taken to have the objective intention spoken of...”

63. More recently in ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*** the Court of Appeal gave guidance in what are “last straw” cases which included as one of the tests to apply whether there was a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence.

## 10 Discussion

### *Observations on the evidence*

64. I considered that the claimant was very moderate, reserved and convincing in her evidence. She was clear as to what had happened. She set out her understanding as to why she was entitled to sick pay, that she had been told that the Shetland Islands Council policy had been adopted by voluntary organisations including the respondent, and then applied to Mr Molloy, her predecessor who had been absent for a year, Mrs Fraser and herself. She explained the conversation with Mr Miler on 7 January 2019, and was adamant that she had not used foul language, which she did not do, but accepted that she had been angry. She explained clearly why she had resigned her employment.

65. Mr Miller’s evidence was less convincing. He was not able to recall the full details of the conversation with the claimant on 7 January 2019. He could not recall for example what he had said about the involvement of Mr Duncan of the Council in that discussion. The minute of the meeting on 10 January 2019 noted that the decision was unanimous, but he accepted in cross examination that it was unfair, and said that he had disagreed with it at the time, and thought it unfair to back date the reduction in pay, and had stated that during the meeting. His evidence was not consistent with that minute and its reference to a unanimous decision. He stated that he had been aware of the letter to staff



sent after the employment terminated, and agreed with it, but it stated wrongly that the claimant had been absent for nearly a year, when the absence had been from 30 July 2018 to 10 January 2019 at that point, referred to her post as “Joint Manager” and that Mrs Fraser had been covering that for that period.

5 That contrasted starkly with the position taken in the earlier hearing that the claimant had continued in her original role, and was also a change of title from that noted in the minute of the meeting of 17 April 2018 which was “Joint Co-ordinator”. The minute of the meeting had further referred to the advice of one of those present that Mr Miller keep a detailed written record of that phone call,  
10 but no such written record was produced to the Tribunal.

66. Where there was a conflict of evidence, I generally preferred the evidence of the claimant. I comment separately on the issue of the alleged victimisation, being the claim under section 104, below.

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*(I) Was the claimant dismissed?*

67. The claimant argues that there have been fundamental breaches of her  
20 contract of employment by the unilateral imposition of new terms, both as to title and role in April 2018, and as to payment when off sick from December 2018 which were both made on a retrospective basis. Separately the claimant argues that the reduction in pay was a final straw, which together with the earlier issues, including the failure to address her grievance in accordance with  
25 policy, entitled her to resign as being in breach of the implied term as to trust and confidence. She did so in response to the breach, and did not unduly delay.

68. I consider that she is correct in making those claims. I consider firstly that there was a material change to her terms and conditions proposed by changing her  
30 role from sole manager/ co-ordinator, managing staff including Mrs Fraser, to that of joint co-ordinator. There were material changes effected by that, not purely cosmetic ones to title. Duties were to be divided between them. That inevitably meant taking some away from the claimant. She was justified in

considering that that would happen, and it is borne out by the letter with the appeal decision which refers to sharing of responsibilities – those responsibilities being those undertaken by the claimant alone originally.

5 69. It was surprising that despite the reference to seeking joint agreement in that letter, no attempt to do so was made. Whilst the claimant was off work ill, that did not prevent that issue being discussed, and it is notable that the absence did not prevent the respondent deciding to make another change to the claimant's terms and conditions of work, in relation to pay.

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70. I consider secondly that the decision to reduce pay to SSP levels, and impose that retrospectively, was in breach of contract, and in relation to the level of pay that breach was material. Firstly I accepted the claimant's evidence that the Council policy on sick pay was adopted. That was supported by her evidence, including what was said by Mrs Hughson of Shetland Voluntary Action that it had been adopted across the sector in that field, and the application of it for Mr Molloy, Mrs Fraser and for the claimant herself at earlier stages. Secondly, whilst it was said that these were discretionary decisions, no written evidence of that, such as board minutes or letters to the employees concerned, was tendered. Thirdly, when the claimant went off ill on 30 July 2018, it was not suggested to her at that stage that the payment of full pay was discretionary. Fourthly, the letter to her reporting the decision sought to found on financial reasons for the change, which supported the impression that the rationalisation for the decision was given long after the absence had started, and had not been the case at the time the absence commenced. Fifthly the statement of terms and conditions was not the contract of employment, although it was evidence as to it, and in any event it did not have any specific provision as to sick pay, for example stating that SSP was payable. Finally, the Council policy for pension was adopted, and they were the primary funder of the respondent.

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The weight of evidence was clearly that the terms on sick pay from the council policy had been adopted.

71. Thirdly there was I consider no basis in law to entitle the respondent to reduce pay at that point, given that pay had been maintained initially from the start of that absence, on such a unilateral and retrospective basis. The lack of specific mention in the terms of employment of what is to be paid during absence is not I consider a sufficient basis to do so. The practice of paying full pay that had been adopted previously, and the understanding at least that the council policy had been adopted, together with the complete absence either of evidence of the claimant being informed that payment of sick pay from when she went off ill on 30 July 2018 was discretionary, or of any board minute or similar granting discretionary sick pay or setting out how the exercise of any discretion would be made, led me to conclude that payment of sick pay under the Council policy was a legal obligation, and payable to the claimant as that term is used in section 13 of the 1996 Act. The breach was I consider a material one.

72. Even if there was no breach of specific contractual terms, the sequence of events did entitle the claimant to resign on the basis that there had been a final straw which led to a breach of the implied term as to trust and confidence set out above. What led to that final straw included the change to terms imposed unilaterally with effect from 1 April 2018 and without any consultation with her, the grievance which was not dealt with by having a meeting with her to find out about it, an appeal in relation to the grievance which paid at best cursory attention to the basis of it from the terms of the appeal letter (failing to address the detail of the argument for the claimant), the failure to engage in any discussion over new terms of contract or a job description after the Tribunal Judgment was issued, despite the seeking of agreement being referred to in the letter of appeal decision, and the imposition of reduced pay to SSP levels by decision intimated on 11 January 2019 but purportedly effective on 1 December 2018. Such acts collectively cannot sensibly do other than undermine trust and confidence so completely as to lead to a breach of the implied term as explained in the case law cited above. It entitled the claimant to resign.

73. She did resign in response, and did so within 9 days of receiving the letter. It was not suggested that that delay was material, and Mr Robertson was right not to do so. I therefore find that the claimant was dismissed

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(i) *Was the dismissal unfair?*

74. I then considered the fairness of the decision. A dismissal that is constructive can nevertheless be a fair dismissal. There is no onus on either party in seeking to show that there was either fairness or unfairness. Firstly no argument over what a fair reason for the conduct complained of was put forward. The best that could be said that it was for a measure of advance planning and in light of the financial circumstances, which might potentially amount to some other substantial reason. Secondly, no real argument was made by the respondent that the circumstances were those of a fair dismissal. That was I consider understandable. There was a complete absence of consultation, either on the issue of the new job title, and related duties, or the proposal to change pay from full to SSP, and to seek to do so retrospectively. Had there been, the claimant would have referred to the contractual position at the very least, as she later did in her resignation letter. There was also a complete absence of consultation on the issue of why the claimant had not attended the appointment. Had there been, the failure to inform her of it would have emerged. She would also have responded to the allegation of having used foul language, and would have denied doing so. Consultation is a fundamental element of fairness. It was simply absent in this case. No explanation was tendered for that, and none was apparent from the evidence led.

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75. On both procedural and substantive grounds I concluded that the dismissal was clearly unfair.

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(ii) *Was the dismissal for asserting a statutory right?*

76. The separate issue is that of victimisation, under section 104 of the Act. For that claim to succeed, the sole, or if more than one the principal reason for the act complained of that leads to the dismissal must be the commencement of proceedings or other assertion of statutory right. The onus is on the claimant.

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77. Whilst the decision followed the Tribunal Judgment and was taken in that overall context, I am satisfied that the reason for the action, misguided though it was, was the concern over the claimant's working for another employer and perception of having failed to attend the OH appointment, coupled with the concern over the respondent's financial position and the belief that there was no contractual entitlement to full pay when off through ill health. The respondents were wrong to have acted as they did, but I do not consider that the grievance or Claim originally pursued were the reason, or principal reason, for the decision made. I have accordingly dismissed the claimant's claim under section 104 of the Act.

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*(iii) Was there an unlawful deduction from wages?*

78. For the reasons set out above, I consider that there had been an unlawful deduction from wages under the terms of section 13 of the Act. It was separately a material breach of contract.

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*(iv) Remedy*

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79. The claimant had produced a schedule of loss, on which she gave very brief evidence, to which Mr Robertson had not taken objection in cross examination. The figure given in submission as to pension loss of £2,400 was accepted. Following the correspondence to which I have referred above, a revised calculation of loss was produced, and its terms agreed.

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80. The claimant had worked on the bank as a nurse during employment with the respondent and it was appropriate to take no account of the income from that

source. The claimant had obtained new employment in three respects. I am satisfied that she mitigated her loss.

5 81. The basic award I calculate at a different sum to that in the original schedule, and was latterly accepted by the claimant as the accurate figure. The basic award is £7,181.55.

10 82. In respect of the compensatory award, the period of loss sought is from dismissal to November 2019. In the circumstances that is reasonable. The loss of earnings is said to be said to be £10,393.10, the pre-termination earnings for that period, less the earnings anticipated for the period of loss, which after revisal have been estimated at £2,112. That produces a net loss of £8,281.10.

15 83. To that is added the agreed pension loss figure of £2,400.

84. The total compensatory award is £10,681.10.

85. The award for unfair dismissal I make is thus in the total sum of £17,862.65.

20 86. The claim for unlawful deduction from wages is for the period from 1 December 2018 to date of termination and is in the sum of £1,228.94.

25 87. The claimant did not receive any benefits and the recoupment provisions do not therefore apply.

### **Conclusion**

30 88. The claimant was constructively dismissed, that was unfair, she suffered an unlawful deduction from wages, but she was not dismissed for asserting a statutory right under section 104 of the Act, and I require to dismiss the Claim made under that section.

89. Awards are made for the claims that do succeed as set out above.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Alexander Kemp**  
**26 September 2019**  
**30 September 2019**

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