EMPLOYMENT TRIBUNALS

Claimant: Ms P Ferreira

Respondent: Central Facilities Group Limited

Heard at: Nottingham
On: 9 December 2019

Before: Employment Judge D Faulkner (sitting alone)

Representation
Claimant: In person
Respondent: Mr R Scuplak (HR Consultant)

RESERVED JUDGMENT

1. The Claimant's complaint of failure to pay holiday pay is dismissed following withdrawal.

2. The Respondent was in breach of the Claimant's contract of employment in relation to her pay. The complaint of breach of contract therefore succeeds.

3. In addition, and alternatively, the Respondent made unauthorised deductions from the Claimant's wages. The Claimant's complaint in that respect is well-founded.

4. The Claimant was dismissed by the Respondent within the meaning of section 95(1)(c) Employment Rights Act 1996. As the Respondent does not contend that the dismissal was fair, the Claimant's complaint that she was unfairly dismissed is also well-founded.

5. A further hearing will be arranged to determine the question of remedy.

REASONS

Complaints

1. The Claimant complains of unfair dismissal. She also complains of unauthorised deductions from wages, alternatively breach of contract. She confirmed at the outset of this hearing that she no longer pursued any complaint in respect of holiday pay.

Issues

2. It was agreed with the parties that in the time available in a one-day hearing, the Tribunal should deal only with issues of liability, the question of remedy should any of the complaints succeed being potentially quite complex. The issues to be decided were therefore agreed to be as follows.

Unfair dismissal

3. In relation to unfair dismissal:

3.1. Were the actions or omissions of the Respondent a cause of the Claimant's resignation?

3.2. If so, did those acts or omissions amount to fundamental/repudiatory breach of the Claimant's contract of employment? The Claimant relies on express terms related to pay, duties and job title, the implied duty of trust and confidence, and the implied duty to afford employees a reasonable opportunity to obtain redress of a grievance.

3.3. Did the Claimant affirm the contract of employment prior to resigning?

3.4. If the Claimant was dismissed, the Respondent does not seek to argue that the dismissal was fair and accordingly the complaint of unfair dismissal would succeed.

Wages/breach of contract

4. The issues in respect of the complaint of unauthorised deductions from wages are:

4.1. What were the terms of the Claimant's contract as to hours and pay?

4.2. Was she paid on any occasion less than that properly payable by the Respondent?

5. As for the alternative claim of breach of contract, the Respondent accepts that it arose or was outstanding on termination of the Claimant's employment, and that the tribunal thus has jurisdiction to hear it. The issues are therefore:

5.1. Again, what were the terms of the Claimant's contract as to hours and pay?

5.2. Was the Respondent in breach of contract?

Facts

6. The parties agreed a bundle of over 250 pages. Whilst they directed me to certain key documents that I read before hearing evidence, I made clear that particularly given the time constraints of a one-day hearing, it was for the parties to highlight any other document which they believed it important for me to consider.

7. Witness statements were produced by the Claimant, and for the Respondent by Miss Maria Del Carmen Carro Vazquez who is an Area Manager, Miss Magdalena Zdankowska who is a Support Operations Manager, and Mrs Heidi Davies (formerly Graham) who was employed as an HR Advisor until May 2019. All four witnesses also gave oral evidence. Both parties made closing submissions. My findings of fact are based on this material. References to page numbers are of course to the agreed bundle and references to paragraphs are to the relevant witness's statement.

8. The Respondent provides cleaning and facilities management services to hotels, serviced apartments and commercial premises throughout the UK and Ireland. It employs around 3,000 employees. Miss Zdankowska's unchallenged evidence (paragraph 2) is that the vast majority are part time and have no fixed hours of work. Clients only want the Respondent to clean rooms which have been or are occupied, and it has to be able to adjust its services to those needs.

9. The Claimant was employed as Assistant Head Housekeeper at Roomzzz, which are serviced apartments in Nottingham, from July 2015 until her resignation in May 2019. Miss Carro Vazquez was Head Housekeeper there from 2015 until July 2017, at which point she became Area Manager, reporting to Miss Zdankowska. Another employee, Ms Adi Matau, then became Head Housekeeper; the Claimant was offered the job but turned it down.

10. The Claimant's duties included checking that rooms had been properly cleaned, supervising cleaners (otherwise known as room attendants), attending to paperwork, checking refreshments trolleys, staff induction/training and dealing with relevant entries on to computer systems. She also deputised for the Head Housekeeper when required, which she agrees was around one-third of her time overall. In addition, there were two supervisors, one of whom was Ms Matau. They carried out roles similar to the Claimant, except that they did not deputise for the Head Housekeeper. There were also around a dozen cleaning staff. All staff worked five days out of seven on a rota basis. The Claimant was originally employed by WGC Limited until a transfer to the Respondent under the TUPE Regulations on 1 December 2016. Miss Carro Vazquez also transferred to the Respondent at that point as, it is safe to assume, did other staff.

11. The Claimant's offer of employment letter from WGC (Samantha Clamp, Area Manager) was dated 20 June 2015 and is at page 28. As far as material it said, "The salary for this position will be £8.00 per hour and will be based on a 35-hour working week".

12. The statement of terms and conditions of employment dated 20 July 2015 is at pages 29 to 31. The document states, "A copy of your job description is available from your line manager. The employee accepts that he/she may be required to perform other reasonable duties or tasks outside the scope of his/her normal duties". As to pay it states that the Claimant will be paid £8.00 per hour. In relation to "Hours of Employment", it states "Normal hours of employment depend on the business requirement but will be on a 7-day rotating shift basis. Normal shift hours will start at

[ ] and finish at [ ] (sic). The Employee may be required to work additional hours as the needs of the Company demand … Overtime is not guaranteed". The Claimant says (paragraph 2) that she did not think it mattered what the document said about her hours given the terms of the offer letter, though she said in oral evidence that on her first day of her employment with WGC, Miss Carro Vazquez said all contracts were zero hours, and that was certainly Miss Carro Vazquez's view.

13. The job description issued by WGC for the "Assistant Housekeeper" role is at pages 32 to 33. Under the heading, "Main Duties/Responsibilities" it lists 34 points. At point 12 it says, "Carries out any other cleaning duties as specified by the head housekeeper". The Claimant says she never received this document until it was shown to her as part of her grievance process with the Respondent (see below), though she accepts that other than point 12 it accurately described her job with WGC. Miss Carro Vazquez says (paragraph 8) that she, the Claimant and the Supervisors did not routinely clean rooms but had to step in to cover staff absence any also regularly undertook "periodic cleaning", which is a more thorough clean of certain items, which Miss Carro Vazquez suggested would take up about 5 hours per week.

14. The Claimant says (paragraph 6) that cleaning had never been part of her duties, and refers to an email sent to her by WGC on 7 October 2019, evidently in connection with this Hearing (page 216). It says that WGC's enquiries show "that you did clean rooms during your employment with WGC Limited. Although this is a very small amount of rooms cleaned during the whole of your employment … rooms had been cleaned by yourself, possibly in exceptional circumstances". It then lists nine dates between 25 December 2015 and 7 June 2016 on which she cleaned between two and twenty-one rooms, although at least one was when she volunteered to work on a day off. The Claimant initially said that she only helped out on two occasions when the Respondent was exceptionally short of cleaners, taking that information from the fact that page 216 has only two days on which she entered the data there set out, but she accepted in evidence that all nine days related to her. The Claimant also accepts that she undertook periodic cleaning. She says she would not have accepted the position of Assistant Head Housekeeper had she known that more regular cleaning duties in rooms and common areas were required.

15. In practice, the Claimant worked at least 35 hours per week up to the point of transfer in December 2016 and often worked overtime. The Claimant said in evidence that there were two or three occasions when she worked fewer than 35 hours in a week, describing the arrangement as "a bit flexible" but on average she worked 40 to 45 hours, though there were no overtime rates.

16. The Employee Liability Information received by the Respondent from WGC is, so far as relevant, at pages 77 to 82. In relation to the Claimant, and indeed all other employees except the Head Housekeeper, under the headings, "Contracted hours per week" and "Contracted days per week", the information given is "Variable".

17. The Claimant says that in December 2016, she was told (either by Miss Carro Vazquez or the Area Manager, Bobby Tintila) that her duties would have to be shared with a Supervisor and that her hours were to be reduced to between 20 and 25 per week. Miss Carro Vazquez denies making any such statement and says that in fact, during the first seven months of 2017, in the total of 16 weeks when the Claimant was at work and not absent because of holiday or sickness, she averaged

just a few minutes under 35 hours per week. The Claimant says (paragraph 4) that in separate discussions with three managers – Bobby Tintila, Miss Carro Vazquez, and the Operations Manager (Ms Clamp) – she made clear that she was not happy about what she had been told and asserted her right to work 35 hours per week. No complaint was made in writing. Miss Carro Vazquez says (paragraph 16) that no such complaint was raised with her at any time. The Claimant says she was informed that all staff were on zero hours contracts, and that the blank spaces in the statement of terms supported that regardless of the offer letter. Although it denies that any such discussions took place, this was certainly the Respondent's understanding of the contractual position.

18. The Claimant says she did not pursue the matter further as she believed she was bound to accept that this was the position, particularly as Ms Clamp had worked at both companies and had issued her offer letter at WGC. She also felt she would not get any further by raising the matter with HR based on previous experience on other issues. The Claimant raised a grievance about Miss Carro Vazquez in January 2017 but did not mention the question of her hours. Again, the Claimant says this is because she had been told she had to accept what the Respondent said and until some point later in 2017 was still working 35 hours per week. The Respondent's case (in its Response at page 17) is that it required the Claimant to "work such hours in accordance with the needs of the business and the Claimant did so". I take from the totality of this evidence that when the Claimant was at work during the latter half of 2017 and into 2018, this was what happened and that she did not work 35 hours every week.

19. Between September 2018 and January 2019, the Claimant was off work because of a knee problem. In January 2019 she asked to work 4 hours per day as a phased return and was advised by her doctor not to kneel. It is agreed that she worked 4 hours per day in the first week. The Claimant says that thereafter she was assigned less than 4 hours per day. This and/or what she perceived as lack of responsibility and work ethic on Ms Matau's part led her to go to the CAB who drafted a grievance and advised her that she was contractually entitled to work 35 hours per week.

20. On 8 and 11 February 2019 the Claimant presented a grievance, which was eventually picked up by Mrs Davies (pages 94 and 95). She attached two letters from WGC, one dated 20 June 2015 which was he original job offer (page 28) and the other dated 4 February 2019 (page 93) which was addressed "To whom it may concern" and stated in general terms that WGC had employed the Claimant on a 35 hour working week. The Claimant asserted her right to work 35 hours per week and stated, "Unfortunately, since being TUPE'd to [the Respondent] my hours of work have been reduced drastically and I am finding [it] extremely difficult to financially manage on this reduced fortnightly income".

21. On 14 February 2019 the Claimant sent a further e-mail to Mrs Davies (page 97), chasing for a reply and also complaining about allocation of work by Ms Matau, who she said was not pulling her weight. Mrs Davies replied (pages 96 to 97) that according to the information received from WGC at the time of the transfer, the Claimant was "on a flexible contract" and so she would contact WGC for clarification. She added that in view of the further issues raised she would arrange a formal grievance hearing. The Claimant replied (page 96), saying in relation to her hours: "Regarding the hours I was doing with WGC [there] never was no reason to make a complaint because in fact I was working much more than 35 hours per week …

Actually I blame [Miss Carro Vazquez] with the confusion with my hours because she told me that all contracts were zero hours. I should have contacted Samantha Clamp about this but I needed the job as I moved from the Lake District to Nottingham. It didn't make any sense to move with zero hours contract but I was afraid of losing my job and I had rent to pay and bills".

22. The Claimant sent a further email to Mrs Davies on 15 February 2019 (pages 100 to 102) providing more detail about her complaint regarding Ms Matau's management and also complaining about Miss Carro Vazquez. I need say no more about the detail, or about the further complaint regarding Ms Matau made on 16 February (page 103) given that the Claimant has made clear that neither the substance of those matters, nor how the Respondent dealt with them, formed part of her reason for resigning or of her Claim.

23. The Claimant was initially invited to a grievance hearing fixed for 26 February 2019 (pages 104 to 105), but although Mrs. Davies had emailed WGC on 14 February 2019 (page 98), no response was received until 26 February 2019, which necessitated postponement of the grievance hearing until 2 March 2019. When they eventually replied (page 98), WGC confirmed that the offer letter at page 28 was correct at time of issue, and that the employee liability information they had provided to the Respondent was wrong.

24. Miss Zdankowska's manuscript notes of the hearing are at pages 107 to 117. They record the Claimant outlining her case that she had been entitled to work a minimum of 35 hours per week at WGC but that this had been significantly reduced post-transfer. Miss Zdankowska indicated that the Claimant was entitled to work 35 hours per week in line with what WGC had said. The Claimant indicated she had been advised by ACAS that she could be paid for "wages lost", which Miss Zdankowska said she would check with HR. There was also a discussion about the Claimant's duties, and about how they might be impacted by her knee problem, and then discussions about her concerns regarding Miss Carro Vazquez and Ms Matau. The outcomes the Claimant sought were essentially that she wanted a 35-hour working week and that she wanted Ms Matau to take more responsibility.

25. On 6 March 2019 the Claimant submitted a medical certificate indicating that whilst fit to attend work she needed to avoid kneeling and using stepladders (page 119). On 11 March 2019 she emailed Miss Zdankowska (pages 121 to 122) stating that her position was Assistant Head Housekeeper (or Deputy Head Housekeeper), not a public area cleaner ("PA") or room attendant ("RA"). This email appears to have been occasioned by Ms Matau telling her, on behalf of Miss Carro Vazquez, that to "make up my hours I have to do PA and RA duties. Was I demoted without my knowledge??? These duties don't apply to my position!". She then quoted from a Deputy Head Housekeeper role advert posted by the Respondent and stated that it did not include RA or PA duties. In reply, Miss Zdankowska indicated that the instruction the Claimant referred to "came from the finance team". At the time the Claimant was only working around 3 hours per day; she says she was told that any additional hours would have to consist of cleaning work and that once she was back up to 7 hours per day in future, she would also have to undertake cleaning work to make up those hours. Given the email record, I accept that evidence.

26. On 14 and 20 March 2019, Miss Zdankowska conducted a number of interviews (notes are at pages 123 to 128 and 132 to 142), including of Ms Matau and Miss Carro-Vazquez. I need say little about them as they largely concern working

relationships. I note only that Ms Matau confirmed (page 137) that the Claimant "works basic supervisor hours plus I offered her PA as lightest duties to make up her hours but she refused as she is senior supervisor" and Miss Carro Vazquez said that the Claimant was not fit to do her role because of her health problems (page 142).

27. On 21 March 2019, the Claimant emailed Mrs Davies (pages 143 to 144) to clarify the outcomes she was seeking, which were as far as material, "the grievance against Maria, payment of wages lost since my hours have been reduced incorrectly, weekly working hours according to my duties as assistant head housekeeper not as public area cleaner or room attendant… My contract is for assistant head housekeeper and not other duties".

28. On the same day Miss Zdankowska sent Mrs Davies an email setting out her thoughts (pages 145 to 146). This was turned into a formal outcome letter by Mrs Davies, sent out in her name on 28 March 2019 – pages 147 to 149.

29. Miss Zdankowska concluded that the Claimant had a contractual entitlement to work 35 hours per week, based on what WGC had now told the Respondent, though in her view the Respondent had no basis for believing that this was the position until over two years after the transfer. She did not know how the Respondent might deliver 35 hours per week, in the absence of any cleaning duties which she informed Mrs Davies the Claimant was refusing to do "to make up her hours". Miss Zdankowska says in her statement (paragraph 14) that there was only a finite amount of management time, with a Head Housekeeper as the senior manager on site and Supervisors, in addition to the Claimant. She says she could not envisage how the Claimant might be given 35 hours of management functions every week and said in her email to Mrs Davies that this "needs to be solved separately". At paragraph 20 of her statement she states that the Claimant's insistence on working 35 hours and her insistence that she would not carry out any cleaning duties were incompatible: she would either have to accept a 35-hour week on management duties alone was not possible or, subject to health considerations, undertake some basic cleaning work. She also says that she felt there were complications in meeting the Claimant's request to make up the already lost hours, such as whether the Claimant had in fact been able to work 35 hours per week given her ill health (paragraph 25) but that this was not for her to sort out. The issue of back pay was not addressed in the email.

30. Miss Zdankowska says (paragraph 11) that she was very concerned about what she perceived to be the severity of the problem with the Claimant's knee and with how the Claimant described how she undertook some of her work, placing a pillow on the floor whilst checking under beds. She also says (paragraph 15) that the Claimant's health presented a difficulty in terms of trying to give her the additional hours she was seeking, unless she was able to carry out some cleaning duties. She said in the email "It's really difficult to accommodate light duties in housekeeping" and that she was "100% sure [the Claimant] is not fit to [do] the job". She accepts she had no access to medical records when forming these judgments.

31. Miss Zdankowska did not uphold the allegation of unfair treatment of the Claimant by Ms Matau and/or Miss Carro Vazquez. It is unnecessary for me to say anything further about this for the reasons I have already given. I will add however that Miss Zdankowska agreed in evidence that her conclusions that the difficulties the Claimant was experiencing were because she could not accept the new management arrangements were not relevant to her investigation; they were just

Miss Zdankowska's feelings. She also accepts that she was speculating when she stated in her email to Mrs Davies that the Claimant was willing to attend a mediation meeting with Ms Matau and that it was the wrong choice of words to say that the Claimant was "not reliable" because of her sickness issues.

32. Miss Zdankowska recommended a welfare meeting or an occupational health referral because of her concerns about the Claimant's health. Although referred to in the email, this was not mentioned in the decision letter. She also considered, and mentioned in her email to Mrs Davies, the question of whether the Claimant might be redeployed to another site in Nottingham, once any health issues were resolved, given her difficulties with Ms Matau and Miss Carro Vazquez. This too was omitted from the decision letter. Miss Zdankowska said in oral evidence that she discussed this with the Claimant, but then changed that evidence to say she probably discussed it with HR and not the Claimant.

33. As far as material, the outcome letter referred to the information about hours which the Respondent had at the time of the transfer from WGC, stating, "hours of work were offered, you completed this work and were paid for this working time. We therefore managed you on this basis for the past two years. Obviously, it was a complete surprise that you came to us with this new information, two years after the transfer … We will honour your contractual terms, so that you commence 35 hours per week going forward… the correct amount of hours is to be allocated to you accordingly". It then went on to say in relation to the Claimant's duties, "This point was not spoken in detail during the meeting, however, I can confirm as per your contract as supervisor (your job title whilst at WGC was Assistant Head Housekeeper however due to the size of the hotel your title is Supervisor, this was not a demotion) you are expected to do Supervisor duties however your duties may be modified from time to time to suit the needs of business and to make up your contracted hours".

34. The Claimant appealed by email dated 2 April 2019 (pages 150 to 151). As far as material: she referred to the discussions she said took place with Bobby Tintila post-transfer regarding her hours; asserted that her contract did not require her to carry out PA and RA duties; and complained about Miss Zdankowska's conduct of the grievance hearing. She ended her email stating, "Most importantly I want from [the Respondent] a full written explanation why the changes of my contract (sic) regarding my job title and duties without my knowledge". In further email exchanges with Mrs Davies, the Claimant asked for a full statement of why the Respondent concluded there were no grounds to substantiate her grievance regarding what she saw as variations of her terms and conditions of employment relating to her job title and duties, and regarding payment of the wages she had lost since the transfer in December 2016. Mrs Davies decided to deal with the appeal herself.

35. The appeal hearing took place on 18 April 2019. The notes of the meeting are at pages 157 to 162. They record the Claimant saying that she did not want to continue with her grievance against Miss Carro Vazquez. As to hours, Mrs Davies confirmed that the Claimant would be treated as on "contracted hours". There was then a discussion about the job title, with the Claimant clarifying that she was more senior to supervisors whilst at WGC. As for cleaning duties, to make up her 35 hours, the Claimant said she saw that as a demotion and that her health issues would make it difficult. Mrs Davies' response was that a "welfare meeting" would be held to discuss what the Claimant could and could not do. The Claimant made clear

she would not do RA and PA duties. As for wages lost, Mrs Davies said that this would need to be looked into.

36. Mrs Davies' decision was sent by letter dated 1 May 2019 (pages 163 to 164). The Claimant was still off sick. On the question of duties, the letter stated, "I advised that room attendant, PA and other cleaning duties are not the main focus of your role however you may be asked to pick up these duties to suit the needs of the business". It went on to say that Mrs Davies had obtained a job description (pages 32 to 33) from WGC "that would have been contractual alongside your contract". She enclosed a copy and highlighted point 12, as well as points 26 ("Perform other tasks as assigned by the head housekeeper") and 29 ("Undertakes other duties and responsibilities which, while outside the normal routine, are within the overall scope of the position"). Mrs Davies concluded, "Therefore, your duties may be reasonably modified to suit the needs of the business". I should also note point 14, which reads "Completes additional daily, weekly or monthly cleaning tasks as required by the head housekeeper".

37. As to job title, the Claimant's complaint seems to have been that at WGC she was Assistant Head Housekeeper, but on the Respondent's systems she was referred to as Senior Supervisor. Mrs Davies stated in her letter that there was no difference between the two job titles, Senior Supervisor simply being the Respondent's terminology, but agreed that in future the Respondent's systems could be changed to refer to the Claimant as Assistant Head Housekeeper. The Claimant says that she did not know whether this dealt with her concern as she was off sick and did not know whether the change had been implemented though she adds that even if it had, that would not have resolved her grievance as she wanted to be known by the equivalent title used by the Respondent, namely "Deputy Housekeeper".

38. As for hours of work, Mrs Davies says that there were two principal issues (paragraph 12). First, she knew from colleagues that it would be difficult for the Claimant to work 35 hours per week without undertaking cleaning duties. She did not address this point in her decision. Miss Carro Vazquez (paragraph 15), having assessed 10 random weeks after July 2017 (pages 246 to 265), says that there was sufficient work for the Claimant to have worked 35 hours or more per week on management duties, and that this would generally have been the case for most weeks of the year. In fact, in oral evidence, she agreed that there should have been sufficient management, non-cleaning duties for a 35-hour week even during times of low occupancy, provided the Claimant was for example prepared to work at weekends and work as the sole manager on quieter days. Miss Zdankowska did not quite agree with Ms Carro Vazquez's assessment, saying reaching 35 hours would be "difficult". The Claimant accepted in evidence that she could not say the Respondent could provide her with 7 hours of management duties per day, but she believes she could have done 7 hours of non-cleaning duties on average.

39. In respect of compensating the Claimant for what had happened since the transfer, Mrs Davies reasoned that she had been paid for all the hours she had worked and at least to some extent had been able to determine her hours herself – though the Claimant says she did not know that, for example, she could have sent a Supervisor home to give herself more management time. There was also the question for Mrs Davies of whether the Claimant would have been able to work 35

hours per week regularly, because of her health, and the fact that there was no record of the Claimant raising the point.

40. Notwithstanding those concerns, Mrs Davies thought that payment should be made to the Claimant of six months of lost wages, amounting to £901.80 as a goodwill gesture – Mrs Davies said in evidence it was to help the Claimant out because of the "misunderstanding" about her hours. She says she did not think the Claimant should be paid retrospectively for work she had not in fact done. In terms of the way forward, the letter simply said, "Your hours have been increased back to your contacted hours of 35 hours per week …".

41. The Claimant believed that the Respondent should have paid her the full amount she would have earned doing 35 hours per week going back to December 2016, which she says (paragraph 5) would have totalled £4,447.25. She claims that amount, less the £901.80, by way of unauthorised deduction from wages, or as compensation for breach of contract. She also says that failure to pay this sum, together with what she saw as the unilateral change in her duties and job title led her to resign by email on 9 May 2019 (pages 167 to 168), with effect from 24 May 2019.

42. She set out the three reasons why she was resigning, which she said amounted to a fundamental breach of contract. The letter outlined the case she had already advanced in her grievance and appeal, stating that she would not have accepted the position with WGC had she been required to do cleaning duties, and therefore she saw this as a demotion, Ms Matau having made clear she would have to clean on a daily basis during quieter periods in order to achieve a 35 hour week. As to lost pay, she did not see why she should pay for WGC's error.

43. The Respondent says that notwithstanding the grievance outcome, the Claimant was not entitled to work 35 hours per week – I take that to mean, until it agreed that she was. Alternatively, it says she impliedly accepted through 2 years of inaction, a variation in her contractual hours. These arguments were partly rehearsed in Mrs Davies' reply to the Claimant's resignation (page 166) in which she questioned why the Claimant waited so long to raise the point and why the Claimant found her employment "untenable" when the Respondent had corrected WGC's error.

<u>Law</u>

Wages/breach of contract

44. Section 13 of the Employment Rights Act 1996 ("ERA") provides as far as relevant:

(1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) the deduction is required or authorized to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion after deductions, the amount of the deficiency shall be treated for the purposes of this part as a deduction made by the employer from the worker's wages on that occasion.

45. It is now established that employment tribunals have jurisdiction to resolve any issue necessary to determine whether a sum was "properly payable" to a worker, including issues as to the meaning of the contract – see the Court of Appeal's decision in **Agarwal v Cardiff University [2019] ICR 433**. In this case, that will mean determining the terms of the Claimant's employment as to hours and pay. The same determinations are of course required in relation to the alternative breach of contract complaint under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") (as already noted, the Respondent does not dispute that the Tribunal has jurisdiction to hear the complaint under the Order). Construction of contractual terms is a question of law. Where there is ambiguity or the written terms are incomplete, it is permissible to bring in extrinsic evidence in order to construe the contract, including how it operated in practice, always bearing in mind the context in which the contractual agreement was made.

46. On the question of hours of work (and thus pay), Mr Scuplak's argument in closing was that if the Claimant had resigned shortly after the transfer, it would not have been any defence for the Respondent to say it did what it thought was right, but that is not what happened. She had in his submission impliedly agreed to a variation in her terms of employment by working for some considerable time under arrangements where in practice she did not work the hours she claims she was entitled to – certainly over a year, discounting the time post-transfer when she continued to work at least 35 hours per week.

47. Implied agreement to changes to terms and conditions has been considered in a number of cases. In **Jones v Associated Tunnelling Co Ltd [1981] IRLR 477**, the Employment Appeal Tribunal ("EAT") distinguished between changes that have immediate effect and those which do not (such as in that case, related to the right to vary the employee's workplace). It said, "If the variation relates to a matter which has immediate practical application (e.g., the rate of pay) and the employee continues to work without objection after effect has been given to the variation (e.g. his pay packet has been reduced) then obviously he may well be taken to have impliedly agreed. But where, as in the present case, the variation has no immediate practical effect the position is not the same". In **Solectron Scotland Ltd v Roper [2004] IRLR 4**, the EAT stated that the test is whether the employee's conduct is

"only referable" to her having accepted the variation, in other words whether the conduct is reasonably capable of a different explanation. Elias J suggested it would be an exceptional case where an employee's conduct (in continuing to work) was only referable to agreement to a change in the contract, though it could not be said that continuing to work would never amount to acceptance, where the employer has made its position clear. The question is therefore whether the employee's conduct clearly shows agreement to the new terms.

48. This issue has been addressed more recently by the Court of Appeal in **Abrahall v Nottingham City Council [2018] ICR 1425**. The Court said that the following matters required consideration: whether the employee's conduct was reasonably capable of a different explanation; protest or objection at the collective level, which will negate acceptance – in that case, this was key to the outcome that failure to provide incremental progression had not been accepted; and there is also the question of when acceptance can be said to have occurred. Elias LJ added that agreement to variation, exceptionally, may be inferred from an employee simply carrying on in employment.

Unfair dismissal

49. Section 95(1)(c) ERA provides that an employee is dismissed for unfair dismissal purposes if "the employee terminates the contract … (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". The test for establishing dismissal in these circumstances is that given in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**. In order to establish constructive dismissal there must be a repudiatory breach of contract by the Respondent – in other words, conduct going to the root of the contract or which shows that the Respondent no longer intends to be bound by it; the Claimant must have resigned in response to that breach; and if the Claimant has affirmed the contract after the breach, which may for example arise as a result of delay in resigning, constructive dismissal will not be made out.

50. The Claimant relies on express terms relating to hours, pay, job title and duties. The Respondent's position in relation to hours and pay is as set out above, namely that the Claimant impliedly agreed revised terms. In relation to her job title, its case is that the change was of no effect. As to duties, it essentially says two things. The first is that any change in duties was tentative and had certainly not taken effect. I should note therefore that the required fundamental breach of contract can be anticipatory as well as actual, though an anticipatory breach can also be withdrawn before it takes effect – **Norwest Holst Group Administration Ltd v Harrison [1985] ICR 668**. Secondly, the Respondent says that there was scope in the Claimant's contract of employment and job description to require the revised duties. Flexibly drafted contractual provisions are not without their limits. In considering that argument therefore, it is necessary to take into account what the Claimant's duties were, the extent to which they were (or were to be) changed, whether the Respondent was entitled to change them, and whether the changes (or proposed changes) were sufficiently material to amount to the required fundamental breach of contract. Employers should not conduct themselves in a manner calculated or likely to destroy trust and confidence even where a contractual provision appears to permit a particular course of action – **United Bank Ltd v Akhtar [1989] IRLR 507**.

51. That leads me to the first implied term the Claimant relies upon, namely that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (**Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, Malik v BCCI SA (in liquidation) [1997] ICR 606**).

52. Any breach of the trust and confidence term is fundamental and repudiatory (**Morrow v Safeway Stores plc [2002] IRLR 9**). Whether there has been such a breach has to be judged objectively: in the **Woods** case, it was said that Tribunals must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is that the employee cannot be expected to put up with it".

53. As for the implied term in relation to how an employer deals with grievances, there is of course no implied term that an employer must resolve a grievance to an employee's satisfaction. The Employment Appeal Tribunal in **WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516** held that there is however an implied term in a contract of employment that an employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they might have.

54. It must also be considered whether the Claimant has affirmed the contract after any breach, because if she has done so, any right to accept the Respondent's repudiation of the contract by resigning and claiming to have been constructively dismissed is lost in relation to that breach. Affirmation can be express, or it could be implied from the Claimant's conduct, where she acts in a way which is only consistent with the continued existence of the contract. Delay can be evidence of affirmation, but in **W E Cox Toner (International Ltd) v Crook [1981] ICR 823,** the EAT held that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; though if it is prolonged it may be evidence of an implied affirmation.

Analysis

Holiday pay

55. As already noted, the complaint relating to holiday pay is withdrawn and is therefore dismissed.

Terms and conditions – hours and pay

56. I begin my analysis of the remaining complaints by considering the Claimant's terms and conditions of employment. For completeness, I deal first with her hours of work, which of course entirely affected how much she was paid.

57. First of all, of course, it is necessary to consider the written documentation. The offer of employment letter which the Claimant received from WGC was not as detailed as would have been helpful in what it said about hours and pay, but its effect does seem to me to be clear. It stated what the hourly rate was, and then said that the Claimant's salary would be based on a 35-hour working week. That is

mandatory language, telling the Claimant what hours her pay will be based on, and therefore what her pay will be, not what it might be as a maximum.

58. As for the terms and conditions document, the Respondent relies on the fact that the times when the Claimant was to start and finish work were not stated. That seems to me to be an omission that makes no difference to the overall position. The document refers in terms to "normal shift hours" and "additional hours", the latter not being guaranteed. That is very much therefore a statement that there were normal hours, which in turn by implication were guaranteed to the Claimant.

59. In practice, the Claimant worked 35 hours per week and more for WGC, and continued to do so for a period of time after the transfer to the Respondent; some months thereafter the hours began to reduce. It was certainly WGC's position that the Claimant had a 35-hours per week contract, and the Respondent ultimately accepted that to have been what it inherited with the Claimant's employment. Indeed, Mrs Davies concluded in her grievance appeal decision that the Claimant was to be "treated as on contracted hours".

60. There can be no reasonable doubt therefore as to the Claimant's terms and conditions relating to hours and pay at the point of transfer. It is true that most of WGC's employees were employed on flexible hours arrangements, but it is the terms and conditions of this particular employee, the Claimant, that have to be assessed. It is also true that Miss Carro Vazquez was of the view that the Claimant was on flexible hours, and she appears to have shared that view with the Claimant, but she was not responsible for determining the Claimant's terms and conditions. What she believed to be the case cannot override what the documentation provided, nor can the Claimant's evidence that her hours at WGC were "a bit flexible" on occasions.

61. The terms as to hours and pay in December 2016 being clear, the next question is whether the Claimant impliedly agreed to those terms being changed. The Claimant says that she had discussions with three managers not long after the transfer, asserting her right to a 35-hour week, but when told that she was, like her colleagues, on a zero-hours contract, she thought she had no alternative but to accept that. On balance, I am inclined to accept her evidence that these discussions took place. I do not accept the Respondent's interpretation of her e-mail of 14 February 2019. Her comment in that email about not needing to complain was, as the Claimant says, clearly in relation to her employment with WGC, pre-transfer.

62. The case law makes clear that I am to be very cautious about finding that the Claimant impliedly agreed to revised terms by continuing to work, eventually doing so for fewer than 35 hours per week and being paid on that basis. Both in **Selectron** and **Abrahall**, such implied agreement is described as an "exceptional" case. That is particularly so in light of my conclusion that the Claimant raised objections, when given what is now accepted to have been an erroneous understanding of her contract by the Respondent's managers.

63. She was employed on a reduced hours basis for almost 18 months (although in practice much less than that because of sickness absence), but the simple fact of a lengthy period of time is not by itself sufficient to signal implied agreement, and neither necessarily is the immediate and regular practical effect of the changed arrangements. The key question, as **Solectron** and **Abrahall** make clear, is whether that conduct is only referable to the Claimant having accepted revised terms or whether it is reasonably capable of any other explanation.

64. In my judgment, the Claimant's conduct is not referable only to her having accepted revised terms and conditions as to hours and therefore as to pay. As my findings of fact make clear, her conduct is explained by two factors, first a mistake on the Respondent's part – genuine as it may have been – as to her entitlements, and secondly her very reluctant and equally erroneous belief that the Respondent was right. Her conduct is reasonably capable of that explanation and on that basis, she did not impliedly agree to a change in her terms and conditions of employment. That conclusion is reinforced by the considerable difficulty of trying to identify when any implied agreement took effect. It cannot have been when the Claimant first worked fewer than 35 hours per week and there is no other evidence which would enable me to conclude when it was. Whilst it might have been said that the contract of employment as a whole was affirmed by continuing to work for many months without guaranteed hours (though that is not a point either relevant to or argued in respect of the unfair dismissal complaint), that is not the same as saying that the Claimant impliedly agreed to revised terms. I find that she did not.

Breach of contract and wages complaints

65. It plainly follows therefore, that by only paying the Claimant the hours she actually worked, rather than the pay she was entitled to, for the latter half of 2017 up to the date of termination of her employment, the Respondent was in breach of contract. The complaint of breach of contract therefore succeeds. On the same basis, the Respondent made unauthorised deductions from the Claimant's wages by paying her during the relevant months, and doubtless on multiple occasions, less than was properly payable to her. The complaint of unlawful deductions from wages is therefore well-founded. As Mr Scuplak indicated, the extent of the compensation, or deductions, may not be straightforward to determine, given the Claimant's sickness absences during part of the relevant period. It must be said however that it ought properly to be within the Respondent's knowledge when she worked less than 35 hours during those periods when she was fit to work and what she was actually paid accordingly. Those are matters for a remedy hearing if the parties are unable to resolve the matter between themselves.

Terms and conditions - duties

66. I turn next to consider the terms of the Claimant's contract of employment in relation to her duties. The statement of terms and conditions said, "A copy of your job description is available from your line manager. The employee accepts that he/she may be required to perform other reasonable duties or tasks outside the scope of his/her normal duties". That clearly gave the Respondent some flexibility in determining the work the Claimant could be expected to do, namely reasonable duties or tasks other than her normal work.

67. As for the job description, the Claimant said that she did not see it. As she did not dispute its contents apart from point 12, I am inclined to think that this was WGC's job description for the role, though I also accept that the Claimant did not see it until the question of her duties was being debated during her grievance – that was the Claimant's evidence and the Respondent was not able to gainsay it. The overall tenor of the job description is that of a supervisory role, though it is also true to say that points 12, 14, 26 and 29 provide broad scope for the Head Housekeeper to assign cleaning tasks and indeed other responsibilities to the job holder.

68. Particularly as I conclude that the Claimant did not see the job description, it is relevant to note what the Claimant actually did in practice, certainly up to the point of transfer and, it appears, after that until she went off sick in September 2018. Both parties' evidence is to the effect that the role was essentially supervisory and administrative in nature, with occasional cover for cleaning staff and involvement in periodic cleaning. That is confirmed by the documentary evidence from WGC, to the effect that the Claimant cleaned rooms on 9 days between the start of her employment in July 2015 and the transfer in December 2016, two of those days evidently involving more extensive cleaning and one of those days being voluntary on the Claimant's part.

69. In my judgment therefore, the Claimant's contract as to her duties meant that whilst she could be required to clean, did so occasionally and carried out periodic cleaning, typical PA or RA cleaning could not be said to be a contractually required regular feature of her work. Under her terms and conditions, she could be required to do duties outside of her normal routine, but not so that those other duties became routine; she could be assigned alternative duties by the Head Housekeeper, but not in such a way as to fundamentally change the nature of her role.

Unfair dismissal

70. With the terms of her employment identified as above, was the Claimant dismissed?

71. First of all, there was no meaningful challenge to the Claimant's case that she resigned because of acts or omissions of the Respondent. The crucial question is whether those acts or omissions, or any of them, amounted to a fundamental, repudiatory breach of the Claimant's contract of employment. The Claimant relies on three things, namely the Respondent's failure to pay backdated wages once it agreed that she was, and always had been, entitled to work 35 hours per week; its change to her job title; and its changes to her duties. She also relies on what she believes was the Respondent's failure to deal with her concerns appropriately by way of the grievance process.

72. Dealing with the grievance first, the Respondent's implied duties were to afford the Claimant a reasonable opportunity to have it considered and of course not to breach the wider implied term of trust and confidence in the way it dealt with it.

73. I can see no basis for criticising the Respondent in respect of the time taken to deal with the grievance. It was raised by the Claimant on 11, 14 and 15 February 2019, was originally due to be heard on 26 February 2019, and for perfectly understandable reasons was postponed to 2 March.

74. As to the substantive response to the grievance, in my judgment some of Miss Zdankowska's handling of the complaints was not ideal, as she in effect admitted, most notably her reaching conclusions about the Claimant's health without medical evidence and speculating about the Claimant's difficulties with Miss Carro Vazquez. Her decision letter, apparently prepared by Mrs Davies, also completely failed to deal with the question of the Claimant's claim for unpaid wages and failed to get to grips with how the question of her ill-health might be addressed, which Miss Zdankowska clearly recognised was an important issue. Both of those matters were expressly addressed by Mrs Davies on appeal.

75. It is clear that the Claimant was given opportunity to present her case, that investigations were carried out into the matters she had raised and that responses were provided, so that the grievance process itself did not breach the implied term of trust and confidence, and there was clearly therefore no breach of the implied obligation to give her a reasonable opportunity to have her grievance considered. That said, Miss Zdankowska's failure to deal with a fundamental feature of the Claimant's case was, objectively assessed, something which could contribute to a course of conduct likely to destroy or undermine trust and confidence. As just noted, Mrs Davies plugged some of the gaps on appeal. The focus of the Claimant's case was that the Respondent was in breach of the implied term of trust and confidence by its overall conduct in relation to her back pay, job title and duties, exemplified in the outcome of the grievance and grievance appeal. I will now deal with each one of those matters in turn.

76. I do not think the Respondent can objectively be said to have been in breach of any express or implied term in its handling of the question of the Claimant's job title. Whilst it is agreed that the Claimant was more senior than those with the job title "Supervisor" during her employment at WGC, and was undertaking a very different role to them, the Respondent at no point sought to change her job title in communication with her or on any contract or similarly formal document. As it argued, the different job title on its internal systems simply reflected its particular terminology and was purely administrative; it did not of itself represent any change in status for the Claimant. As to the Claimant's assertion that she wanted to be known as Deputy Housekeeper, which was equivalent to the role of Assistant Head Housekeeper at WGC, she did not raise that with the Respondent at any time, which is evidence suggesting that it was not an issue of material concern.

77. In relation to duties however, the position is very different. The Claimant was clearly told by Ms Matau that in order to work more than the 3 hours she was doing at the time (whilst her grievance was under consideration), and to work up to 7 hours a day in future – which the Respondent had agreed she was entitled to do and be paid for – she would have to do PA and RA duties. This was confirmed by Miss Zdankowska's decision dealing with the Claimant's grievance and by Mrs Davies on appeal. Both made clear the Claimant's duties may be modified. Mrs Davies said that RA, PA and other cleaning duties were not the main focus of the Claimant's role, but she may be asked to pick up these duties to suit the needs of the business. This could only mean what Ms Matau had communicated: neither Miss Zdankowska nor Mrs Davies said otherwise. How 35 hours per week might be filled was not left open, nor were there simply tentative suggestions that the Claimant may have to clean more regularly in future, as Mr Scuplak contended. The overall message being given to the Claimant was that cleaning as an RA or PA would have to become a regular feature of her role.

78. Even accepting the flexibility within the contractual terms – treating the terms of the job description as of marginal importance given that the Claimant did not see it – this represented a material change in the work the Claimant was going to have to carry out if she was to work more hours than the 3 hours per day she had been doing on her return to work from sick leave, and if she was to work in the longer term the 35 hours per week it was agreed she was entitled to. Her work was not being reasonably modified, as Mrs Davies contended, within the contractual term referred to above, but seriously modified, to suit the situation the business found itself in. None of that is to denigrate the importance of cleaning, simply to say that this was

not the job the Claimant had been doing. As she said, she would never have accepted the job if she had thought it involved regular cleaning of this nature.

79. It might be said that this was all anticipatory breach; even if so, far from withdrawing it, the Respondent affirmed it by the grievance and appeal outcomes. In my judgment therefore the Respondent was in anticipatory breach of the express term relating to the Claimant's duties and certainly in breach of the implied term: its position was crystal clear and was likely to destroy or undermine the Claimant's trust and confidence. The Respondent may have had difficulty in filling 35 hours with management duties – though Miss Carro Vazquez's evidence was that in fact the Respondent could have done so – but that does not change my analysis of the effect of its decision to impose different duties on the Claimant without her consent.

80. As to pay, Mrs Davies' decision was that it was not right to pay the Claimant for hours she had not worked and that there was also a question over whether the Claimant would have been able to work 35 hours per week over the relevant period. The reality is however that the Respondent agreed that the Claimant had always had a 35-hour contract and, as I have found, was entitled to be paid on that basis. She had admittedly had periods of absence, but it ought to have been possible for the Respondent to calculate what wages could properly be said to have been lost, or at least something close to it.

81. By the firm positions it took in relation to the Claimant's duties and pay, the Respondent was in breach of the express terms of her contract of employment as I have outlined them – in respect of her pay, the Respondent effectively agrees that was the case. Assessed objectively and overall, its conduct in these respects was also highly likely to destroy trust and confidence, given the contractual position as the Claimant correctly saw it and as I have analysed it. The grievance and appeal outcomes confirmed the Respondent's position. A breach of two core express terms of the contract was by any measure a fundamental, repudiatory breach, as in any event was the breach of the crucial implied term.

82. Did the Claimant affirm the contract? In short, no. She was certainly entitled to see how Respondent dealt with her complaints. She resigned just 8 days after the appeal outcome letter was written. The Claimant was thus dismissed. As the Respondent does not contend that the dismissal was fair, the Claimant's complaint of unfair dismissal is well-founded.

83. I apologise to both parties for the delay in preparing Judgment and Reasons in this case. Unless the parties are able to resolve the question of remedy between themselves without further involvement of the Tribunal, as I would hope they could, the matter will now proceed to a remedy hearing. Should that be necessary, and should either party believe that any Case Management Orders are necessary to ensure that they are ready for that hearing, they should write to the Tribunal at the earliest opportunity.

Employment Judge D Faulkner

Date: 7 February 2020

JUDGMENT SENT TO THE PARTIES ON

08 February 2020

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