EMPLOYMENT TRIBUNALS

Claimant: Ms T Sales

Respondent: G4S Secure Solutions (UK) Limited

Heard at: London South **On: 23 January 2020**

Before: Employment Judge Khalil (sitting alone)

Appearances

For the claimant: Ms Forsyth, Case worker (South West London Law Centres)
For the respondent: Ms Page, Solicitor

RESERVED JUDGMENT

1. The claim for constructive (unfair dismissal) is not well founded and fails.

2. The claim for unauthorised deductions (unpaid wages) is well founded and succeeds. The claimant is awarded £323 (subject to (5) below).

3. The claim for unauthorised deductions (holiday pay) is not well founded and fails.

4. The Tribunal awards 2 weeks pay pursuant to S.38 Employment Act 2002. The sum awarded is £1016.

5. The Tribunal awards a 10% uplift for the respondent's unreasonable failure to comply with the Statutory Code of Practice (grievance). This applies to the sum awarded in (2) above thus the sum is increased to £355.30.

<u>Reasons</u>

<u>The claims and the issues</u>

1. By a Claim form presented on 12th of January 2019, the claimant brought claims for constructive unfair dismissal, unauthorised deductions from wages and a failure to provide written statement of employment particulars. The claimant was represented by Ms Forsyth, an employment caseworker at the South West

London Law Centres and the respondent was represented by Miss Page, Solicitor.

2. The Tribunal heard evidence from the claimant and from Mr Bryan Hall, regional manager (southern region) for the respondent. Witness statements had been exchanged. There was an agreed bundle of documents.

3. The claimant had presented a list of issues which did not mirror the pleaded claim. The list of issues in relation to the constructive unfair dismissal claim were as follows: did the respondent breach the implied term of trust and confidence by:

    a) failing to give notice of the intention to move the claimant (referred to as redundancy in the claim form)
    b) failing to give notice of the intention to demote her (not expressly pleaded)
    c) unilaterally reducing the hours the claimant worked and so her pay (not expressly pleaded)
    d) unilaterally changing her job duties (not expressly pleaded)
    e) denying her role was redundant
    f) escorting the claimant off-site (the claim form also referred to an alleged prohibition against contacting people)
    g) failing to consider the claimant for the security guard role that replaced a supervisory role
    h) insisting the claimant sign new terms and conditions (not expressly pleaded)

4. In relation to the unauthorised deductions claim this was for wages for 25, 30 and 31 July 2018 and 1 and 7 August 2018, days when the claimant says she was ready willing and able to work but was not provided with any work and did not receive pay.

5. In addition, the claimant says that from January 2018, on occasions when she covered the work of a security guard, she was only paid at the security guard's rate of pay and not at the usual rate of pay as a security supervisor. This had also impacted on her holiday pay rate for the periods of holiday since.

6. Further, the claimant says that her holiday pay was not calculated having regard to the over time she worked on a regular basis when she was covering for security guards at weekends. The claim in this regard was limited to 2 years back pay from the end of her employment but subject to the period above in paragraph 5.

7. Also, the claimant said she had not been provided with a statement of employment particulars pursuant to section 1 of the Employment Rights Act 1996.

8. The evidence in this case concluded on 23rd of January 2020 and the parties were ordered to provide written submissions by 6 February 2020 which was

done. As there had been limited witness evidence and because both parties were represented, this was considered to be proportionate having regard to the overriding interest.

Relevant findings of fact

9. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

10. Only relevant findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken too in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

11. The claimant was employed as a security supervisor at the Knolly's House and Stephenson House ('K&S House') site in Croydon. Her employment commenced on 27th of March 2002 with Alpha plus security Ltd. Her employment transferred to the respondent pursuant to TUPE on 12 September 2009. Since her transfer to the respondent, she was not given a new/updated statement of employment particulars.

12. The respondent is in the business of providing security officers to provide security and surveillance services to a variety of clients' premises on a nationwide and global basis.

13. The site at which the claimant worked had various occupants/tenants. The site was managed by Savills on behalf of the site's owner.

14. The claimant's duties included those of a security officer, organising the rotas, arranging cover, leading on fire evacuations, liaising with the building tenants regarding security issues and liaising with the facilities manager and the building manager. There was a dispute between the parties in relation to whether the claimant also had responsibility to monitor CCTV footage. The Tribunal accepts the claimant's evidence that she did do this from time to time when employees of Savills were not able to do this themselves.

15. The claimant was paid at an hourly rate of £9.50 as a supervisor. The pay of a security guard was £8.16 per hour. There was no dispute that from January 2018 onwards the claimant's pay on occasions when she would cover the work of security guards at the weekend was paid at the security guard rate of £8.16 hour. Up until then it had been paid at the hourly rate of £9.50 per hour.

16. This change was implemented by the claimant's manager Mr Abdullah as he said that the claimant should not have been paid the higher hourly rate whilst

doing security guard work only. The claimant did not protest at the time or thereafter and undertook on average, she says, up to three weekend shifts per month thereafter for approximately seven months until her resignation. There was no grievance raised in this regard or any approach to HR and no further discussion. The claimant did not challenge her manager's view of the situation and worked on. Mr Hall, for the respondent said in evidence that the claimant had received the higher rate until January 2018 in error.

17. The Tribunal accepts that the claimant did undertake overtime but had no specific evidence of the actual dates or occasions on when this was undertaken.

18. The Respondent was instructed by its client Savills to remove the claimant as a security supervisor from the site. This took place on 23rd of July 2018.

19. Mr Hall for the respondent says that for approximately two weeks leading up to that date he was in discussion with Savills trying to persuade them not to undertake this measure but his attempts to put his case forward were unsuccessful. He explained that Savills had the right to request this under the commercial contract and despite his attempts to push back, Savills insisted on proceeding in this way to reduce the cost to the tenants in the building. The Tribunal accepts Mr Hall's evidence in relation to its efforts and conversations with Savills in this regard.

20. The Tribunal saw the email exchange in the bundle at pages 99 to 106 in relation to some of the conversations. At page 104, the assistant category manager for Savills, Mr Jim Butterworth, stated that the need to remove the claimant was due to the changing specification and the position no longer being required.

21. The Tribunal finds that there was no other ulterior or sinister motive in relation to the need to remove claimant from the site and the claimant accepted this in evidence.

22. Mr Hall decided to handle the conversation with the claimant himself in relation to the instruction from Savills. He said he had regard to the sensitivity of the situation and her long service. He had informed Savills that he would handle the conversation himself. This was at page 103 of the bundle. In the same email, he made reference to his intention to relocate the claimant to another site and subject to that, putting her at risk of redundancy.

23. Mr Hall met with the claimant on 23rd of July 2018 and informed her that her position was no longer required by Savills. There was a dispute between the parties about the language and terminology used by Mr Hall. The Tribunal finds that Mr Hall did refer to the claimant's position being obsolete. It is an unusual word to use and one which is likely to be remembered if it was said. The Tribunal also finds that Mr Hall did not make reference to this as a redundancy

situation. Mr Hall was able to discuss at this meeting three alternative positions for the claimant which Mr Hall considered to be potentially suitable. He had made reference to this in his email exchange with Savills and his intention was only to consider the situation as a redundancy if he was unable to relocate the claimant. Whilst Mr Hall could have treated this as a redundancy situation from the very beginning, the Tribunal finds that Mr Hall was not doing so and was genuine in his approach (and was using best endeavours) to simply relocate the claimant to another site.

24. Mr Hall accepted that the claimant was upset and in shock through the course of this meeting. Mr Hall said he would be able to offer the claimant suitable alternative positions/assignments. These were available immediately in Sutton and Croydon and a further position would become available in a few weeks in Wimbledon. Mr Hall said that these positions would be on the same terms and pay. Crucially, Mr Hall informed the claimant that she would be able to continue her arrangement of working five days/shifts, Monday to Friday. Mr Hall informed the claimant that she could trial each of the three positions before deciding on her preference. The claimant agreed in evidence that Mr Hall had said all of this to her. She said in evidence that he said that she was not to worry.

25. In his witness statement, Mr Hall, having regard to suddenness of the situation, said he gave the claimant two days off with pay as a gesture of goodwill. However, in evidence Mr Hall stated she was given one day's pay and the Tribunal finds that that is what happened.

26. The Tribunal finds that the claimant was escorted off site on this day. Mr Hall said he escorted the claimant out of consideration, because it was a difficult situation. The claimant says she felt untrusted, awful by this. The Tribunal finds that there was no ill motive or bad faith on part of the respondent in this regard. This was not a conduct related request of the client and there would be no reason for the respondent to behave harshly with the claimant. The unexpectedness and genuine upset of the claimant is likely to have clouded her thought process.

27. The following day, the claimant emailed Mr Hall asking for confirmation in writing about the request from Savills to remove her from the site. Mr Hall responded on the same day confirming the cost-cutting reason of Savills, reiterating that the claimant had done nothing wrong and stating that her line manager would be in touch regarding the Sutton position and training for it and also confirming he would be talking to the manager for the Wimbledon site later in the week. This email exchange was at page 108 and 109 of the bundle.

28. On the following day, 25th of July 2018, the claimant emailed Mr Hall informing him that she hadn't yet heard from her line manager and also asking if she would be getting paid for the days off i.e. 24th and 25th of July. Mr Hall responded almost instantly apologising that she had not heard from her line manager yet expressing his anger with him in the email. He said that he had

made arrangements in relation to the Sutton site. He also confirmed that she would be paid for these two days off and to inform him if she had not heard anything further by 2:30 PM on that day. This email exchange was at page 107 and 108 of the bundle.

29. The claimant undertook two days of training at the Sutton site on 26 and 27th of July 2018 on a 7.00am to 7.00pm basis i.e. her usual working hours. This was not disputed. There was a dispute between the parties about whether Mr Hall informed the claimant that this was to be a 30 day trial period. Mr Hall agreed in evidence that he did say it was a trial period but could not be sure if he had made reference to 30 days. The Tribunal finds that whilst Mr Hall did make reference to this being a trial he did not refer to the period of it. Whilst undertaking the training at Sutton, the site supervisor Mr Jim Swain informed the claimant shift patterns at Sutton were a 'four on four off' basis. The claimant said that she had been told otherwise and that she was supposed to be doing Monday to Friday, otherwise she would suffer and receive a lot less money. In addition, the claimant says she was asked to sign a new contract by Jim Swain relating to the Sutton site by 8 August 2018. This evidence was not challenged and is accepted by the Tribunal.

30. There was also a dispute about when the claimant informed Mr Hall that she was not interested in the Croydon position. Mr Hall said this was in his first meeting with her on 23rd of July. The claimant says she informed another security guard and Mr Jim Swain, manager of the Sutton site whilst she was undertaking her training at Sutton, following the issues regarding running water that she says she had been informed about. Whilst the email from Mr Hall of 24th of July at page 108 bundle does only make reference to Sutton and Wimbledon, the Tribunal finds that it would be extremely unusual for the claimant to rule out a position in Croydon which was the area in which she was already based and had been for a number of years when first being informed of the situation. The Tribunal thus finds that she did not inform Mr Hall on 23rd of July that she would not wish to work at the Croydon site.

31. The claimant was on holiday on 2 and 6 August 2018. The claimant was not allocated any work on the 30th and 31 July 2018 or Wednesday, 1 August and Tuesday 7 of August the day after she returned from holiday. There was no challenge to this evidence and the Tribunal finds that the claimant did not work on these days and did not receive pay for these days.

32. After the claimant returned from her holiday, she looked at the roster for the Sutton site (page 171) and saw that she had been rostered on a 'four days on four days off' basis. The claimant did not query this with Mr Hall by telephone or by email. She agreed in evidence that she was aware that Mr Hall was more senior to her line manager.

33. The claimant then resigned. Her resignation email sent on 8 August was at page 115 of the bundle. Her reasons were because of the way she said her

"redundancy" had been handled, that she was being demoted, the process of being escorted off, the loss in pay she was going to suffer because of the projected rota and she also complained about the reduced pay from January 2018 on occasions when she had covered security guards and was no longer receiving her usual pay for it and the impact of this on her holiday pay too.

34. Mr Hall responded to the claimant's email within 20 minutes of receiving it reiterating that the claimant was not being made redundant, suitable alternatives were on offer at Sutton and Wimbledon (about which he was awaiting to hear that week) and her pay was to remain the same. He also confirmed the Monday to Friday arrangement which she should have been working and he was happy to take this up on her behalf and he expressed his regret that she had not brought this to his attention. In relation to the reduction in pay from January he supported the decision which her line manager had made. He asked the claimant to inform him if she still intended to resign as then he would need to inform the team at Wimbledon that she was no longer interested in that position. The email was at page 114-115 of the bundle.

35. On the same day of her resignation, and before the claimant had resigned, there was an email exchange between Mr Hall and Mr Govans, Contracts Manager, in which Mr Govan's was querying the claimant's non-attendance for her scheduled shift at Sutton and he referred to conflicting stories about the position at Sutton and Wimbledon. Mr Hall responded by confirming that she was given the choice of Sutton or Croydon whilst he was arranging to get her into Wimbledon. Mr Arsalan Khan, Area Operations Controller, also responded stating that the claimant had told him that she would be doing her shift at Sutton while she was waiting for Mr Hall to get her trained at Wimbledon. These emails were at page 112 and 117 of the bundle.

36. Around the time the claimant ceased working at K&S House, the respondent placed a receptionist (Jacqueline Woodhouse) on the same site pursuant to a long-standing vacancy which the claimant herself had been involved with. Mr Hall did not have any involvement in this recruitment and the Tribunal accepts his evidence in this regard. The claimant also stated in evidence this recruitment was being handled by a different 'part' of the respondent and was for the medical centre on site. She also said it was a lower grade job starting at £8.16 per hour rising to £8.50 after probation. The Tribunal accepts her evidence in relation to this role. This role was not offered to the claimant and neither did the claimant raise it with Mr Hall or anybody else. This was not disputed.

37. There was also a dispute about whether Mr Hall was aware of the claimant's serious illness (cancer) of her grandson. Mr Hall denied that he was aware. The Tribunal accepts his evidence in this regard. Mr Hall said in evidence that he had not been to the site for some six months or so. He was not the claimant's direct line manager. Mr Hall has responsibility for 170 sites. The Tribunal's

assessment of Mr Hall's evidence was that there was no reason for him to withhold knowledge if he was aware.

38. After resigning, the claimant via her representative submitted a grievance to the respondent which was at page 122-125 of the bundle. A subject access request was also submitted which was at one to 126-127 of the bundle. The subject access request was acknowledged by the respondent at page 128 of the bundle on 6 September 2018. The grievance was responded to by a letter dated 13th of September 2018 which the claimant alleged was not contemporaneous, alternatively fabricated. This allegation is very serious. The author of the response is also a Solicitor. The Tribunal finds, without more, this was not a fabricated letter. The Tribunal notes that no such claims were made in relation to the acknowledgement to the subject access request. There was no evidence in the bundle that the claimant had chased a response to the grievance. Indeed, there had been correspondence relation to the alleged overpayment in November and December 2018. The Tribunal observed from the respondents opening skeleton argument that there had been a dispute between the parties in relation to the inclusion or otherwise of ACAS correspondence in the bundle but the Tribunal was not taken to any documentation in this regard and neither was this issue raised by either party at the outset of the hearing. The Tribunal had no motive before it why the respondent would behave in such a way.

39. In the outcome letter of 13th September 2018, the respondent requested to see the claimant's contract dated 24th of December 2004 (pre-TUPE) and made reference to considering reinstating the claimant to a suitable position to resolve any dispute. The claimant was invited to consider this and respond accordingly.

<u>Applicable law</u>

40. Under S. 95 Employment Rights Act 1996 ('ERA'), an employer is treated to have dismissed an employee in circumstances where he/she is entitled to terminate the contract by reason of the employer's conduct.

41. The legal test for determining breach of the implied term of trust and confidence is settled. That is, neither party will, 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 employer and employee ***Malik v BCCI 1997 ICR 606.*** This is an objective test.

42. The correct test for constructive dismissal was set out and established in ***Western Excavating v Sharp 1978 ICR 221*** as follows:

- Was the employer in fundamental breach of contract?
- Did the employee resign in response to the breach?
- Did the employee delay too long in resigning i.e. did he affirm the contract?

43. By s.98 (2) ERA an employer needs to have a potentially fair reason for an employee's dismissal and by S.98 (4) the employer must act reasonably in treating that reason as a sufficient for the employee's dismissal.

44. Pursuant to S.13 ERA, an employer shall not make a deduction from a worker's wages unless authorised. By S.13 (3) the deduction is the difference between the amount paid and the amount properly payable.

45. Pursuant to S. 1 ERA, an employee is entitled to a written statement of employment particulars within 2 months of commencement of employment and any changes to that are to be provided within one month after the change in question (S. 4 ERA).

<u>Conclusions and analysis</u>

46. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

<u>Constructive dismissal</u>

47. The references below are to the issues and/or pleaded claims identified in paragraph 3 above.

48. **<u>3 (a) & (b)</u>:** The Tribunal concludes that by not giving the claimant advance notice of the decision to remove her from the site at which she was working, the respondent did not behave in an improper or unreasonable way calculated or likely to destroy trust and confidence. The Tribunal concludes that Mr Hall was attempting to persuade its clients to avoid having to make the decision to remove the claimant from the site. With that in mind, the Tribunal concludes that not informing the claimant about the intentions of its client would shield the claimant and not unnecessarily unsettle her. The opposite would or could have been more destabilising. The Tribunal concludes that Mr Hall's attempts were genuine and carried out in good faith. In so concluding, the Tribunal does not import the question of motive into the test or conclusion. It is simply part of the factual matrix having regard to the emails at pages 104 and 105 which clearly referred to discussions taking place. In addition, the decision to remove the claimant was entirely client driven and was only implemented once Mr Hall realised that that was the only option in relation to that site. That was the context which was explained to the claimant and it was made explicit that it was not down to anything the claimant had done. Also, the respondent was not, at this stage, proposing to dismiss the claimant which she was aware of.

49. **<u>3 (c), (d) & (e)</u>:** It was open to the respondent not to treat the situation as a redundancy exercise providing its objective to relocate the claimant in comparable terms and conditions was a genuine objective which the Tribunal

has found it was. In doing so, it was operating with reasonable and proper cause and not in a way calculated or likely to destroy trust and confidence. It was equally open to the respondent to treat this exercise from the outset as a redundancy situation, alternatively to revert to a redundancy situation if its attempts to relocate the claimant were proving to be unsuccessful. The Tribunal was not taken to any mobility clause but that is not the only basis upon which an employee can be relocated. This could have happened on the consensual basis. Alternatively, the claimant could have been put through a formal process to change terms and conditions or a redundancy consultation process as already referenced. Indeed, the claimant did not on any occasion resist or challenge the respondent's offer for her to trial a comparable role at three separate locations, the emphasis being that it was a trial. The training which claimant undertook at Sutton was not disputed to be a trial. In the claimant's witness statement, paragraph 37, she agreed that Mr Hall was to come back to her with the option on the Wimbledon site (whilst she was working at Sutton). This is what she had also relayed to Arsalan Khan (page 117 of the bundle). The arrangement at Sutton was thus temporary and the claimant was well aware of this.

50. **3 (f) ('escorting'):** The Tribunal concludes, that in escorting the claimant's off-site, the respondent through its regional manager Mr Hall was taking responsibility for the situation and was supporting the claimant given the suddenness of the situation and her long service. The Tribunal concludes that the alternative scenario whereby the claimant was unescorted and/or a senior manager was not present in these circumstances, would have been a less reasonable way to proceed. The very next day the claimant asked Mr Hall to confirm in writing why he was asked to leave the site on the previous day and his response was sent to her very quickly "reiterating" that the claimant had done nothing wrong and that it was simply a price and hours reduction/cost-cutting by Savills. By reiterating his message and having regard to the various assurances being given as set out in the findings in paragraphs 23-25 above, the Tribunal concludes that Mr Hall's conduct during the 'escorting' process was supportive, reassuring and mitigating. In the same email Mr Hall made reference to the Sutton site training and his intended discussions with the Wimbledon site manager. Mr Hall in evidence readily accepted the claimant's upset and explained it was for that reason he felt it important for him to be personally involved. He said he had walked her to the door out of consideration. Although this relates to motive, Mr Hall's personal presence or manner was not being questioned. The Tribunal concludes that Mr Hall did not act without reasonable or proper cause or in a way calculated or likely to destroy trust and confidence.

51. **3 (f) ('prohibition'):** The Tribunal concludes that there was no express prohibition placed on the claimant about contacting people with whom she had worked. The claimant did say in her witness statement that she was told that she could not return thereafter and have any contact with anyone in the building. When she gave evidence about this first conversation and being

escorted off-site she did not recount being told that she could not return or have any contact with anyone in the building. The Tribunal concludes that Mr Hall was acting in accordance with the respondent's client's instructions by removing the claimant from the site immediately. The instruction was in the email from Savills dated 18th of July at page 103 of the bundle. The Tribunal also had regard to the email from Savills at page 105 of the bundle in which they had referred to their wish to avoid any fallout on site. The Tribunal did not hear any evidence about the claimant's desire to return to the site to see her ex colleagues or that any such request was made which Mr Hall may have been able to assist to facilitate. The Tribunal has regard to the claimant's long service and what would have been likely social media connections through which the claimant could have reached out to her colleagues instead.

52. **3 (g):** In relation to the reception/security guard role which was filled around the time of the claimant's removal from the site, the Tribunal concludes that the respondent did not act in an improper or unreasonable way regarding this appointment. The Tribunal has accepted that this was not a role with which Mr Hall was familiar or aware. On the contrary, it was a role about which the claimant was aware as she had been involved in the recruitment for it when it was a vacancy. The Tribunal accepts that the claimant would not have been aware that it had been filled until she discovered this but that does not mean the claimant could not have enquired about this of Mr Hall if this was of interest. The Tribunal notes that the claimant refers to this role as a receptionist position in her witness statement and it would also be change from a site supervisor. The pay was also considerably less £8.16 per hour rising to £8.50 per hour of the probation. This was compared with her hourly rate of £9.50. Reduction in the claimant's remuneration was something the claimant was extremely keen to avoid. Despite the assurances of Mr Hall, regional manager, she had seen her projected earnings on the rota/the projected loss in remuneration. She referred to this in her witness statement. This is also cited in her resignation letter. The Tribunal concludes that it is simply not plausible that the claimant would have considered or entertained the reception position at her existing site and suffer such a loss in pay. The Tribunal concludes that the situation might have been different if the claimant had not been offered to trial three other roles on the same terms and conditions including pay and pattern, but these offers had already been made. The Tribunal will address below its conclusion in relation to the confusion which arose in relation to her shift patterns and projected rota.

53. **3 (h) (& (c)):** In relation to the assertion that the claimant sign new terms and conditions the Tribunal accepts and concludes that there was confusion and a misunderstanding in relation to what had been agreed between the claimant and Mr Hall and that was through no fault of the claimant. That confusion was obvious from the email at page 117 of the bundle wherein Mr Govans stated:

"What arrangement did she have before accepting this position, as getting conflicting stories"

It was in response to this email, that Mr Arsalan Khan had confirmed his understanding, as already noted above, that the claimant had said she would be doing shifts at Sutton until she could be trained at Wimbledon. The Tribunal concludes that if the claimant had not been given an express assurance from Mr Hall about her pay and her five-day working shift pattern, then mistrust in the confusion which arose thereafter may have been well-founded. However, she was in written dialogue with Mr Hall. He had been responsive. He had also been supportive of the claimant expressing his anger in an email (page 107) in relation to what Mr Arsalan Khan should have done. That in itself, would and should have given the claimant confidence in Mr Hall's authority. The claimant confirmed in evidence that she was aware of his seniority. In reaching its conclusion, the Tribunal does have regard to the timing and content of Mr Hall's email in response to the claimant's resignation at page 114. The inescapable conclusion is that had the claimant called or emailed Mr Hall upon seeing her rota, the misunderstanding would have been resolved based on Mr Hall's commitment to the claimant and his seniority. The Tribunal is fortified in reaching its conclusion by Mr Hall's almost immediate request to the claimant to reconsider her resignation. The claimant has referred to ***Roberts v Governing Body of Whitecross School UKEAT/0070/12*** in her submissions and the reference to a settled intention on part of the respondent. The Tribunal concludes there was no settled intention to reduce her pay or for her to work 4 days on, 4 days off. The settled intention was either as communicated by Mr Hall expressly, or was to be confirmed following the claimant's trial/temporary arrangements. Her future may have been at Wimbledon which the claimant was well aware of. Viewed objectively, a reasonable employee would have waited.

54. As a result of the above conclusions, the Tribunal concludes that the respondent did not singularly or on a cumulative basis without reasonable or proper cause, conduct itself in a manner calculated to or likely to destroy the implied term of trust and confidence or, commit any repudiatory breach of any express term of the claimant's employment. The Tribunal has regard to ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1 CA*** in which the Court of Appeal gave guidance about the approach in constructive dismissal cases.

- What was the most recent act or omission which the employee says caused or triggered the resignation?
- Has she affirmed the contract since?
- If not, was that act or omission by itself a repudiatory breach of contract?
- If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively, amounted to a breach of the implied term of trust and confidence?
- Did the employee resign in response or partly in response to that breach?

55. Applying the above principles, the Tribunal concludes that the last straw relied upon was the rota which the claimant was assigned to and which she viewed on 7 August 2018. Having regard to the findings and conclusions above that was not, in all the circumstances, itself a repudiatory breach of contract. Neither was

it part of a course of conduct from 23 July 2018, which cumulatively viewed, breached the implied term of trust and confidence.

Unauthorised deductions – wages

56. The Tribunal concludes that the claimant was ready willing and able to work on 25th of July, Monday 30th and Tuesday 31st of July 2018 and on Wednesday, 1 August and Tuesday 7 August 2018. In relation to 7th of August Tribunal noted that the claimant was not scheduled to work on that day according to the rota on page 171 of the bundle, thus she did not fail to attend work on that day. The respondent did not offer any evidence all argument in relation to these dates and thus the Tribunal concludes that the claimant's wages for these dates were not paid and the unauthorised deduction is the amount which was properly payable to the claimant. The Tribunal considered this to be 12 hours of pay on each date at £9.50 per hour. The total award is **£570.**

57. The Tribunal noted that in evidence Mr Hall said that only one day of wages was paid to the claimant as a gesture of goodwill (24 July), not two days as had been claimed previously.

58. The Tribunal also finds that the respondent did make a payment to the claimant in the sum of £247.10 (which was not challenged) and the award will need to be reduced by this sum pursuant to S. 25 (3) ERA. The award is thus reduced to **£323 (subject to paragraph 68 below).**

59. In relation to the unauthorised deductions claim for the period January 2018 onwards, in respect of the reduction in pay when the claimant would undertake over time performing a security guard role, this claim fails in relation to 27 days. The Tribunal concludes from the payslips at pages 91-99 of the bundle that there were 27 days on which the claimant was paid £8.16 per hour as opposed to £9.50 per hour. The Tribunal was satisfied that from January 2018 there had been a reduction in the claimant's pay in relation to over time. The Tribunal concludes, there was a custom and practice of this pay being payable at the claimant's actual hourly rate for as long as the claimant had undertaken this overtime previously; it had become an implied term of the claimant's employment. However, when the pay was unilaterally changed, the claimant continued to work without protest. She did not complain informally or formally to her Manager, her Manager's manager or to HR. She agreed this in evidence. She did not raise a grievance. This impacted the claimant immediately. The claimant did overtime on 27 occasions after the change without protest. Having regard to these matters, the Tribunal concludes the claimant did impliedly by her conduct accept the change. There was thus no breach of contract. The Tribunal considers the factual circumstances to emphatically support this conclusion.

Unauthorised deductions – holiday pay

60. This part of the claimant's claim was not entirely clear. The claimant appeared to be saying that when she took holiday, she would only be paid on a flat five days per week basis regardless of factoring in the regular overtime she said she had been working. In addition, her claim for the period from January 2018 onwards was that the lower hourly rate she was receiving for the overtime would get factored in and thus reduce her holiday pay (on this basis only) because of the payroll system which the respondent used.

61. There were however no details provided in relation to when the claimant took holiday and for how long, what remuneration had been earned in the appropriate 12 week reference period before then and what the alleged shortfall was in relation to holiday on each occasion the claimant took holiday. There was also no information or evidence provided in relation to the basis upon which the claimant said there was a series of unauthorised deductions and whether or not there was a three-month gap in between each period.

62. No details were provided in the claimant's witness statement or in evidence other than the broad headline assertion. There were no particulars provided in the claimant's schedule of loss other than the overarching claim for £35.64 for the period January 2018 to August 2018 and a claim for £1683.36 for the period 8th August 2016 to 8th August 2018. In the claimant's submissions, it was simply referenced that the claimant "regularly worked weekends". The payslips at pages 93, 94, 96 and 98 did make reference to payments for holiday pay but this was wholly inadequate, without more, for the Tribunal to calculate the alleged shortfall, particularly with regard to the observations in paragraph 60 above. The Tribunal was not even taken to these documents, neither was any witness in relation to the holiday pay claim.

63. The claimant's case was not put to the respondent, the respondent's case was not put to the claimant and neither party challenged each other's evidence.

64. The Tribunal was left to decide a claim which was not particularised and not certain. In those circumstances the Tribunal was not able to uphold the claimant's claim and the claim fails.

<u>Written statement of employment particulars -S.1 & S.4 ERA and S.38 Employment Act 2002</u>

65. The Tribunal concludes that the claimant was not given/did not have an up to date S.1 Written statement of employment particulars pursuant to s. 4 ERA. The Tribunal concludes that the particulars in relation to hourly rate and identity of the employer changed pursuant to S.1 (3) (a) and S.1 (4) (a) ERA. The Tribunal confirms these particulars to be G4S Secure Solutions (UK) Limited (name of employer) and £9.50 (hourly rate) respectively.

66. As the Tribunal has upheld part of the claimant's unauthorised deductions claim and because of the Tribunal's conclusion in paragraph 65 above, the Tribunal

must increase the claimant's award between 2 weeks pay and 4 weeks pay pursuant to S.38 (3) & (4) of the Employment Act 2002. The Tribunal awards 2 weeks' pay as the breach was in relation to discrete/limited changes in particulars. The award is £**1016** applying the statutory cap on the appropriate date of £508 per week.

ACAS code of practice on grievances - uplift

67. The respondent did not invite the claimant to a grievance hearing following the submission of her grievance. The ACAS code applies expressly to employees. At the time the claimant raised her grievance she had resigned. She was no longer an employee. However, the Tribunal applies a purposive interpretation and construction of the language and considers references to employee and employer to include ex-employee and ex-employer. The related disciplinary code includes the prospect of a dismissal and a right of appeal. That would inevitably apply to an ex-employee.

68. The respondent's non-compliance with paragraph 33 of the code is mitigated by a response letter being written, a request for documentation and an invitation to look at redeployment. The non-holding of a grievance meeting, nevertheless, was an unreasonable failure. The Tribunal awards a 10% uplift. The award in paragraph 58 above is thus increased to **£355.30**.

Public access to employment tribunal decisions
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Khalil

19 March 2020