EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111134/2019 (A)

Held at Aberdeen on the 4th and 5th February 2020

Employment Judge J Hendry

Mrs Karen Urquhart	**Claimant** **Represented by** **Mr F Lefevre** **Solicitor**
Temple Medical Ltd	**Respondents** **Represented by** **Mrs Y Buckle** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is the following:

1. The complaint of unfair dismissal succeeds
2. The respondent company in respect of the claimant's unfair dismissal shall pay the claimant a monetary award amounting to Seven Thousand Two Hundred and Ninety Six Pounds and Ninety Six pence (£ 7296.96) consisting of a basic award amounting to £5717.70 and a compensatory award of £1579.26.
3. The complaint of wrongful dismissal succeeds.
4. The claim for unlawful deduction from wages succeeds and the respondent company shall pay the claimant the sum of One Thousand Seven Hundred and Eighty-Seven Pounds and Thirty-Six pence (£1787.36).
5. The claimant being entitled to accrued holiday pay at the time of her dismissal the respondent company shall pay the claimant the sum of Two hundred and Sixty-Six pounds and Forty Pence (£266.40) in respect thereof.

REASONS

1. The claimant in her ET1 sought findings that she had been unfairly dismissed, wrongfully dismissed and had suffered unlawful deductions from her wages. She sought compensation.

2. The respondent company in their ET3 denied that the claimant had been unfairly or wrongfully dismissed. Their position was that the claimant had, through her actions, committed an act of gross misconduct namely fraud. In relation to the claim for unlawful deduction of wages their position was that the claimant had been overpaid in the sum of £3,033.33 and that the respondents had utilised their contractual rights to deduct this sum from monies owed to the claimant leaving a balance of £157.97 payable by her which sum they counter claimed for. They denied that any holiday pay was due or any other sums were outstanding.

3. Prior to the hearing the respondent's representatives had indicated that they intended to challenge the claimant's quantification of loss in relation to mitigation. At the close of the hearing the solicitor acting for the respondent indicated that these points were no longer being taken and there were no issues now being raised in relation to the basis on which the Schedule had been calculated.

4. Parties prepared and produced a Joint Bundle of Documents. Prior to the hearing commencing parties lodged, by agreement, further documents (**36, 37 and 38**).

Issues

5. A List of Issues was prepared by parties. It was apparent from the pleadings that the principal issue for the Tribunal to determine was the fairness or unfairness of the dismissal on the basis of the evidence before the employers.

6. The Tribunal also had to consider whether or not the claimant had been wrongfully dismissed. Her employment was terminated during her notice. The Tribunal also had to examine both the respondents' counterclaim and whether the claimant suffered the unlawful deductions she claimed. In order to do this the Tribunal would have to consider the claimant's contractual entitlements, what her true salary was and what the factual position was in relation to hours worked and leave accrued and taken.

7. It is important to note that the claimant in her ET1 made the following allegations (**JB p11)**:

''It is the claimant's position that she has been unfairly and wrongfully dismissed. The claimant does not believe her conduct in any way merited summary dismissal. Dismissal was outwith the reasonable bands of responses open to the respondent. The claimant has been unfairly and wrongfully dismissed.''

As evidence was heard it emerged that the claimant had sent a detailed statement of her position (**JBp89**) to the respondent in the course of the disciplinary process and that some of the matters raised by her were not subsequently investigated by them or their representatives although the terms of her "statement" were apparently considered by the dismissing officer. It, therefore, became apparent that there were issues as to whether or not there had been a reasonable investigation and ultimately whether there was sufficient evidence before the respondents to justify dismissal. This did not seem to discomfit Mrs Buckle who raised no

objection to these matters being explored and ultimately, she dealt with these issues in her submissions.

8. However, two further particular matters arose after the hearing concluded. During the hearing the claimant gave evidence that her former employers had reported her to the Police claiming she had committed a fraud. In evidence she explained that after being interviewed the interviewing/reporting Officer had told her that no further action would be taken and that he could not detect *'any criminality'*. The respondent's representatives wrote to the Tribunal after the hearing suggesting that the claimant had misrepresented the position both factually and legally as only the Procurator Fiscal could take such a view and guarantee no action would be taken. They had contacted the officer who said that the matter was still live. The claimant's solicitors responded that she denied she had misled the Tribunal pointing out that the interviewing/reporting Officer did not charge her nor did he submit a report to the Procurator Fiscal. He had, they said, later told the N.M.C., to whom the claimant had been reported by the respondent for committing fraud, that there was insufficient evidence to charge the claimant. This he suggested all went to corroborating her account and bolstering her credibility.

9. The second issue was that the Tribunal raised with parties at the close of the hearing that although some documents had been referred to in evidence particularly documents containing advice from the respondent's IT consultants the documents had not been fully explored in either examination in chief or cross. I indicated that as part of his deliberations he wanted to read what was a bundle of documents in full as they had been introduced into evidence. One such document or more accurately set of documents contained advice from the respondent's IT advisers (**JB58a**) about possible alteration of saved electronic documents. The

suggestion that the claimant had made up the date her contract was saved was in turn fundamental to the respondent's case. Dr Robson had given evidence that that the advice given was that the date of creation or saving of documents such as the claimant's contract could be easily altered. However, what was not mentioned by her in her evidence was that the advice was that an altered date could be detected if there was a forensic examination of the document. No such examination had occurred. Accordingly, the Tribunal wrote to parties asking for their views on how this matter (the possible forensic examination), should be treated given that it was not touched on directly in evidence, although the advice from the IT consultant was introduced into evidence and referred to as justifying Dr Robson's view that the claimant had altered the 2016 contract's date.

Evidence

10. The Tribunal considered the productions lodged by parties in the Joint Bundle of Productions. It also heard evidence from:

- Dr S Robson the owner and Managing Director of Temple Medical Ltd
- Professor John Eagle a non-Executive Director of the company
- Mrs Carean Clarke, Finance Manager.
- The claimant.

Facts

11. The respondent company is a small private company providing aesthetic beauty services from their premises in Aberdeen. It is owned and managed by Dr S

Robson, a qualified G.P. who for some years has concentrated on providing such services.

12. Dr Robson and the claimant have a long association going back 18 or so years when they both worked together in private medical practice.

13. The claimant and Dr Robson had for many years a friendly and trusting relationship. She had encouraged the claimant to join her company when she set it up.

14. The claimant started work for the respondent on the 1 May 2010. At that point she was described as being employed as an Aesthetic nurse. The claimant was given a Contract of Employment in October 2014 (**JB32-36**) in which her job title was given as Nurse Manager. This was following a reorganisation of duties. She received an increase in her salary based on a notional rate of £25 per hour. The claimant would on occasion work longer or less than her agreed weekly contracted hours which agreed weekly hours were varied on occasion by agreement. She was trusted to make up her hours. At or about this time it was agreed that the claimant would be entitled to six weeks holiday per year.

15. The other employees including therapists were paid an hourly rate.

16. The claimant's job title reflected the fact that she managed a number of therapists who carried out beauty treatments. She was also tasked with developing clinical practice in relation to skin care. She would have her own clinics for this purpose.

17. The claimant is a qualified nurse and a member of her professional body the N.M.C.

18. The claimant's ('2014') contract provided that she was paid a salary at the end of each month. Latterly the claimant worked twenty hours a week over three days. She was entitled to a pension. Her net weekly remuneration was £442.37 including pension contributions from her employers. The respondent company's holiday year ran from January to December. The claimant took 10 days leave in the holiday year before her employment was terminated and was due 1.6 days accrued leave amounting to £266.40 gross.

19. The written contract provided to the claimant in 2014 provided at paragraph 9 that the company reserved the right to require the claimant to repay by deduction from her pay the following:

    - Any other sums owed to the clinic by you, including, but not limited to, any overpayment of wages, outstanding loans or advances, or relocation expenses.

20. A later contract provided to the claimant in 2016 ('2016' contract) contained a similar clause authorising deductions (**JBP43**).

21. The business was a small one and at times finances were difficult. Dr Robson concentrated on her clinical work. She was not a natural manager. The business was sometimes disorganised. She placed considerable trust in the claimant which was reciprocated. There was an absence of agreed processes, procedures and proper management in relation to the running and organisation of the business. No check or records were kept of the actual hours worked, including those of the

claimant, although clinical hours could be obtained from the appointments system called 'Pabau'. A number of staff, including the claimant, would contact the respondent's payroll provider to advise them of agreed changes in hours.

22. The business decisions were made on an informal and *ad hoc* basis with Dr Robson preferring to concentrate on her own professional services.

23. In the course of her employment the claimant's hours and rate of pay periodically changed.

24. In general, the respondent's record keeping was poor and there were recurrent difficulties with the respondents' IT systems and providers. In order to rectify perceived management failings Dr Robson employed, at different times, two business management consultants one of whom was an American called "Chad" who visited the practice in late 2015 early 2016 to reorganise it and put in place appropriate structures. Early in this process the claimant received an increase in her salary equivalent to an increase from £20 to £25 per hour. There were continuing discussions about her future role and the responsibilities she would have.

25. At a later point as part of the proposed reorganisation it was proposed that the claimant should be given the title 'Clinical Director' and further increased responsibilities. This was a stressful period for those working in the company including Dr Robson and the claimant and period of flux.

26. Dr Robson later dispensed with the services of "Chad".

27. In mid 2016 the respondent's HR providers "Empire" (now Law at Work) advised the respondent that their contracts of employment needed to be updated and a style or template contract was provided. The claimant was tasked with ensuring that the various therapists she managed were given these new contracts. She populated the style documents provided by Empire with the relevant information. Once she did this they were emailed to Dr Robson for approval. The claimant up-loaded the contracts on the 13 June to the IT (SharePoint) system that was operated at that point.

28. As part of this process, at the same time, the claimant updated her own contract. It reflected a recent discussion with "Chad" and Dr Robson in which they envisaged that she should be the Clinical Director and have additional responsibilities. It noted her hours as 32 hours per week and her salary as based on £30 per hour. The contract also included the clause (**JB p39**):

> "Your break entitlement is dependent on hours that you work:
>
> - When working less than 6 hours there is no break entitlement: when working 6 hours or more you are entitled to a 30 minute paid break."

This clause was common to the style contract provided by Empire.

29. The claimant did not hear back from Dr Robson with any comments. She saved a copy of her contract on the company's IT system and also kept a copy on her own laptop. She assumed that there were no problems with the revised contract as she

heard nothing back. At this time the respondent dispensed with Chad's services without completing the reorganisation. The claimant was never formally designated as Clinical Director. She assumed that Dr Robson had informed payroll of the altered salary.

30. The respondent arranged for a Mr Dan Stevenson to look over their IT system. He made changes to the system which resulted in documents being lost when they were 'migrated' to the new system. The respondent later changed to their current IT provider.

31. Towards the end of 2018 and early 2019 the claimant's relationship with Dr Robson began to deteriorate. The claimant raised a grievance against Dr Robson relating to personal comments she had made about her appearance. The grievance was passed to a Professor Eagle to deal with. He did not uphold the grievance and indicated that the comments were "banter". The claimant was disillusioned with the process. Professor Eagle had become involved with the respondent company at or about this time at the behest of Dr Robson with whom he was in a relationship.

32. In about June 2019 Dr Robson disciplined the claimant. She issued the claimant with a warning. The claimant was given the right to appeal. She appealed and the appeal was passed to Professor Eagle who did not uphold her appeal. In relation to the issue of the breach of guidelines Dr Robson had written: *"I can confirm that I can't establish any evidence that this was discussed and agreed between ourselves and can further confirm that I do not recall such discussions taking place".*

33. The claimant was aggrieved at both the way in which her grievance and her disciplinary appeal had been dealt with. She had no confidence that Professor Eagle would act impartially.

34. It had become apparent to Dr Robson by 2018 that there were continuing problems over the recording and payment for hours worked including those of the claimant. The respondent recruited a part time Cashier Ms C Clarke. She introduced new systems and by February 2019 she introduced new payslips which showed the employee's hourly rate. During this time although the claimant was salaried increasing reference was made being made to the hours worked by staff. The respondents did not have an accurate time recording system but used the 'Pabau' clinical appointments system to check hours but it only recorded clinical work. At one point the claimant wrote to Ms Clarke setting out what appeared to be some underpayments in her salary but indicating that overall that she might have been overpaid (**JBp125c**) She promised to make up the 26 hours that constituted the overpayment. The claimant did this.

35. The various issues that had arisen over pay and disciplinary matters caused the claimant to take advice from ACAS about her employment position in early 2019. She also at this point searched for a copy of her contract of employment which she could not find on the respondent's SharePoint system. She eventually found a copy of the 2016 contract (**JBp39-47**) on her personnel laptop. In it she was referred to as a Clinical Director. The word Director was misspelled ' Directot' She noticed that the hourly rate was £30 per hour and recalled that this had been agreed between Dr Robson, herself and "Chad" as part of the reorganisation. She

noticed from the new payslips that she had not been paid at this rate of pay. She took legal advice about claiming the arrears of pay.

36. The claimant's pay slips did not contain information about her hourly rate of pay or the number of hours she actually worked until February 2019. Prior to this the claimant trusted that the correct rate was being used in calculating her salary. The claimant was therefore now able to see that she was being paid according to an hourly rate of £25. She took legal advice and was told that there were difficulties in making such a retrospective claim given the circumstances. The claimant initially took no action to raise the discrepancy.

37. The claimant emailed Dr Robson on the 30 June 2019 (**JBp53**) in the following terms:

> *Dear Sam,*
>
> *With the recent allegation of gross misconduct resulting in my suspension, this resulted in the need to refer to my contract at the request of ACAS.*
> *For reasons not known to me, this contract was not available on the Temple share point site. I can only assume that this was a result of the change to drop box by Dan Stevenson and then moved to the current share point site. I have a copy of the contract for my own reference.*
>
> *I am writing to you because I am concerned that I have not received my correct pay in accordance to the rate stated in my contract.*

The contract is dated 8th June 2016 and states I am employed by you as a Clinical Director on a part time basis of 32 hours per week.

As from the 1st of January 2017, my hours were reduced to 23.5 hours per week. There was no letter or email provided to amend my contract with regards to the change.

Earlier this year you raised the issue that you had checked my past monthly wages and you had discovered I had been overpaid. Further investigation to this (according to my pay slips) led to me being asked to pay back "the excess wages in the form of either deduction from my wages of doing extra hours".

I had been paid at the rate of £25 per hour and my contract states my hourly rate is £30 per hour. The contract is dated the 8th June 2016. This is in 3 different blocks.

June 2016 to December 2016	*33.5 hours per week*	*29 weeks*
Jan 2017 to 24th Nov 2017	*23.5 hours per week*	*47 weeks*
27th Nov 2017 to 9th May 2019	*21 hours per week*	*76 weeks*
May to present	*20 hours per week*	*7 weeks*

Therefore, I believe I have been underpaid on the dates above by a total of £19,060 as a result of incorrect rates of pay.

I understand that mistakes can happen but I hope we can resolve this as soon as possible without any further action. You should be aware that it is unlawful to withhold payment of wages without consent by virtue of section 13 of the Employment Rights Act 1996.

Please could you respond to my claim and remedy this within a reasonable time. I wish to be paid the outstanding money owed to me within 5 working days of this letter.

Yours sincerely"

38. Dr Robson received the email about 9pm on a Sunday evening. She was flabbergasted at its terms, angry, upset and concerned given the financial state of the business about the sums involved. She immediately discussed the email with Professor Eagle. She responded (**JBp54**):

"Thank you for your letter. I am looking into all of this. Unfortunately it is not possible for this to be resolved in the timescale proposed by you – I shall keep you posted."

39. The claimant resigned on the 2 July 2019. She indicated that she would work her notice of 9 weeks. She was due to terminate her employment on the 31 August 2019.

40. Dr Robson asked Law at Work to carry out an investigation. The Adviser tasked to carry out the investigation was a Ms O'Donoghue. As part of this investigation she contacted Ms Carean Clarke the respondent's bookkeeper. She had joined the company in July 2018 and was responsible for changing the format of pay statements in February. She emailed Law at Work the 3 July 2019 (**JBp57**) :

> *"We implemented a new timekeeping sheet in February of this year, where all staff record their hours in the clinic on a daily basis. I used these timesheets as the basis for calculating hours for payroll at the end of each month. Prior to this , staff just advised payroll of their hours at the end of each month. One reason for tightening up the time reporting process was the ongoing issue with Karen, regarding claims that the clinic owed her days, as she had worked and hadn't been paid, but she kept her own record of these hours. It was easy enough to check on Pabau our appointments system when she was seeing clients but the other "non Clinic" hours were the issue. Karen and I subsequently had a conversation during February when we both confirmed that she worked 21 hours per week (this was part of reducing her hours to 20 per week) and we confirmed the rate of £25.00 per hour. There was never any mention then, or at any other time of an increased hourly rate".*
>
> Ms Clarke also expressed the view that: '' *the first thing "you do after receiving a rate increase is to double check your next pay slip."*

41. The payroll provider Grant Considine Chartered Accountants responded to a similar query by letter on the 4 July (**JBp58**) that they were unaware of any pay increase in June 2016 but on the 20 July, they had received an email from Mrs Urquhart informing them about a pay increase for two other members of staff.

42. Dr Robson had no records to check what hours or rate of pay the claimant worked. She therefore contacted Grant Considine by email on the 11 July (**JBp73**) She asked how they would know what hours the claimant worked. They told her that they would get a spreadsheet but only with the hours of other staff. She wrote:

‘‘ *Did you get timesheets from Karen or anyone confirming the hours they worked*?’’

They responded that they received an email from ‘Helen’ and had noted that the claimant’s hourly rate changed from £20 to £25 per week in October 2015. They stated that they had not been told that her hours were 33.5 rather than 32 hours which was paid. They had stopped doing the payroll in April 2017.

43. Dr Robson was convinced that the claimant was perpetrating a fraud. She had no recollection of agreeing an increase in July 2016. She believed that the claimant was acting maliciously.

44. Dr Robson suspended the claimant from work on the 16 July (**JBp59**). She wrote:

> *"I am writing to confirm our discussion of 16th July 2019 during which I suspended you from your employment pending investigations into allegations of gross misconduct.*
>
> *You are alleged to have seriously breached the implied term of trust and confidence in your employment relationship with Temple Medical. There is reasonable belief that you created a contract fraudulently for your own personal financial gain, further evidenced in your demand for payment of £19060 for unpaid wages on 30th June 2019."*

45. The claimant's suspension was with pay.

46. Dr Robson had seen the copy contract saved by the claimant. She contacted a Mr. Dave Senior of Indigo Tech who provided technical IT support to the company and asked him if it was possible to change the date of a document. He responded by providing her (**JBp58a**) with a link to an article as to how to carry out this process. The article ended: *"Note that if you are trying to change file dates and times for any kind of nefarious reason, there are ways for forensic experts to figure out that the file was altered."*

Dr Robson had found no emails generated by her about the contract. She carried out no further investigations into the saved 2016 contract or more generally into difficulties that had occurred with the IT system that might explain why it had not been recovered there.

47. Dr Robson met the claimant on 16 July. The meeting was minuted (**JBp60**). The claimant had been given no notice of the purpose of the meeting. At the outset Dr Robson stated that the purpose of the meeting was to be investigatory in nature in relation to the terms of the claimant's letter. She was asked if she had a signed copy of the 2016 contract and she responded that she did not. Dr Robson stated that she had never seen the contract. The claimant indicated that she had filled in the style contract in the way Dr Robson had asked her to. She was asked if she had the original document and she explained that she did not and that the document she had (dated 16 June 2016) was a pdf copy only which had been taken for her own purposes. She explained: *"the original document possibly lost, possibly disappeared at the time when team site was moved after Dan Stevenson"* The claimant could not at that point recall which of many meetings she had attended with Chad and Dr Robson dealt with the increase in her rate. When asked why she didn't check her pay slips she responded she had been naïve and stupid and that she had no reason to look at her contract as she trusted she was being paid correctly. She asked Dr Robson why would she make an attempt to falsify a document in 2016 and then raise the issue 3 years later. It was not suggested to the claimant that she might have altered the date the contract had been saved.

48. Following the meeting Mrs Urquhart emailed Ms O'Donoghue who was dealing with the investigation for the respondent company. She wrote:

"Good afternoon Robyn

Thank you for the minutes of the meeting on Tuesday. I have tracked comments and amendments on the new attached document.

This meeting was a complete surprise to me. I had just returned from annual leave and was called into this meeting as soon as I opened the door to reception. During this hearing I felt completely blindsided by these questions, overwhelmed and threatened. This is evident in some of my answers which I feel make me look very defensive. Having had no prior warning to this, I felt unable to put my points across well.

I am unsure what the next final meeting will involve and suspect it may not be in my favour. Therefore, I have attached a statement from myself explaining the questions further since I had no opportunity to do so effectively. I would appreciate if this could be taken into consideration by yourselves, Carean and ultimately Dr Robson.

This 2nd allegation has left me particularly shocked and distressed.

On 22nd May, Pauline had a meeting with Sam and has asked that both Rhoda and I attend as support to her. During this meeting many issues were discussed and it was agreed by all at the meeting that mediation would be a way forward for all staff. I had anticipated this would happen fairly quickly. However, I find myself being suspended the following week for gross misconduct which was found not to be the case.

Since then I have handed in my notice of resignation and raised a formal complaint against Dr Robson with regards to other matters and I find myself in the position where, yet again, I am suspended for a very serious allegation following my complaint.

It appears that this has now become a spiral of attacking and defending and this is not where I would have anticipated I would be with Dr Robson. I would assume she would feel the same way.

It leaves me deeply saddened, that this has come to this.Had the mediation taken place after our request on 22nd of May, I feel we would not be in the situation we currently find ourselves in.

Kind regards

Karen"

49. The attached document (**JB p65**) made reference to the background to the June 2016 Contract. The claimant wrote that the style contracts were designed by Empire HR and they were emailed to Dr Robson when completed. The claimant had saved them by uploading them to the management section of Team Sites, that she had no need to check her contract and did not check her pay slips. She indicated that an employee Jo Brownhill started with the company from June/July 2016 and took over responsibility for HR matters in the role of Commercial Director. She then made reference to Dan Stevenson who had changed the IT systems. She indicated that the IT system was changed again when *"issues with*

Dan were raised". The new IT company (Indigo) had set up a new Microsoft account. Documents were moved from to 'Team Sites'. She said that she had not been asked to double check all the files and that it had been apparent over the next few months that some documents had not *''come across."*

50. The claimant also wrote that she was aware of the company's financial difficulties and had offered to cut her hours to save money and that this was not the action of someone who wanted to defraud the company.

51. The various matters raised by the claimant in relation to the IT system were not investigated. No steps were taken to try and contact Mr Stevenson, Ms Brownhill or to discuss possible difficulties in moving the documents with the IT providers, Indigo. No investigations were made into the records held by Empire in relation to the new contracts, whether the claimant's contract was to be revised or generally the claimant's role in the preparation of the new contract terms.

52. The claimant was invited to a disciplinary hearing on 31st of July. It was to be conducted by an HR consultant from Law at Work. The evidence on which the respondents relied was enclosed. The enclosures did not include the advice from Mr Senior of Indigo or the articles and advice prepared by him in relation to changing the date of documents.

53. The letter dated 24 June from Law at Work inviting the claimant to a disciplinary hearing on the 30 July recorded that the findings would be reported to Professor John Eagle who would decide if there were to be further investigations or *'ultimately make a decision on the outcome'* The claimant was accused of falsifying

her employment contract. The meeting was chaired by Donna Gibb a consultant with Law at Work. The claimant was allowed to attend with her husband Alan Urquhart. The claimant raised the question of Professor Eagles involvement in the process. She was told that he was a Director and when the claimant contested this, she was told that he had been nominated to make the decision on behalf of the company.

54. At the hearing the claimant was asked about her 2016 contract and the sequence of events around its creation. She explained that she had sent the 2016 contract to Dr Robson who had not responded. She went on to reiterate the circumstances around the creation of the document and the IT difficulties which had resulted in documents going missing including 'Staff Certificates' which she said had to be reissued (**p99)**. She explained that she had kept a copy on her own computer. She said she had spoken to Ms Clarke in May when she got suspended about her contract. In relation to her claim the claimant said that she had taken legal advice and the solicitor *''said that it was unlikely that I would be awarded backdated pay as both Dr Robson and I had accepted the current conditions of contract''*

55. The claimant was asked why she did not raise the matter earlier. The claimant went over the circumstances around the increase in pay and her stepping up to the role of Clinical Director. She expressed the view that the '*admin side of Temple is non existent*' There was a discussion about the holidays that had been agreed at the time. She had begun taking the extra or additional holidays in June 2016. She was asked why she did not let the accountants know about changes and she responded that she assumed it would be her manager (Dr Robson) who would tell them. The claimant was also asked why the Bookkeeper (Ms Clarke)

didn't know about changes. In the course of the hearing Ms Gibb was asked by the claimant what her views were on the HR practices at the respondent company. She responded that her role was to prepare a summary report for Mr Eagle to make a decision on (**JBp103**)

56. The claimant confirmed that she had saved the contact in June 2016. The information from Indigo Tech was not disclosed to the claimant or discussed in the course of the hearing.

57. Following the hearing Ms Donna Gibb contacted Professor Eagle to discuss the matters.

58. Ms Gibb contacted Dr Robson on the 1 August in relation to some queries she had. On being asked whether the contracts of employment for all members of staff are on team sites and whether they are signed Dr Robson responded: *"signed contracts in all personnel files – not all signed on team sites. KU signed original contract (2014) signed in her personnel file. bogus contract (unsigned and never seen by me) on team sites along with original. No bogus contract in her personnel file. Bogus contract uploaded to team sites on 18th June"*.

59. In relation to queries over holiday entitlement Dr Robson was asked to confirm whether she approved an increase in holiday entitlement and whether the claimant had taken 30 days annual leave from 2017 onwards. She responded*: "don't recall this being agreed. I recently discovered (and you would need to clarify this personally) that Pauline told Carean that Karen was entitled to 8 weeks holiday per year due to length of service. This is news to me and certainly needs checking*

what she has taken." Dr Robson was asked whether Karen had been asked to draft new contracts in May/June of 2016. She wrote: "*yes – age was liaising with yourselves over this – she sent me Jo Green's contract which is very similar in format. I have never seen KU contract that she drafted, did not approve pay rise and would never have approved a contract with the spelling mistake "clinical directot".*

60. The claimant was not asked to comment on this additional information.

61. On the 1 August Ms Clarke was asked by Ms Gibb about some matters arising from the claimant's evidence. She confirmed that the claimant had on her return from suspension said that she had found her saved contract but not told her where she had found it. She had asked why it wasn't on the HR file and said that some documentation had gone missing at the time of the "migration".

62. Ms Gibb wrote to Professor Eagle on the 1 August with her summary of findings to date. She wrote:

> *"During the hearing the evidence was considered and Karen was provided with every opportunity to provide explanations and make any representations. During the hearing Karen could provide no evidence of having sent the contract dated 8th June 2016 to Sam, she was unsure what date she had sent it and was unsure what date she had finished drafting the contract. She is unsure why the properties of the document are dated 13th of June 2016 and states she may have been drafting the contract for a number of days from 8th June until 13th of June 2016.*

Karen has confirmed that the contract had not been issued to her. She was unaware when the contract had been due to come into effect. Karen confirmed she was not specifically instructed to draft a contract for herself but to draft contracts for all staff and assumed this also meant herself. She was unable to provide any dates of meetings where her alleged pay increases had been discussed and when it had been due to come into effect. Karen was unable to fully explain why she had not become aware that the 20% increase in her pay had not been paid over a period of 3 years.

During the hearing Karen has confirmed she did seek legal advice on the alleged underpayment and knew she had no legal rights to receive the money. Karen has confirmed that she wishes she had worded her letter of 30th of June 2019 differently …

Outcome

There is no evidence of the contract being received by Sam and it has not been formally issued, further there is no date confirming when the contract is to take effect. There is no evidence that Karen having been awarded an uplift in pay from £25 to £30/hour. Karen is unable to provide an explanation for the time delay in raising the matter and has confirmed she was aware she had no legal right to receive any additional payment …..

On reviewing the evidence if you believed there are no further points you require to be investigated and have a reasonable belief that your

employee is guilty of the allegation against her and that it amounts to gross misconduct then the sanction on your company's disciplinary procedure would be summary dismissal …On reviewing the evidence, we do believe the allegations amount to a gross misconduct offence, there is evidence to substantiate the allegations and that her actions have resulted in a breakdown of trust and confidence. A sanction of summary dismissal would be merited…".

63. Professor Eagle reviewed the documentation and did not consider he required to carry out any further investigation. He concluded that the claimant had fraudulently created the contract. He asked Ms Gibb to draft a letter for him which she did. Before it was sent he was sent a copy of the minute of the telephone call with Ms Clarke on the 1 August (**JBp112**).

64. Law at Work drafted a letter for Professor Eagle to sign. He revised it and the letter in final form was sent out to the claimant on the 5 of August 2019 summarlly dismissing her from her employment. The claimant was given a right of appeal to Dr Robson. Professor Eagle described himself in the letter as a Non-Executive Director.

65. Following the claimant's dismissal, the respondents made a complaint to the Police alleging fraud and also brought the matter to the attention of the claimant's professional body, the N.M.C. The claimant was interviewed by a Police Constable who indicated at the end of the meeting under caution that he did not see any criminality and that the matter would not be proceeding further.

Witnesses

66. Dr Robson is an articulate and intelligent person who has some little insight in to her shortcomings as a manager preferring, as she does, to concentrate her energies elsewhere. She did not apply this insight namely that disorganisation in the firm, both in IT, record keeping and more generally management might have a bearing on events and the confidence that she could have, given that situation, for her unshakeable belief in the claimant's guilt. These patent difficulties did not seem to give her pause for thought.

67. I regret that on many crucial matters I did not find her either credible or particularly reliable as a witness. She showed little interest despite being a physician trained to seek and evaluate evidence in trying to be objective here and my impression was that her previously close relationship with the claimant having soured she was unable to look at any of these matters dispassionately.

68. My assessment of Professor Eagle is that he appears to be an experienced and talented professional. Unfortunately, he also appeared to find it difficult to look objectively at the whole circumstances or view his partner's evidence objectively. Rather he seemed to take uncritically his partner's position and did not deploy his own forensic skills and experience to try and objectively assess the evidence, or perhaps lack of evidence, of the claimant's wrongdoing, describing her guilt in his evidence as being 'Obvious!' Although he knew about the background administrative and IT problems, which he had tried to assist with, he did not seem to recognise this background of confusion and poor practice for example around the IT difficulties should be explored further as it might support the claimant's position or more generally that it should be considered as possibly having an

impact on Dr Robson's reliability. He seemed to discount the impact of these various matters or more broadly that there could be an innocent explanation or explanations given these various problems which had existed for some years that might explain why the claimant's most recent contract was nor signed or a copy saved on the system. To do so would of course imply criticism of Dr Robson which he seemed disinclined to contemplate. He was generally a reliable witness to fact but was not at crucial points a credible one.

69. Ms Clarke was generally credible and reliable although it was clear that she advocated her employer's position and as a relatively recent employee had not been aware of the earlier history of many matters. Being an organised and methodical person she no doubt found it difficult to understand how confusion and differences of opinion could arise over matters such as an employee's level of salary which as a Bookkeeper/Cashier should have been carefully recorded in her experience. She was found to be simply wrong when she had asserted that pay slips, before the changes she brought in around February 2019, contained information about the claimant's hours and rate of pay. This misunderstanding had coloured her perception of the claimant's credibility. Ultimately, her evidence was limited and of little assistance and where there was any difference between her recollection and that of the claimant I preferred the claimant's.

70. I found the claimant to be generally credible and reliable as a witness giving her evidence in straightforward manner and having a greater grasp of the various changes in the business than Dr Robson seemed to have. My impression from the evidence was that latterly the claimant kept her head down as relations with Dr Robson deteriorated and had only made this claim when she had decided to leave.

Crucially I did not accept that there was no genuine basis for the claim she made or that there was anything that properly could be called a fraud in her actions.

Submissions

71. On behalf of the respondent Mrs Buckle began by addressing the claim for unfair dismissal reminding the Tribunal that conduct was one of the potentially fair reasons for dismissal. She asked the Tribunal to take into account the respondent's size and administrative resources. She began with the claimant's demand for arrears of salary and what she described as a thorough investigation. Her clients she submitted had acted reasonably throughout and the dismissal was both procedurally and substantively fair. Mrs Buckle referred to the evidence of Dr Robson in which she had described her response to the claim that had been made and the steps taken to establish the true date of the claimant's contract and the 'IT' advice that she had obtained that the date could easily be altered. Added to this was the evidence of the company accountants that they had not been told of any salary increase. She referred to the up- dating of the contracts done carried out by Empire. The claimant had never queried her rate of pay even after the new pay slips were introduced in February 2019.

72. The respondents had sought advice from Law at Work and had suspended the claimant while they carried out investigations and undertaking a disciplinary process which she then outlined. This led to the claimant being found guilty of gross misconduct and dismissed during her period of notice. The solicitor then referred to the case of **Buzolli v Food Partners Ltd UKEAT/0317/12/KN.** As in this case the claimant had been subject to a final written warning. The Tribunal should look at the process in the round to judge if it was fair. If the Tribunal were

to find the dismissal unfair for procedural reasons it was almost certain that the claimant would have been dismissed in any event and the Tribunal should apply the 'Polkey' principle to the extent of 100%. The claimant's position was incredible and she should not be believed. Mrs Buckle added that Tribunal should not substitute its own view for that of the employer in relation to these matters.

73. Mrs Buckle emphasised that the claimant knew she was not made Clinical Director and was struggling with the administrative side of her role. She would have noticed a failure to increase her wage by 20%.There was also a question of contributory fault on the claimant's part by her actions. Mrs Buckle referred to the case of **Sandwell West Birmingham Hospital NHS Trust v Westwood [2009] UKEAT 0032 – 09 – 1712** as authority for the proposition that it was an error of law for the Tribunal to consider the employers conduct when considering contributory fault. The Tribunal should categorise the claimant's conduct as culpable and blameworthy (**Nelson v BBC [1980] ICR 110**) The claimant had taken legal advice and told that her claim was unlikely to succeed.

74. Mrs Buckle then looked at the claim for breach of contract which she said should be considered using an objective test as to whether the claimant was in breach of contract and disentitled to the balance of her notice which was properly calculated at the rate of £25 per hour. The solicitor then considered the evidence supporting the counter claim which came from Dr Robson and her evidence in relation to holiday pay entitlement. The upshot being that the respondents were entitled to deduct the sums claimed from any award. From December 2018 to January 2019 it was accepted that the claimant worked 21 hours per week and not 23 hours claimed.

75. Mr Lefevre began by outlining the claimant's long service and good relationship with Dr Robson and then contrasted this with the respondent's actions in making serious criminal allegations against her including reporting her to the N.M.C He referred to the duties on employers to make rigorous and careful enquiry in potentially career ending circumstances (**A v B [2003] IRLR 405 EAT and Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 CA**) Mr Lefevre reviewed the evidence of alleged wrongdoing expressing concern with the process whereby Professor Eagle did not actually meet the claimant. How, in these circumstances could he assess her credibility as a witness? The advice from Law at Work was poor and they had not carried out a proper investigation. They had not enquired about what was printed on the pay slips and if they had they would not have asserted that the claimant must have known about her salary rate. The employers chose to deal with the claim made as a disciplinary matter rather than as a 'civil' claim. The claimant was then suspended and had no notice of the first interview she had. Despite this the claimant set out her position in writing and the points raised by her in that statement seem to have been ignored.

76. There was, he continued, certainly no investigation made into the IT system and its failings or the involvement of 'Empire' in relation to the new contracts they had or what information they had that might shed light on events. The respondents had no tangible evidence that the claimant had changed the date of uploading her contract. And throughout this Dr Robson, although she could not recall events, she was unwilling to accept the claimant's position ''in any shape or form''. There was at the end of this saga no proper appeal as it would have been to Dr Robson who had already decided that the claimant was guilty of fraud. The claimant's evidence should be preferred over that of the respondent's witnesses. He

reminded the Tribunal of Professor Eagles evidence that the case against the claimant was 'obvious' and posed the question that it hadn't been quite so obvious to the Police Officer that had interviewed the claimant. He submitted that given the various difficulties the respondent's case had there was no doubt that the dismissal was unfair. There was no basis to make any deduction for fault as the claimant was entitled to pursue her claim and have that determined by a court or tribunal. The evidence in relation to hours worked and claimed had to be seen against the disorganised state of the respondent's business and could not be relied on to demonstrate any sums were due to the claimant.

Discussion and Decision

The Reason for Dismissal

77. The first matter for the tribunal to consider was whether it had been satisfied by the respondent that the reason for the dismissal was one of the potentially fair reasons for dismissal contained in section 98(1) or (2) of the Employment Rights Act 1996 ('ERA'). They had said that it was the claimant's conduct that had led to dismissal, so that it was for them to show that misconduct on her part was the real reason for dismissal, i.e. under s.98 (2)(b) of the ERA.

78. In the circumstances here, it is clear that the reason for dismissal was alleged misconduct and what the employers had in mind at the time of dismissal was the allegation that the claimant had fraudulently claimed arrears of wages and had falsified her contract and that this "*related to the conduct of the employee*" – s.98(2)(b).

Section 98(4) ERA

79. The task for the Tribunal in terms of section 98(4) of the Act was to ascertain whether, in all the circumstances (including the size and administrative resources of the respondent) the dismissal was fair or unfair. I would comment that Mrs Buckle made much of the small size of the company. This is a fair point in relation

to the small number of management staff who could deal with disciplinary matters, appeals and so forth. In effect the business only had Dr Robson and then the claimant exercised some management responsibilities over therapist. There was criticism of the disciplinary being dealt with by Professor Eagle who had no formal role in the firm but overall I think that criticism unfounded at least in principle. Dr Robson clearly had strong feelings about the claimant and her actions and seems to have recognised that she could not deal with the disciplinary fairly. The issue became whether her partner could.

80. One further matter arises for comment from this submission namely the company had instructed specialist employment advisers to assist them throughout and they at least might be expected to ensure that the process was rigorous and fair. It is difficult given this particular factor to see how the size and administrative resources of the business had a significant bearing on the issues that were before the Tribunal.

81. The Tribunal had regard to the well-known cases of **British Home Stores Ltd v Burchell** [1978] IRLR 379, **Iceland Frozen Foods v Jones** [1982] IRLR439, and **Sainsbury's Supermarkets v Hitt** [2003] IRLR 23 and to the guidance contained in those cases as to the approach the Tribunal should follow in assessing a dismissal. The latter cases had particular relevance when considering the various decisions made as to the scope of the investigation particularly the decision not to seek a forensic report on whether the contract had been falsified or it's date of uploading altered.

82. Under paragraph (a) of this sub-section the question of whether the employer acted reasonably, particularly where the reason for dismissal relates to conduct, often involves consideration of the adequacy of the employer's investigation and thus whether a reasonable employer could have concluded that there was sufficient evidence before them to show that the employee was guilty, i.e. the ***Burchell*** test.

83. No specific issue as to the adequacy of the investigation itself was raised in the ETI. However, the case proceeded with questioning and evidence being directed to various alleged deficiencies. The claimant also argued that the employers did

not have a sufficient basis for them as reasonable employers to dismiss her and those arguments interacted with adequacy of the investigation and its fairness.

84. The respondent company expressly labelled the alleged conduct as "gross misconduct". They described the claimant's alleged actions as amounting to a breach of the implied duty of trust and confidence. The question of whether a dismissal is fair or unfair under s.98(4) of the ERA is not answered by deciding whether or not the employee has been guilty of gross misconduct. As Phillips J said in ***Redbridge London Borough v. Fishman*** [1978] ICR 569:

"*The jurisdiction based on* [what is now section 98(4) of the Employment Rights Act 1996] *has not got much to do with contractual rights and duties. Many dismissals are unfair although the employer is contractually entitled to dismiss the employee. Contrary-wise, some dismissals are not unfair although the employer was not contractually entitled to dismiss the employee. Although the contractual rights and duties are not irrelevant to the question posed by* [s.98(4)]*, they are not of the first importance. The question which the Industrial Tribunal had to answer in this case was whether the* [employer] *could satisfy them that in the circumstances having regard to equity and the substantial merits of the case they acted reasonably in treating the employee's* [conduct] *as a sufficient reason for dismissing her.*"

85. This has been more recently confirmed by the EAT in **Weston Recovery Services v. Fisher** (EAT0062/10) i.e. that the only relevant question is whether the conduct was "sufficient for dismissal", according to the standards of a reasonable employer and whether dismissal accorded with equity and the substantial merits of the case" (s.98(4)(a) and (b)).

86. In **A v B** the Employment Appeal Tribunal noted that the relevant circumstances for section 98(4) purposes will include the gravity of the charge and the potential effect upon the employee (see paragraph 58). Ellias. J (as he was then) wrote:

"60. Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of

course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him. 61. This is particularly the case where … the employee himself is suspended and has been denied the opportunity of being able to contact potentially relevant witnesses. Employees found to have committed a serious offence of a criminal nature may lose their reputation, their job and even the prospect of securing future employment in their chosen field … In such circumstances anything less than an even-handed approach to the process of investigation would not be reasonable …"

87. This approach was adopted by the Court of Appeal in **Roldan** :

"13. … it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where … the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite. …"

Wrongful Dismissal

88. Separately there is the issue of wrongful dismissal which, as a contractual matter, must be judged on an objective standard. I did not find it necessary to make detailed separate findings in fact for the reasons I outline later.

Observations on Evidence Re Criminal Charges.

89. Various complications arose with this case. Following the hearing the respondent's representative wrote to the Tribunal on the 17 February claiming that there had been an irregularity in the claimant's evidence as she had been incorrect to say that she had been told that there was no basis for criminal charges and that the case had been 'thrown out'. The respondent's position was

that after contacting the Police, following the hearing, they were told that the case was still pending further enquiries. I think it unfortunate that this issue was not dealt with at the hearing or that the respondents did not check the up to date progress of the compliant prior to the hearing. Parties agreed that I should consider this matter and I allowed Mr Lefevre to comment further on the issue. The respondents also added further submissions on the issue.

90. I struggled a little to understand why this matter was raised by the respondent. The claimant did not actually use the phrase, as far as my notes disclose, ‘‘thrown out’’ although that was the import of her evidence. My notes are that she said that she had been told by the Reporting/Investigating Officer that he had found no ‘discernible criminality’. However, even if she had been drawn into hyperbole the position was tolerably clear and must have been so to the respondent and their representative. They must have been aware that the Police had no more evidence of wrongdoing than they had and that no charges had been brought after the claimant was interviewed under caution. It must have been apparent, absent some fresh evidence, that the case was not going anywhere. The comment attributed to the Officer who interviewed the claimant was apposite and completely believable. He could, of course, give no guarantee that ultimately there would be no prosecution that would be something that only the Crown could provide. Mr Lefevre in his submissions indicated that his understanding of the up-to-date position was that no report had been sent to the Procurator Fiscal. That does not surprise me.

91. As I commented in my letter to parties on the 29 April 2020 in relation to possible criminal proceedings in Scotland it is within judicial knowledge that the Police investigate and only if there is sufficient evidence of criminality is a report then

submitted to the Procurator Fiscal for possible prosecution. I regret the time, effort and expense that has been expended on this particular issue which has not added anything to the respondent's case.

Forensic Examination of Contract

92. The second issue that arose on conclusion of the hearing was that on reading in full the respondent's IT report (**R58**) it became clear that neither party had addressed the advice contained at the end of those documents in which it was suggested that although the date of a digital copy of a document could be easily altered that could be discovered through a forensic analysis. The bundle of documents was referred to as a 'report' but in reality, it is an email from the respondent's IT provider together with a link to some relevant web pages.

93. Mr Lefevre in his submissions dated 12 May excused his role by saying that the documents were lodged on the morning of the hearing. Regrettably, I have no note of that but nevertheless if they had not been fully considered by him then time should have been sought to read them and take instructions. Mrs Buckle submitted that there had been a full investigation but suggested in her later written submissions that as the document concerned (the claimant's 2016 contract) was located on the claimant's computer the employers could not have carried out such an enquiry! They did not ask the claimant for access to her computer and I am not convinced that this matter was considered at all.

94. It leaves a difficulty for the Tribunal in considering this issue fairly. If as the respondents argue the claimant was committing a fraud and one which they believed affected her fitness to practice (leading them to lodge a complaint with claimant's professional body the N.M.C) then there is a strong argument, on the

authority of **A v B** and **Roldan ,** that this further investigation should have been strongly considered. A finding that the date had or had not been altered might well have been determinative of the issue. However, there may have been some grounds that would have allowed the respondent to argue that deciding not to carry out such an investigation was within the band of reasonable responses open to them (**Sainsbury's Supermarkets v Hitt**). There might for example be issues of cost or significant delay or aternatively it might be a straightforward and relatively inexpensive process. I simply cannot say.

95. Regrettably given the circumstances I have narrated I have come to the view that even if the Tribunal did consider the issue, and it was not raised by the claimant's solicitor during the hearing, the Tribunal does not have the evidence before it to decide this issue fairly. I conclude therefore that in these circumstances the claimant cannot found on this particular matter as part of a failure to carry out a reasonable investigation. The issue of whether such a report should have been instructed is not one I can consider.

96. That is not entirely the end of this matters wider relevance, as quite extraordinarily, supervised as the disciplinary process was, the IT advice on which the respondent's relied was not disclosed to the claimant either at the investigatory hearings or in the invitation to the disciplinary hearing (**JB 68**) nor raised for her to comment upon. In other words, an essential aspect of the respondent's case and one that was crucial in supporting their finding that the claimant had fraudulently produced the contract and backdated it was never directly put to her. In my view the failure to ask the claimant to comment on the IT advice and possibly allow her to produce her laptop for inspection alone renders the dismissal unfair.

Background and the Investigation

97. Turning to the disciplinary charge levelled against the claimant and the case more generally the first matter to consider is the hourly rate itself as this is the cornerstone of the dispute. There was no background suggesting that the claimant was seeking higher pay before these events and the evidence indicates that she only appears to have become dissatisfied with what she was receiving by way of pay when she came to look for her contract in February 2019. This was precipitated by difficulties she had experienced at work which we need not go into but they caused her to contact ACAS and to look for her most up to date contract. I would observe that for some years the business had financial problems and the claimant seemed to have been realistic as to its ability to pay her more. As we have seen the claimant's hours had been varied periodically a number of times by agreement and the hours the claimant was actually contracted to work was not at all clear as records had not been kept of what had been agreed from time to time. In short, they had altered on occasion and had not been reduced to writing.

98. Dr Robson in her evidence could not recall agreeing the rise in the claimant's pay that was claimed. She was not at all confident from her own knowledge that it had not been agreed. Her response to the initial claim is illuminating (**JBp54**). She does not say that the hourly rate claimed is wrong nor does she say that the claimant has been properly paid and that this can be checked against records rather she says it will be investigated. If the matter could be readily cleared up on her next day at work she would have been unlikely to have said, as she did: '*it is not possible for this to be resolved in the timescale proposed by you'* (five working days). In other words she appears to start from a position of not being

very sure or confident about the true position or her ability to clarify the matter quickly.

99. It appears that Dr Robson almost immediately formed the view that the claimant was not just mistaken in her claim but lying. The claimant observed that the investigatory meeting came as a complete surprise to her and the result of any investigations made by the respondents at that stage (they had the information from their IT consultants) was not given to her before the meeting nor any evidence put to her at it apart from an email from the payroll providers, Grant Thornton, that stated that they did not know about any change to her hourly rate to £30 per hour. The matter was allowed to drop there. The claimant was not asked if she accepted that she was responsible for telling the payroll company about any increase in her salary which was the position taken by the respondents later.

100. The second investigatory hearing was also short and did not explore the basis for the respondent's belief that the claimant had fraudulently created the contract and backdated it. The two principal allegations were not put to her in terms although by the disciplinary hearing, although still unaware of the information from the IT provider or the allegation that the 'saved' date of 16 June had been fraudulently altered, the claimant was aware that Dr Robson was suspicious as to why the contract may have been prepared on the 8 June but not saved in the claimant's laptop until the 16 June (JBp102). It does not seem to have occurred to the respondent that if the claimant was intent on perpetrating a fraud she might have invented more details, saved the contract on the IT system and so on which with a lack of records and Dr Robson's lack of recollection, would have been hard to disprove.

101. The Tribunal did not hear evidence from the HR adviser who wrote the final disciplinary report that was sent to Professor Eagle. I regret to say that report gives the impression that the writer has not approached the matter even-handedly and is providing the conclusion the employer wants rather than a more objective opinion on likely guilt. She writes that she believes the allegtions amount to gross misconduct although leaving the final decision to the respondent. I had no faith in Professor Eagles evidence that he approached the matter other than with a closed mind about the claimant's guilt.

102. Let us consider what evidence the respondent company actually had of fraud. The suggestion by the respondent's IT consultants that the date of the creation of a digital document can be altered is not evidence that the contract actually was altered. It raises the possibility alone. The investigatory and disciplinary hearings were not models for an objective, careful and full enquiry as can be evidenced from the minutes.

103. It is also important to bear consider the charge made against the claimant in that the respondent alleged, not that the claimant was mistaken or confused about the matter but that she had acted fraudulently. In other words she had deliberately set out to deceive. To do this they had to consider and then rule out any alternative explanations. I now turn to the basis on which they made this finding. That inevitable involves considering some of the shortcomings in the investigation that led to what the evidence the respondents ultimately had before them as employers.

104. There was no direct evidence that the claimant had made up the increase and backdated her contract. No one had seen her do it or could prove she had backdated the contract. Her position put simply was that it was only when she

went looking for the contract that she found a saved copy which alerted her, along with the hourly rate first appearing on payslips, to the fact that her hourly rate was incorrect. The issue then is was their sufficient evidence for any reasonable employer to conclude that the claimant had been likely to have backdated the contract and lied about the increase in hourly rate?

105. The respondent justified the finding that the contract must be fraudulent on a number of limited basis. These are set out in the report prepared by Law A at Work dated 1 August (**JBp108/110**). The first was that claimant had never queried her wages or more accurately the hourly wage rate that was used to make the calculation. There was no evidence of any history to suggest that the claimant had queried her wage rate in the past. Some regard has to be made to the general background which was that the claimant was not hourly paid. Her initial contract stated that she was salaried and there is no indication this changed. There was no reference in her first written contract as to the number of hours she was expected to work. The claimant agreed variations in the hours she worked with Dr Robson. These do not seem to be recorded or at least no written evidence was produced to the Tribunal but any changes in hours were notified on a sort of ad hoc basis to their payroll providers. The claimant would receive a net sum every month.

106. In a situation where, as before there was a good friendly relationship between Dr Robson and the claimant it does not seem in any way untoward for the claimant to assume she was being paid correctly especially as she thought that she was being paid as pro rata of her salary and the hourly rate was not on the payslips. This is a situation where the respondents appear to have been less than

objective and failed to consider that this background might explain the claimant's position and why her claim for backdated wages came when it did and not earlier.

107. As noted, the claimant's salary seems to have been worked out using this hourly rate and this seems to have been why at some point the claimant's salary increased namely through the application of an increased hourly rate. The claimant believed that a further adjustment to that hourly rate was agreed with 'Chad' during a further proposed reorganisation of duties.

108. No steps seem to have been taken to contact 'Chad' or to obtain evidence about what was happening at that period (other than Dr Robson checking her emails as to whether she had been send the claimant's 2016 contract to approve) or whether it might have impacted on the claimant's level of salary. No effort was made to check, as the claimant contended, that information on the IT system had been lost for example staff were not interviewed as to whether the had any experience of this occurring. No steps were taken to contact Jo Brownhill the HR manager employed about this time to check her understanding of the situation.

109. Another complicating factor was the various attempts at reorganising the business and which duties the claimant would take on was it seems a continuing 'work in progress'. It is perhaps foreseeable, that if the claimant was to take on additional duties then additional remuneration would be paid to reflect that or at least been the subject of discussion. As it was the various re-organsiations do not appear to have made much practical difference as the general disorganisation in the business appears to have continued with Dr Robson concentrating on her clinical work.

110. The claimant was cross examined on the basis that she could not have failed to notice her salary was too low if £30 per hour had truly been agreed especially as she had access to her payslips. She responded in evidence that the wage rate had only been added to the payslips relatively recently when the new Cashier, Mrs Clarke, had taken over their issue in about February of 2019.

111. No payslips had been produced by either party and over the lunch break on the second day of the hearing I asked whether parties were content that payslips should be produced which might through light on the issue. Mrs Buckle duly made enquires and confirmed that the earlier Payslips provided by Grant Considine did not contain the appropriate wage rate as the claimant had contended. It is surprising that Dr Robson or the HR professional carrying out the investigation did not check this at the disciplinary stage as part of their investigation. It was an example of making assumptions that proved to be on less than strong grounds. It probably influenced Mrs Clarke's evidence that she found it incredible that wring hourly rate could be paid for such a long time as the rate should be on the payslip. It turns out that it wasn't. This was a feature of the respondent's case which relied on conjecture rather than solid evidence.

112. The second matter that the Professor Eagle placed weight on when he came to dismiss was the statement in the report that the claimant had taken legal advice about her claim and had pursued it although '*she knew she had no legal rights to receive the money*' That statement was a travesty of what had in fact been said (**p100**) and recorded. The claimant had explained to the representative from Law at Work that she had taken legal advice. She candidly explained that she had been advised that her claim was unlikely to succeed at Tribunal because she had accepted the 'conditions of contract'. We do not know what exactly was said

to the lawyer or if this was the full advice but what the claimant said was a far cry from an admission of fraud. This was quite an extraordinary misrepresentation for a professional HR representative to make and to then be accepted without query by the disciplining officer who claimed to have read the papers. No reasonable employer would have failed to explore the various issues raised by the claimant.

Proving Wrongdoing

113. The various shortcomings that have been identified lead to the fundamental problem the respondent's case has which is to show wrongdoing on the part of the claimant they had to rule out any other explanation other than dishonesty. There was no direct or cogent evidence to show the claimant had made up the increase and backdated her contract. The respondent had to rely on inference from the circumstances that fraud was the only likely explanation. The issue then is was their insufficient evidence for any reasonable employer to conclude that the claimant had been likely to have backdated the contract and lied about the increase in hourly rate.

114. One matter that was relied on was that the 2016 contract produced by the claimant has a minor spelling mistake which it was claimed would have been spotted by Dr Robson if she had actually seen the document at the time. I struggle with the suggestion that in the busy chaotic environment that the evidence paints along with the difficulties the respondent had with IT that any reasonable employer would put much weight on this assertion. It also has to be borne in mind that the claimant saved 'a' copy of her contract and the events around the conclusion of the revision exercise at least in relation to the claimant's

contract and whether it was finally concluded, was unrecalled by both the claimant and Dr Robson.

115. Interestingly there clearly were revisions of the staff contracts at this time. It is not clear what happened regarding the claimant's contract. No evidence was led from the then HR providers who started the exercise. I would also observe that Professor Eagle was well aware of Dr Robson's shortcomings as a business person and he appears to have ignored the failure to keep records, the general disorganisation and Dr Robson's lack of any clear recollection of events at this time as being important factors in any assessment of what might have occurred. No reasonable employer would have ignored this background because it is necessary to be able to rely on it in order to discount the claimant's recollection.

116. The respondent company considered that the fact that the contract could have been altered and generally the failure of the claimant to provide details of what happened in or around June 2016 was evidence from which they could infer guilt.

117. As I have indicated earlier there are significant failings in the investigation of the case against the claimant, leaving aside the failure to forensically examine the 2016 contract, which no reasonable employer would have countenanced but the result of this was that it affected the evidence they finally relied upon. The history of problems with the IT system was not explored for example with other staff who might have knowledge of the matter or with former IT providers. This might have corroborated the claimant's position that the original copy of the contract might have been lost or that there was nothing significant in Dr Robson being unable to locate emails about these matters.

118. No steps were taken to try and contact 'Chad' about the plans Dr Robson had when the claimant understood she had been given an enhanced hourly rate

or if that was contingent on some other part of the reorganisation that was being put into operation. Strangely no contact seems to have been made with the 'Adviser' who had been tasked to produce the new revised contracts about the circumstances around the revision of contracts, who was to do what, what was the claimant's role and whether there was any information about her contract and salary being reviewed. This was potentially significant because the respondent company alleged that the clamant had effectively hidden her contract or deleted it from the system and effectively replaced it three years later.

119. No reasonable employer would in the circumstances of this case have concluded that there was sufficient evidence to conclude that the claimant was perpetrating a fraud by backdating her contract.

Hourly Rate

120. While I accept that the claimant was truthful and that this increase in hourly rate was mooted and possible envisaged to take effect at some point I am not convinced that the matter was ever finalised. She may have genuinely understood that she was to get the increase but the issue has to be seen against the background of the business evolving and proposals for reorganisation at that time. The claimant is described as Clinical Director in the contract and the evidence suggests that as part of a reorganisation of duties the claimant was to receive a higher hourly rate to reflect those responsibilities but like previous reorganisations the matter was never finalised or put into operation by Dr Robson.

Wrongful Dismissal

121. I did not accept that on the balance of probabilities the claimant changed the date of creation or saving of her 2016 contract or was perpetrating a fraud by lying

about an agreement to increase her hourly rate. The dismissal was wrongful as there was no material breach of contract on the claimant's part and she would be entitled to the balance of her notice period. My understanding is that this has been subsumed in the unfair dismissal claim and accordingly no award is made.

Employers Other Claims

122. The respondent alleged that the claimant had been overpaid as her hours should have been recorded at 21 hours and not 23 hours. This caused them to deduct £1787.30 from her final salary. The respondent in their ET3 say that they exercised their contractual right to make this deduction relying on a clause in writing contained in the '2014' contract (p81). Whatever dispute existed about the actual terms of the contract it was not argued that the respondents had no right to make appropriate deductions as the clause was replicated in the 2016 contract the claimant produced which she founded upon to justify the higher hourly rate.

123. The respondent's new Cashier, Ms Clarke, seems to have found a confused system for keeping track of holidays and time worked. Dr Robson had no internal records to refer to and had to contact the previous payroll providers to try and use their records. Ms Clarke implemented a new timekeeping sheet in February 2019 and I am not sure from her evidence that she fully understood that the claimant was meant to be salaried. She recorded at the time (J**Bp79**) that this was because of ongoing problems with staff claiming non- clinical hours which were then not remunerated or time off in lieu given.

124. The evidence that the claimant was working less hours than those she was paid for came from Ms Clarke and was bolstered by her analysis of the appointment booking system 'Pabau' . No query about the claimant's hours had been raised earlier. I accept the claimant's evidence that this is not an accurate way of

ascertaining hours worked as the appointments system only gives a partial account of the hours spent at work as it only records appointments. I accept the claimant's evidence on these matters.

125. I noted that Mrs Buckle was disinclined to engage with the fact that the '2016' contract provided by the claimant, which she asserted was the new revised contract prepared by the respondents HR advisers provided for breaks (half an hour if less than 6 hours worked) which would not be recorded in the appointment system. If this was the style provided by her firm (or an earlier incarnation of it) and no one checked, then it may have been the style the claimant was expected to use. I am not convinced that the respondent has demonstrated that their recording of hours is sufficient to show that less hours were in fact worked and the deduction will be reinstated.

126. The claimant it was alleged took ten days leave but the respondents claim she was only entitled to 8 days causing a deduction of £333.33 to be made. Once again, the evidence was poor and it was one of the areas that Ms Clarke was trying reorganise and properly record. At the time the claimant was dismissed she worked three days a week. That would mean that six weeks holiday would equate to 18 days per year. She had worked 7 months and was therefore entitled to 11.6 days (7 x 1.6) which satisfied the ten days taken. It was argued that she had agree to use three days of her holiday entitlement to be trained on some new process the business was introducing. Other staff had agreed to forego three days to have the training. This seems an unusual situation where staff use accrued holiday leave to learn a process that is being introduced by the employers. There was no written evidence produced for example in the form of emails showing that the claimant agreed to this. Given the state of the claimant's

relationship with Dr Robson it would seem unlikely that she would do so. I do not accept that the employers have demonstrated that the claimant had waived this leave entitlement.

127. The accrued holiday pay is £266.40 (£25 x 6.66 x 1.6) days and it may be that as it is subject to tax and national insurance it should be paid net with the respondents making the appropriate deductions. I will make the order gross but on the basis that a net payment with vouching for appropriate deductions will satisfy that aspect of the claim

128. As part of their case the respondents argued that in the alternative the claimant was dismissed for an SOSR reason namely the breakdown in the parties relationship. It must be borne in mind that the claimant was dismissed during her period of notice. She had agreed to work notice and the respondent had not sought to terminate her notice early. There appears to have been a professional relationship with both Dr Robson and the claimant keeping to their respective roles to the end. The evidence discloses that the reason for dismissal was in fact a belief in misconduct rather than any real misconduct. I am not satisfied that this submission is well founded on the basis of the facts I have found.

Remedy

129. No issue was taken in relation to the calculations used in the claimant's Schedule of Loss (JBp144/145) nor any issue taken regarding a failure to mitigate loss although there were arguments made in relation to 'Polkey' and contribution.

130. This is a case where there are not only what could be described as serious procedural flaws but they go to the substance of the matter. I am not convinced that the evidence allows me to conclude that if these flaws were rectified there would be any likelihood of the claimant being fairly dismissed.

131. The Tribunal has to have regard to the statutory basis on which a basis and compensatory awards are made. The test is different for each type of award. In relation to the basic award (Section 122) this can be reduced if it is just and equitable to do so having regard to the claimant's conduct prior to the dismissal. In relation to the compensatory element the discretion is wider (Section 123) in that the award can be reduced if it is just and equitable to do so based on the conduct of the claimant 'in all the circumstances'. The conduct of an employee can cover a wide range of circumstances and can include being

132. It was argued that putting forward such a large claim, knowing it was fraudulent or at best unlikely to succeed based on solicitor's advice that the claim was unlikely to succeed amounted to contributory conduct in terms of both sections. The claimant was in fact candid during the investigation and did not for example invent dates or circumstances to bolster her position. Indeed, she was honest in disclosing that her solicitor had told her that she had limited chances of success in a Tribunal. Of course, matters might have turned out differently. Dr Robson might have recalled the proposed increase and accepted that the shortcomings of the company were to blame for not implementing it or that it was contingent on some further allocation of duties. Here we have one aspect of her conduct namely the fact that she made a claim for unpaid wages, as she saw it. I did not accept that the claimant made the claim fraudulently but she did make it in circumstances where she was no doubt pleased to be able to discomfit Dr Robson but although the advice was that the claimant was unlikely to succeed it was her legal right to make it. The claim was pursued properly and politely with no undue threats or ancillary conduct that was questionable. For example, the

claimant did not threaten to liquidate the company if she wasn't paid or say that Dr Robson was lying and so forth.

133. Where I accept that in an area where a legal claim is thought to exist, even one with limited chances of success, and then lawfully pursued it would only be if there was some other aspect or character to that conduct which was blameworthy that would justify a reduction. In these circumstances I do not make any reduction in the basic or compensatory award.

134. The claimant is entitled to a basic award of £5,717.70 (9 years' service, aged 45 at date of dismissal =11 weeks x £519.80). The net weekly wage was agreed at £442.37) and wages lost through the early truncation of the notice period is agreed at £1579.26 (3.57 weeks x £442.37)

135. Finally, I would express the view that it is unfortunate that this case ended up at an Employment Tribunal hearing with bitter recriminations and with all the expense and time that this entails. It is puzzling given the lack of any solid evidence of fraud that the respondents didn't just reject the claim for arrears of wages made by the claimant and allow her to complete her notice. Relations were strained but there was no evidence that working relations broke down. It seems to be becoming increasingly common for employers to report employees to their professional bodies such as occurred here and in some circumstances that is quite proper. Unfortunately, the impression I am left with here was that it was done here as a vindictive act. It prevented the claimant taking up arranged employment and no doubt was concerning and upsetting for her. I understand from later correspondence that no action was taken. These circumstances do not reflect well on the respondent company or on is managers.

Employment Judge	**James Hendry**
Date of Judgement	**2 July 2020**
Date sent to parties	**3 July 2020**