



## THE EMPLOYMENT TRIBUNALS

**Claimant:** DR JANICE BRYDON

**Respondent:** CUMBRIA, NORTHUMBERLAND, TYNE & WEAR  
NHS FOUNDATION TRUST

**Heard at:** THE EMPLOYMENT TRIBUNAL AT NEWCASTLE  
UPON TYNE

**On:** MONDAY 22 FEBRUARY 2021

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

***Representation:***

**Claimant:** IN PERSON

**Respondent:** MISS SOPHIE FIRTH (Counsel)

## RESERVED JUDGMENT

1. The Claimant's complaints of unauthorised deductions from wages are not well-founded and are dismissed.
2. The hearing listed on 29 March 2021 shall be vacated.

# REASONS

## Introduction

1. This was the hearing of Dr Janice Brydon's claim against Cumbria, Northumberland, Tyne & Wear NHS Foundation Trust ("the Trust") under section 13 of the Employment Rights Act 1996 in respect of alleged unauthorised deductions from wages.
2. In early-2015, Dr Brydon started a new role with the Trust. There is a dispute about the salary to which she was entitled. Dr Brydon claims that her salary was £54,998 per annum. The Trust claims it was £40,558 per annum. The latter figure, asserts the Trust, is the appropriate figure for the band 8(a) position held by Dr Brydon; the former figure would be appropriate to a band 8(c) position.
3. In the months February through to September 2015, the Trust paid Dr Brydon at the higher rate of £54,998 per annum. However, in early-October 2015, the Trust considered it had made a mistake and calculated that between February and September 2015 it had overpaid Dr Brydon by £11,795.32. It reduced Dr Brydon's monthly salary from the rate of £54,998 per annum to the rate of £40,558 per annum. In November 2019, the Trust started to recoup the alleged overpayment of £11,795.32 by making the first of 24 equal monthly deductions from Dr Brydon's salary.
4. By this claim, presented on 23 September 2020, Dr Brydon contends that she was not overpaid in the months between February and September 2015 and that she was and remains entitled to a salary at the higher rate paid during that period. On her case, she has been underpaid since October 2015. It is Dr Brydon's complaint that—

- (1) the deductions from her salary that commenced in November 2019 are unauthorised deductions from wages, and
- (2) the monthly payments of her salary since October 2015 at a reduced rate relative to that which she was paid before October 2015 also involve an unauthorised deduction from wages.

(Dr Brydon's claim under (2) above goes back only to September 2018 by virtue of section 23(4A) of the 1996 Act, the effect of which is to preclude me from considering so much of a complaint as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.)

5. Dr Brydon relies on a document dated and sent to her by email on 17 April 2015 (some ten weeks after her relevant employment commenced) entitled "Statement of Employment Particulars" in which her salary was stated to be £54,998. She describes this document as her contract. While she recognises (and always has accepted) that the figure of £54,998 was erroneous, she considers that the Trust is bound by it until a new contract is made by "mutual agreement".
6. The Trust for its part contends that Dr Brydon's contractual entitlement was to a band 8(a) salary of £40,558 per annum and that she was overpaid between February and October 2015. It is the Trust's case that—
  - (1) the deductions from Dr Brydon's salary that commenced in November 2019 are lawful having regard to section 14 of the 1996 Act and the terms of Dr Brydon's employment contract, and
  - (2) if it is wrong about the position before October 2015, from that date Dr Brydon's consented to a variation of her contract of

employment such that her salary entitlement was reduced to the band 8(a) rate of £40,558 per annum.

### **Issues**

7. The first issue which I have to determine is what was the salary to which Dr Brydon was contractually entitled.
8. In order to determine this first issue, I must consider how and when the contract was made and on what terms. I must also consider the status of the document entitled "Statement of Employment Particulars" and the effect of the provision within it that Dr Brydon's salary was £54,998.
9. If and only if I determine the first issue in Dr Brydon's favour, that is, if I find that Dr Brydon was contractually entitled to a salary starting at £54,998 per annum, then I must go on to determine whether or not there was a variation of that contract in or about October 2015 whereby the parties agreed that Dr Brydon's salary should thenceforth be reduced to £40,558.

### **Evidence**

10. I considered the following material when making my decision:
  - (1) a hearing bundle containing 263 pages of documents;
  - (2) a witness statement bundle containing a further 26 pages and being the witness statements of the following witnesses:
    - (a) Dr Brydon,
    - (b) Mrs Victoria Bullerwell, Head of Workforce at NTW Solutions Limited, which is a wholly-owned subsidiary of the

Trust and which now deals with the Trust's staff requirements;

(c) Mr Christopher Dixon, who is a Payroll Team Manager employed by Northumbria Healthcare NHS Foundation Trust and who oversees the team which administers the Trust's payroll.

(3) a neutral chronology agreed by the parties;

(4) a skeleton argument prepared by the Trust's counsel.

11. Prior to the hearing, I was able to read items (1) to (3) in their entirety. At the outset of the hearing, the Trust's Counsel supplied me (and Dr Brydon) with a copy of her skeleton argument (4) and I was able to read it before beginning the substantial hearing.
12. In the course of the hearing I heard evidence from each of the three witnesses I have identified above.

### **Findings of fact**

13. It was not disputed that the amount an employee is paid by the Trust depends upon the pay band in which their job is categorised and, within that band, which point that individual employee is at. Sometimes the points are referred to as increments. As time goes by and an employee's experience increases, they will move up a point or an increment up to a maximum point within the band in which their job sits. With each upward move they will receive a pay rise. This rise is in addition to the annual cost of living increase they receive and was referred to as an incremental increase. Thus any individual's pay is determined by their job (which dictates the applicable band) and their individual experience or time served in the job (which dictates the point or increment within the band).

14. Dr Brydon accepted that while she did not know the precise details of the point range within any particular band let alone the salary which might be paid at any such point in any such band, in 2015 she was familiar with this system. This is hardly surprising: Dr Brydon had worked for the Trust since at least 2000 and since 2011 as a psychologist.
15. By late-2014, Dr Brydon as working in a band 7 role and had been at the maximum point or increment for some while. Her salary was approximately £40,000 per annum and, apart from cost of living increases, would not increase further while she remained in that role.
16. Dr Brydon explained that in late-2014, concerned to take on more responsibility and to enjoy career progression, she applied for jobs within the Trust that were in the next band up, that being band 8(a).
17. There is a dispute about what jobs Dr Brydon applied for. The Trust asserted that Dr Brydon applied for the job of Senior Psychologist but was unsuccessful in her application and instead was offered the job of Principal Psychologist. Dr Brydon for her part insisted that she never applied for the job of Senior Psychologist but that she did apply for a particular job of Principal Psychologist, was unsuccessful, and was offered instead the choice of one of two jobs as Principal Psychologist albeit neither one the one she had applied for. She selected the one she preferred.
18. Dr Brydon's evidence was very clear on this point. When asked what roles she had applied for, she replied that she had applied for a "principal psychologist's role" and that "100% I never applied for a higher role than that." She continued, "The job that I went for interview for had the same title as the job that I do now: principal psychologist." The Trust was not able to adduce any direct or even hearsay evidence

on this point but instead reconstructed a position based on non-specific documents.

19. I prefer Dr Brydon's evidence on this point for the following reasons:
- (1) Dr Brydon's account is unremarkable and makes sense in its own terms.
  - (2) Dr Brydon was able to give direct evidence about this matter which must have been an important matter to her, being related to her employment.
  - (3) Neither of the Trust's witnesses had any direct knowledge of this matter, something they candidly and readily accepted. They had no dealings at all with Dr Brydon in late-2014 and early- 2015, whether directly or indirectly.
  - (4) Neither of the Trust's witnesses was able to give any hearsay evidence properly so-called about this matter. By that, I mean that while Mrs Bullerwell made assertions, they were just that: when tested by Dr Brydon, she was unable to state the source of her information and belief.
  - (5) There is an absence of documentary evidence to support the Trust's position. There is neither application form nor interview notes nor any rejection letter.
20. Dr Brydon conceded in cross-examination that the job she had applied for—the principal psychologist's role—she knew was a band 8(a) role. She explained that she had looked for band 8(a) jobs and applied, that band 8(a) jobs were what she was looking for, and that she was looking for band 8(a) jobs because she then was at top of band 7 and wanted progress. She volunteered that she “would not have looked

higher”, by which I understood her to mean, she did not look at jobs in bands above band 8(a).

21. When it comes to the salary to which an employee in a band 8(a) job as entitled, Dr Brydon explained that she had a rough idea of what a band 8(a) job paid and that it would be incrementally higher than the salary which she was then on.
22. I accept Dr Brydon’s evidence on these points and find that in late-2014, she was searching for a band 8(a) role in order to obtain more responsibility and career progression and that she understood that a band 8(a) role would carry an incrementally higher salary than that which she then enjoyed on the maximum point in band 7.
23. I do not find that Dr Brydon had seen any job advertisement in which the precise salary payable for a band 8(a) role was specified or that any figures were discussed at any interview. There is no evidential basis on which I could do so.
24. There is no dispute that before Christmas 2014, Dr Brydon was orally offered the job of principal psychiatrist and accepted that offer. Dr Brydon told me in her evidence that that occurred in a conversation between herself and the Trust’s Ruth Andrews. There also is a document in the bundle at page 255 entitled “Successful Applicant Form” which is significant. Although the Trust described this as a record of an interview, it was agreed that in fact it is an internal document completed by the “Appointing Officer” which records an appointment and is used to put that appointment in train. This document records Dr Brydon as the applicant and Principal Clinical Psychologist as the job. Next to the question, “Has the applicant verbally accepted job offer?” the answer “yes” is ringed. The document bears a date at the top 10 December 2014 and the manuscript words “Send -> James”.



25. Dr Brydon stated in evidence that following her acceptance of the job offer, she attended an induction on 19 January 2015. That was not challenged and I accept her evidence on the point.
26. What happened next is controversial. At pages 251 to 253 of the bundle is a three-page letter dated 20 January 2015—the day after the induction—and addressed to Dr Brydon. The document bears the name James Denton next to the place for signature. Mrs Bullerwell states that the document is a print of a PDF document on the Trust's computer system and also exists as a MS Word-format document. It states, "Further to your recent interview, I am pleased to confirm the conditional offer of the above post... Your starting salary will be £40,558...". The third page is a declaration form which must be completed, signed and returned by the employee. Dr Brydon claims not to have received this document in or around January 2015.
27. There are some other documents which are relevant:
  - (1) At page 129 of the bundle is a copy of a completed declaration form apparently identical to the uncompleted form on the third page of the letter. It bears a signature and handwriting which Dr Brydon accepted are hers.
  - (2) At pages 124 to 126 of the bundle is a copy of the offer letter identical in all respects save that it bears the date 13 April 2016. This document bears a manuscript "8" in the top right-hand corner of its first page.
  - (3) At pages 127 and 128 of the bundle is a two-page document entitled "Personal file - contents checklist" relating to Dr Brydon in her role as "principal clinical psychologist". The document is also dated 13 April 2016. It is what its name suggests: a checklist. It is a list of other documents, each of which is checked off as

present on the file (or not, as the case may be), initialled and dated. Almost all of the entries are checked off by “BM” on “13/04”. It is agreed that BM is Bethany Manning and 13/04 represented 13 April 2016.

- (4) At page 153 of the bundle is an email written by Dr Brydon on 30 April 2017. In it she states, “I do not recall receiving an offer letter”.
- (5) At pages 133 to 134 of the bundle is a letter written by Dr Brydon dated 11 July 2017. Here she states, “I have never been in receipt of an offer letter”.
- (6) At pages 169 to 171 of the bundle are the agreed notes of a grievance meeting held on 8 August 2017. It is recorded, “MR asked whether JB had received an offer letter. JB advised that MG had said she had but she had not...”.
- (7) At pages 200 to 203 of the bundle is a grievance investigation report dated November 2017 and prepared by the Trust’s Marie Robson in advance of a grievance hearing. This document included at appendix 8 an offer letter and form. It will be recalled that the version of the offer letter dated 13 April 2016 bears a manuscript “8” in the top right-hand corner of its first page.
- (8) At pages 243 to 246 of the bundle is a letter dated 28 February 2018 recording the outcome of a grievance appeal meeting held on 15 February 2018. The letter records Dr Brydon’s assertion that she received the offer letter in April 2016.
- (9) At page 254 is a document prepared by the Trust’s solicitors which shows the metadata of the PDF of the document at pages 251 to 253, being the offer letter dated 20 January 2015. This

shows the document has the title “Janice Brydon - Offer Letter”, that its author was “jadenton” and that it was created at 12:51:10 on 20 January 2015.

28. Until the grievance appeal hearing, Dr Brydon either could not recall or denied having received any offer letter. At the grievance appeal hearing, she asserted that she received an offer letter on or shortly after 13 April 2016. In her witness statement she states at [40], “The offer letter was as the Respondent is aware received in April 2016 some fourteen months after the start date”, and at [48], “The offer letter was provided and was not signed or accepted as reported in the Respondents Grounds of Resistance, however this was not until April 2016”.
29. In oral evidence at the hearing, Dr Brydon repeatedly confirmed that she did not receive any offer letter on or shortly after 20 January 2015 but did so only on or shortly after 13 April 2016.
30. The Trust’s Mrs Bullerwell states in her witness statement at [13]:

I am aware that the Claimant says that she never received an offer letter... She says that she did not receive the offer letter until April 2016. I have recently reviewed the recruitment file relating to the Claimant in the run up to these proceedings and am aware that, in addition to the pdf version of the offer letter dated 20 January 2015 (page [251]) there is a Microsoft Word version of the offer letter document on the electronic system. On the Word version of the document the date section auto populates with the current day’s date. I am aware that there is a version of the offer letter within the bundle at pages [124-126] and that this is dated 13 April 2016. The April 2016 letter coincides with the audit of the file prepared by Bethany Manning (signed B. Manning) on 13

April 2016, which starts in the bundle at page [127]. The Word document would have auto populated the date as 13 April 2016.

31. I find that the offer letter was sent on 20 January 2015 and received shortly thereafter. I reject Dr Brydon's evidence that the offer letter she received was dated 13 April 2016 and that she received it on or shortly after that date. My reasons are as follows:

- (1) There is a PDF version of the offer letter dated 20 January 2015 which was created on 20 January 2015. The creator of that document was James Denton. It seems likely that James Denton is the "James" to whom the "Successful Applicant Form" (page 255 of the bundle) was sent on or about 10 December 2014. The production—and by inference the sending—of the offer letter was stimulated by the "Successful Applicant Form".
- (2) The date 20 January 2015 corresponds with the time when Dr Brydon was offered and accepted the job (before Christmas 2014), the induction (19 January 2015) and the commencement of the job (no later than 2 February 2015).
- (3) It would be surprising to say the least were Dr Brydon to start in a new job without a written offer. It seems to me inherently likely that the Trust's processes would produce such a letter; and the employee herself would expect such a letter.
- (4) It would also be unlikely were the offer letter to have been created in January 2015 but not sent then.
- (5) The salary range in the letter (£40,558 to £47,088) for a band 8(a) post corresponds precisely with the range then-current for a band 8(a) post on 20 January 2015: see the document entitled "Agenda for Change play bands and points from 1st April 2014"

at page 79 of the bundle. On 13 April 2016, the range for a band 8(a) post had gone up (to £40,964 to £47,559): see the same document for the period from 1st April 2015 (page 85). It seems to me highly unlikely that the letter would have been sent out on 13 April 2016 populated with out-of-date figures.

- (6) It is clear that on 13 April 2016, Bethany Manning carried out an audit or check of Dr Brydon's file. It is beyond coincidence that all of the documents referred to in the checklist at pages 127 and 128 of the bundle could have come in on or gone out on the very same date that the checklist was created, 13 April 2016. Mrs Bullerwell's suggested explanation, that the paper file copy of the self-populating MS Word document was printed out on this date is compelling.
- (7) No reason was advanced as to why the Trust would "out of the blue" send the offer letter in April 2016, some 16 months after it was drafted and 15 months after Dr Brydon started the job to which it relates.
- (8) Had the offer letter been sent to Dr Brydon in April 2016, that would have been a very odd thing to have happened from her perspective, especially given her position at that time as to her salary. It might be expected that she would remark upon that at the time. There is no evidence that she did.
- (9) Dr Brydon's evidence has been inconsistent through time such that I am cautious about relying on it without more. At first, Dr Brydon denied ever having received an offer letter. Only after that version of the offer letter dated 13 April 2016 was disclosed to her as appendix 8 under the grievance investigation report of November 2017 did she claim to have received the offer letter on or shortly after 13 April 2016. She seems to have changed her

case to fit the document as it emerged. It is telling that the only copy of the offer letter before me bears the manuscript “8” in the top right-hand corner of its first page consistent with it coming from the grievance investigation report to which it was appendix 8 and which I infer was sent to Dr Brydon before the grievance appeal hearing.

- (10) When asked where the copy of the offer letter she received was now, Dr Brydon was evasive. She was asked three times before she answered that simple question. She stated that it was “at home with her documents”. She gave no explanation of why she had not disclosed it.
32. I cannot accept that the offer letter was sent and received in April 2016. Given that Dr Brydon accepted that she had signed and returned the third page of the letter (page 129 of the bundle), it follows that she had the letter at some point in time (despite her protestations in 2017 that she had never had an offer letter). The most likely time is shortly after it was created on 20 January 2015.
33. Dr Brydon started work in the job either at the end of January 2015 or at the very beginning of February 2015, on Monday 2 February 2015 at the latest. That is not disputed.
34. On 17 April 2015, the Trust sent Dr Brydon the document at pages 101 to 109 of the bundle entitled “Statement of Employment Particulars”. That document states (among other things):

*Your appointment is Principal Clinical Psychologist, Band 8a...*

*Your appointment is also governed by the Agenda for Change:  
NHS Terms and Conditions of Service Handbook...*

*Your pay band is Band 8a starting at £54,998...*

*In addition to statutory deductions, any sums that you owe to the Trust will be deducted from your pay at the appropriate rates.*

*If at any time you owe the Trust any monies as a consequence of inadvertent overpayment of salary, you agree to repay any such monies upon written request by the Trust. Your agreement is regarded as confirmation that the Trust is authorised, subject to prior notice being given, to deduct any monies owing from your salary.*

35. Between February 2015 and September 2015, the Trust paid Dr Brydon at the band 8(c) rate of £54,998 per annum rather than the band 8(a) rate of £40,558 per annum. The difference was £11,795.32.
36. Dr Brydon stated that she realised in September 2015 that she was being paid overtime at an erroneous rate. She states that she brought the matter to the Trust's attention and it was this that caused the Trust to appreciate that it had been paying her at an erroneous rate since February. I have seen no evidence to corroborate that account and I make no finding that it is true. What is not in dispute is that in late-September 2015, the Trust considered that it had overpaid Dr Brydon. On 2 October 2015, it wrote to her (page 110) in these terms:

*I am writing to inform you that unfortunately an overpayment has been identified in the payments you have received from 2nd February 2015 to 30th September 2015. the overpayment was due to you being paid Band 8C instead of 8A.*

*The gross amount you have been overpaid is £10,848.09.*

*I will be recovering the gross amount as an overpayment over 8 months which reflects the period over which the monies were paid, commencing October 2015.*

37. Unfortunately, that letter itself contained an inaccurate calculation of the overpayment. On 6 October 2015, the Trust wrote again to Dr Brydon (page 111), this time claiming an overpayment of £11,795.32. The calculation of that figure appears at page 132 of the bundle and was not challenged; nor was an alternative calculation produced; accordingly I find it is accurate.
38. It is clear that Dr Brydon immediately disputed the position because on 7 October 2015 the Trust's Payroll Officer Catherine Wilkinson wrote to her that she had requested the Trust's HR function to investigate the position, clarify the rules on overtime and suspend repayments until after an investigation (page 114). However, the first contemporaneous writing from Dr Brydon that appears in evidence before me is her email of 4 December 2015 (page 117) in which she states, "This needs to be agreed ...surely, I don't understand why HR are just going ahead without consultation? This was not my error?". I infer from that email that Dr Brydon accepted then (as she confirmed when cross-examined) that the level at which she had been paid was indeed erroneous but that her position then (as she confirmed to me at the hearing it remains now) was that the Trust was bound by its error.
39. Also on 4 December 2015, The Trust's Catherine Wilkinson wrote to its Jill Baskerville, "As well as the extension Janice has also requested that repayments commence February 2016 to allow her time to sort her finances out" (page 120). Dr Brydon was not asked about this email during the hearing and I have not seen or heard any evidence of the request that lies behind it. However, this contemporaneous document can only be interpreted as suggesting Dr Brydon had accepted there had been an error and had submitted (albeit reluctantly) to a repayment schedule.



40. On 11 December 2015, however, Dr Brydon wrote to the Trust's HR Officer, Simon Gourley (page 122). She referred to what the parties call her contract, being the document at pages 101 to 109 headed "Statement of Employment Particulars" and in particular to the words I have cited above, "Your pay band is Band 8a starting at £54,998". She went on, "I understood that as this was the terms of my contract and any error is on the employer, this was not my fault as I accepted the contract. This is what I believed I was being paid." These words are consistent with the position Dr Brydon has adopted throughout: that the Trust is bound by the error in the Statement of Employment Particulars. Her letter continues, "This situation has now been adjusted and my wage reduced, however, it is my understanding that you are recovering money which you agreed to pay me which I understand would be an unlawful deduction of wages". These words suggest that Dr Brydon accepted the reduction of her salary to the correct level for her band 8(a) post but disputed the recoupment of the overpayment. That position is inconsistent with the position she now adopts, which is that not only the recoupments but also the failure each month to pay her at the erroneous rate amount to unlawful deductions from wages.
41. By letter dated 11 July 2017, Dr Brydon formally raised a grievance (pages 133 to 134). She stated:

*I have been advised that the contract should be honoured by the trust. The contract is a legally binding document and cannot be arbitrarily written, signed or changed. Therefore, any adjustments would constitute an unlawful reduction to my salary resulting in an unlawful deduction for wages. Nothing in the contract states that changes can proceed without my permission. I have never been provided permission or asked in writing that changes would be taking place from October 2015, however deductions went ahead and my salary was reduced.*

That position is consistent with the position now advanced by Dr Brydon.

42. A grievance meeting took place on 8 August 2017. An agreed minute is in the bundle (pages 169 to 171). Insofar as relevant, the notes record the following:

*JB advised that the correct band was on the contract but the wrong amount.*

*MR [that is the Trust's investigating officer Marie Robson] asked if after 8 months JB was put on the correct salary.*

*JB advised that she was put on the correct band and salary but she had not been given any notice that that was going to happen, there had been no discussion or authority given and the only way she knew that it had happened was from her wage slip*

43. This exchange appears to suggest an acceptance by Dr Brydon that she would be paid at the correct band 8(a) rate but a grievance about how the Trust had gone about it.
44. In November 2017, the Trust produced its grievance report at appendix 8 of which was the version of the offer letter bearing the date 13 April 2016.
45. By letter dated 3 January 2018, the Trust communicated its decision not to uphold Dr Brydon's grievance (pages 217 to 219). The letter records the position adopted by Dr Brydon at the grievance hearing, namely that she did not consider she had been overpaid in error but rather paid what was contractually due. The letter is silent as to whether Dr Brydon accepted at the grievance hearing that after October 2015 she was being paid at the correct rate: it certainly does not record any protest by Dr Brydon.

46. By letter dated 10 January 2018, Dr Brydon lodged a grievance appeal (pages 224 to 225). The grievance expressed in this appeal letter concerns the Trust's intention to recoup the alleged overpayments made between February and October 2015. Although the letter records that Dr Brydon was not asked in writing about the reduction in her salary that took place in October 2015, that does not appear to be at the heart of her grievance. This letter contains the most bold statement of Dr Brydon's consistent position throughout that the Trust is bound by any error in the contract document because that document is a contract document:

*I was paid the amount signed and agreed which is not an overpayment, I do not owe any monies as I have not been paid over the contracted agreed salary.*

*As stated in the letter received, "that the error in payment was caused by an error in the production of your contract"*

*As you are aware and according to the trusts own policy, a legally binding contract overrides an offer letter.*

47. The appeal was heard on 15 February 2018 and the outcome communicated to Dr Brydon by letter dated 28 February 2018 (pages 243 to 246). The letter contains this summary of Dr Brydon's case:

*You presented your case and explained that the overpayment was not an error as the salary that had been stated in your contract of employment (undated) was £54,998 instead of £40,558 per annum. You said that this was a legally binding document and therefore the amount that was stipulated within the contract is the amount which should have been paid.*

*You explained during the hearing that to this date you still do not have a revised contract of employment and therefore the salary remains incorrect and binding.*

48. In November 2019, the Trust deducted from Dr Brydon's monthly salary payment the first of 24 instalments whereby the alleged overpayment was intended to be recouped.

### **Relevant law**

#### **—unauthorised deductions from wages**

49. Under section 13(1) of the Employment Rights Act 1996, an employer shall not make a deduction from wages of a worker employed by him unless either (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
50. Under section 13(3) of the 1996 Act, where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of the Act as a deduction made by the employer from the worker's wages on that occasion.
51. Thus both the deductions which the Trust started to apply to Dr Brydon's salary in November 2019 and the reduction which the Trust applied in October 2015 are capable of amounting to unauthorised deductions.
52. However, section 14(1) of the Act provides that certain deductions are permissible and do not fall within section 13. These are deductions from a worker's wages made by his employer where the purpose of

the deduction is the reimbursement of the employer in respect of (a) an overpayment of wages, or (b) an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker.

53. It follows that if between February and October 2015 Dr Brydon was overpaid in excess of her contractual entitlement, any recoupment of that overpayment will not be unlawful under section 13(1) of the Act. Likewise, if after October 2015 the Trust has paid Dr Brydon her contractual dues, the reduction that was applied from that time also will not operate as an unlawful deduction.
54. I ought to note that under section 23(4A) of the Act, I must not consider so much of a complaint as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint. That means I must not consider deductions made before 23 September 2018.

**—mistakes in written contracts**

55. Generally speaking, the law regards an agreement as having been reached when an offer made by one of the parties (the offeror) is accepted by the other to whom the offer is addressed (the offeree or acceptor).
56. When considering a written contract, it is important to distinguish between writing whereby the contract is made and writing which is merely a record of the contract made in some other way.
57. Mistakes in written contracts are not always binding on the parties and written contracts are not set in stone and immutable. Written contracts occasionally and inevitably contain mistakes. Generally, parties are

not bound by such mistakes and may, in the limit, have their written agreement rectified by the Court.

58. Counsel for the Trust in her skeleton argument sets out how the court can deal with mistakes in a written contract by rectification and by interpretation. Rectification is a process by which the document is made to conform to what was actually agreed between the parties, or what the law, applying the objective principle, treats as being their agreement. See the case of *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and the Nai Superba)* [1984] 1 Lloyd's Rep 353 at 359 where the Court of Appeal explained that "the remedy of rectification is one permitted by the Court, not for the purpose of altering the terms of an agreement entered into between two or more parties, but for that of correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect their true agreement."
59. As to the correction of an error by interpretation, Counsel for the Trust in her skeleton argument suggested that if two conditions are satisfied, the Court can correct an error in a contract as a matter of contractual interpretation:
  - (1) there must be a clear mistake ascertained by considering the document against the admissible background or surrounding circumstances, and
  - (2) it must be clear what correction ought to be made to cure the mistake.
60. She referred to the well-known case on the proper approach to be taken to the interpretation of contracts, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 as authority for the following propositions:

*The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax...*

*The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.*

61. Where there is an obvious mistake in a contract, the Court will not enforce it if it can be brought within these rules. It is simply not the law that the error as to salary in the Statement of Employment Particulars provided by the Trust to Dr Brydon on 17 April 2015 is binding on the Trust come what may merely because it is contained in the document recording the parties’ contract.

**—variation**

62. An employment contract like any other species of contract can be varied by express agreement, orally or in writing, or by conduct, or by a mixture of any of these. In this case the Trust contends that if, contrary to its primary case, the provision as to salary in the Statement of Employment Particulars was binding on it notwithstanding the error, then there was a variation as to the salary payable which variation was

made by conduct. The Trust contends that by continuing to work notwithstanding the reduction in her wages after October 2015, Dr Brydon conducted herself such as to accept a variation to the terms of her employment contract.

63. In *Solectron Scotland Ltd v Roper* 2004 IRLR 4, the Employment Appeal Tribunal held:

*The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change, they must either refuse to implement it or make it plain that by acceding to it, they are doing so without prejudice to their contractual rights.*

64. Thus by accepting a change made by her employer without protest, an employee may by her conduct be held to have agreed a variation of her contract in respect of that change.

### **Discussion and conclusions**

#### **—issue one: what salary was Dr Brydon entitled to?**

65. Dr Brydon's case on this issue is that she was and remains entitled to the salary specified in the Statement of Employment Particulars sent to her on 17 April 2015, that is, £54,998 per annum.



66. The Trust's case is that Dr Brydon was entitled to the salary applicable to the band 8(a) post in which Dr Brydon was employed, namely £40,558 per annum.
67. In order to determine this first issue, I must consider how and when the contract was made and on what terms. I must also consider the status of the document entitled "Statement of Employment Particulars" and the effect of the provision within it that Dr Brydon's salary was £54,998.
68. It is abundantly clear that any contract of employment was made some time before the date on which the Statement of Employment Particulars was sent to Dr Brydon. On the facts as I have found them to be, Dr Brydon was offered and accepted the post of Principal Psychologist before Christmas 2014. That offer and acceptance took place in an oral conversation with Ruth Andrews. The fact that that exchange was oral and was informal does not prevent a contract having come into existence. That she subsequently had an induction on 19 January 2015 is entirely consistent with the job having been offered and accepted.
69. Even if I am wrong about that, I have found that Dr Brydon was formally offered the job of Principal Psychologist by letter dated 20 January 2015 and started in post at the latest on 2 February 2015. As a matter of logical necessity, her employment contract in the role of principal psychologist must have been made by then, even if its terms were not recorded in a written contract document. It was approximately 10 weeks later that the Statement of Employment Particulars was sent to Dr Brydon. That document could hardly be the contract itself, even if it was intended to be a record of the contract's principal terms
70. The Statement of Employment Particulars is thus nothing more than that. It is a written record of the main terms of the contract of

employment but it was not an instrument whereby that contract was brought into being. It seems to me that the document is intended to meet the Trust's obligation under section 1(1) of the 1996 Act to provide to Dr Brydon a written statement of particulars of employment.

71. I have no hesitation in finding that Dr Brydon's contractual salary was the band 8(a) rate starting at £40,558 per annum. Dr Brydon was candid: she was looking for a band 8(a) role; she did not look for higher roles; she knew the principal psychologist role was a band 8(a) role; although she did not know the details, she understood the scheme of bands and points within bands and that that scheme determined salary; and further, she had a "rough idea" of the amount of a band 8(a) salary, that is, that it would be "incrementally higher" than the salary she was on at the top of band 7, approximately £40,000. I am confirmed in this view by the fact that the offer letter received by Dr Brydon on or shortly after 20 January 2015 stated the salary to be £40,558. On her own evidence, Dr Brydon knew that the higher rate at which she was paid between February and September 2015 was a mistake. In other words, she knew then that it was not the salary to which she was entitled.
72. The provision in the later Statement of Employment Particulars that the salary was £54,998 is accepted by all as erroneous. Moreover, it was manifestly an error. It is almost 40 per cent more than the agreed salary. It was not an incremental increase.
73. The erroneous salary figure given in the Statement of Employment Particulars is not binding on the Trust. It is an archetypal common mistake in a document recording but not making the parties' contract and as such it liable to correction by rectification or interpretation.
74. Dr Brydon's insistence that the Trust is somehow stuck with its error (for it was the Trust's error, undoubtedly) and that she can enforce that

error against the Trust also chimes with the paradigm cases of unilateral mistake in which the Courts have always granted relief. In my view, given the scale of the mistake, given Dr Brydon's familiarity with the pay banding structure, given her knowledge that hers was a band 8(a) role, given her expectation of an incremental increase in salary, the only way she could deny knowledge of the mistake is if she wilfully shut her eyes to it. That she now seeks to take advantage of the mistake is precisely why the remedy of rectification would be available.

75. In my judgment, the first issue must be resolved in favour of the Trust. Dr Brydon's contractual salary was that applicable in band 8(a), £40,558.

**—issue 2**

76. Having determined the first issue against Dr Brydon, it is not strictly necessary for me to determine the second issue. However, it seems to me appropriate given the importance of this case to the parties that I do so.
77. If I am wrong about the terms of Dr Brydon's contract appertaining to salary and if it were in fact a term of her contract that she should be paid at the rate of £54,998 per annum, then in my judgment it is clear that in October 2015 she consented to a variation of that contract such that she should be paid at the correct band 8(a) rate thenceforth. The basis of such consent lies in her conduct.
78. The most obvious aspect of conduct is the fact that over five years later Dr Brydon is still working the same job on the same terms and has done so continuously without interruption. It would be incorrect, however, to suggest that Dr Brydon did not raise or protest the issue of her on-going salary but such protest as she did make was relatively

muted and ambiguous: the focus and intensity of her complaint has always been squarely upon the Trust's proposed recoupment of the overpayments made between February and October 2015.

79. Moreover, at all times since October 2015, Dr Brydon has accepted that the salary figure of £54,998 in the Statement of Employment Particulars was erroneous and the correct figure was £40,558. Dr Brydon's statement in her email of 4 December 2015 ("This was not my error") recognises that it nonetheless was an error. The variation contended for by the Trust simply represents the correction of that admitted and acknowledged error and as such would be a natural variation for the parties to make. By contrast, it would be extraordinary were Dr Brydon to have refused the variation. The email between the Trust's Catherine Wilkinson and its Jill Baskerville later on 4 December 2015 also suggests Dr Brydon had accepted there had been an error and had submitted (albeit reluctantly) not only to its correction but to a repayment schedule.
80. There is some evidence in the documents that Dr Brydon accepted the correction of the error. Dr Brydon's letter of 11 December 2015 can only be interpreted as consistent with a consensual variation. "This situation has now been adjusted and my wage reduced...", she wrote, strongly suggesting that she accepted the correction of the admitted and acknowledged error by the reduction of her salary going forward. On this letter, Dr Brydon's complaint was not about that, it was about the proposed recoupment of the earlier overpayment which was the subject of the rest of the sentence: "...however, it is my understanding that you are recovering money which you agreed to pay me which I understand would be an unlawful deduction of wages".
81. It was not until July 2017—almost 2 years after the reduction in her salary to the normal band 8(a) rate—that Dr Brydon raised a formal

grievance in respect of the matter and even that is somewhat ambiguous about whether she was contending she should still be paid at the rate of £54,998 per annum. Again, the error in the Statement of Employment Particulars is acknowledged as such; again, the focus of the grievance is on the Trust's proposed recoupment of overpayments; her words "any *further* deduction from my salary is unacceptable" (my emphasis) suggest that her objection was not to the reduction of her salary to the proper band 8(a) rate in October 2015 but rather to the prospect that recoupment of the prior overpayments would be made by further deductions.

82. In the grievance meeting that took place in August 2017, Dr Brydon's grievance was not the fact of the reduction of her salary in October 2015 but rather the manner: "JB advised that she was put on the correct band and salary but she had not been given any notice that that was going to happen, there had been no discussion or authority given and the only way she knew that it had happened was from her wage slip". The tenor of that note is that the reduction was appropriate—it was a reduction to the "correct band and salary"—and as such was consented to.
83. Similarly in her grievance appeal, Dr Brydon's position was, "I do not owe any monies" rather than that the Trust owed her money by virtue of an unlawful reduction in her salary since October 2015.
84. In the notes attached to her ET1, Dr Brydon stated that she wished, "To be paid and backdated payment in line with my contract". It is not clear whether this refers only to the recoupments which had by then been going on for ten months or also to reduction in salary since October 2015. It could be read as suggesting Dr Brydon wished to assert a claim to salary at the rate of £54,998 per annum for the period after October 2015. This represents a hardening of a stance which

previously had been either consistent with acceptance of the position or ambiguous.

85. It was not until the preliminary hearing in this matter on 27 November 2020 that Dr Brydon unequivocally asserted a complaint to an unlawful deduction arising out of the reduction of her salary to the ordinary band 8(a) rate after October 2015. By 2020, however, it was too late to undo the past conduct to which I have referred. Only on 4 January 2021 did Dr Brydon quantify her case (page 53 of the bundle).

**—conclusions**

86. My conclusion on the first issue—that Dr Brydon’s contractual entitlement to salary was to the band 8(a) rate of £40,558—means that the Trust made overpayments of her wages in the period February to October 2015 when it paid her at an annual rate of £54,998. The amount of the overpayment was £11,795.32. Any deduction from her wages now made by way of reimbursement of such overpayment falls within section 14(1) of the 1996 Act and is an excepted deduction.
87. Further, by reason of the contractual provision cited above—

*In addition to statutory deductions, any sums that you owe to the Trust will be deducted from your pay at the appropriate rates.*

*If at any time you owe the Trust any monies as a consequence of inadvertent overpayment of salary, you agree to repay any such monies upon written request by the Trust. Your agreement is regarded as confirmation that the Trust is authorised, subject to prior notice being given, to deduct any monies owing from your salary.*

—not only is any such deduction an excepted deduction under section 14 of the Act, but it also is a a deduction permitted under section 13(1)

of the Act, being a deduction authorised to be made by a relevant provision of Dr Brydon's contract. The recoupment of inadvertent overpayments of salary plainly falls within the contractual term above.

88. My conclusion also means that in paying Dr Brydon at the ordinary band 8(a) rate from October 2015, the Trust has not made any deduction from Dr Brydon's wages for the purposes of section 13 of the Act.

### **Outcome**

89. For the reasons I have set out above, Dr Brydon's complaints that (1) the Trust's recoupment of £11,795.32 from her present wages represents an unauthorised deduction from wages and (2) payment of salary since October 2015 at the normal band 8(a) rate also represents an unauthorised deduction from wages—are not well founded and shall be dismissed.
90. At the hearing on 22 February 2021, I indicated that depending on the outcome of my judgment, further directions or determinations may be required and the matter would be listed to be heard at 10am on 29 March 2021. In light of my judgment no matters remain outstanding and that hearing shall be vacated.

.....  
**EMPLOYMENT JUDGE  
RODGER**

**Judgment signed by  
Employment Judge on:**

**18 March 2021**

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