EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		**RESPONDENT**
MISS J POWELL	**V**	**NHS BUSINESS SERVICES AUTHORITY**

HELD AT: LONDON SOUTH (VIA CVP) **ON: 8 JANUARY 2021**

EMPLOYMENT JUDGE: M EMERY

REPRESENTATION:
FOR THE CLAIMANT **No attendance**
FOR THE RESPONDENT **Mr B Jones (Counsel)**

JUDGMENT

The claims of constructive unfair dismissal and unlawful deduction from wages fail and are dismissed.

REASONS

The Issues

1. The claimant resigned from her job with the respondent and she claims constructive unfair dismissal. She alleges that the respondent breached her contract by: (i) making unlawful deductions from her wages by requiring

immediate repayment of a season ticket loan and by a failure to pay her Occupational Sick Pay; (ii) a refusal to change her Line Manager against whom she had submitted a grievance. The respondent says that they were entitled to deduct money from her wages under her contractual terms relating to season ticket loans. The claimant was paid her contractual sick pay entitlements, she was not paid Occupational Sick pay for a period because she did not comply with the respondent's sickness absence reporting requirements, in particular the need for medical certificates for longer absences; instead she was paid statutory sick pay. The respondent also argues that the claimant resigned because she was facing serious disciplinary allegations.

2. Verbal judgment and reasons were given at the conclusion of the Hearing.

3. Constructive Unfair Dismissal – legal test

   a. What was the reason for dismissal? The claimant says she resigned in response to several breaches of contract by her employer.
   b. Was there an actual or an anticipatory breach of contract, sufficiently serious to justify the claimant resigning, or else did she resign because of the last in a series of incidents which justify her leaving?
   c. Did the claimant leave in response to the breach and not for some other, unconnected reason?
   d. Did the claimant delay too long in terminating the contract in response to the employer's breach?
   e. If the dismissal was unfair, would the claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the claimant being dismissed at some point? (The *Polkey* issue).
   f. If the dismissal was unfair, did the claimant contribute to her dismissal by way of her conduct, and if so would it be just and equitable to reduce compensation by any extent? (The compensatory fault issue).

<u>The legislation and relevant legal principles</u>

4. Employment Rights Act 1996

s. 13 Right not to suffer unauthorised deductions.

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

(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.

s. 23 Complaints to employment tribunals.

(1) A worker may present a complaint to an employment tribunal

(a) that his employer has made a deduction from his wages in contravention of section 13 …

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
 (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made…

(3) Where a complaint is brought under this section in respect of—
 (a) a series of deductions or payments, or
 (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

Part X Unfair Dismissal

Chapter I

Right not to be Unfairly Dismissed

s.94 The right
 (1) An employee has the right not to be unfairly dismissed by his employer.

s.95 Circumstances in which an employee is dismissed.
 (1) For the purposes of this Part an employee is dismissed by his employer if… —

 ……

 (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Fairness

s98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

5. The following paragraphs contain summaries of the relevant legal principles, as set out in *Harvey on Employment Law.*

6. S.98 requires the respondent to prove the reason for dismissal. If it cannot, the claim succeeds. If the respondent can prove the reason for dismissal, s.98(4) requires the tribunal to be satisfied that the respondent has acted reasonably in all the circumstances in treating this reason for dismissal as sufficient. There is a neutral burden of proof, and the tribunal must make up its mind whether s 98(4) is satisfied in the light of all the information before it.

7. It is not for the tribunal to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. Rather its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even although the tribunal, left to itself, would have acted differently

8. Western Excavating (ECC) Ltd v Sharp [1978] QB 761: The test is not whether a reasonable employer might have concluded that there was no breach of contract: it is whether on the evidence adduced before it the tribunal considers that there was a breach of contract.

9. Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329: The reasonableness of the employer's actions is a factor which can be taken into account. *"Reasonable behaviour on the part of the employer can point evidentially to an absence of a significant breach of a fundamental term of the contract; conversely wholly unreasonable behaviour may be strong evidence of a significant repudiatory breach. Nevertheless it remains true that conduct however reprehensible, may not necessarily result in a breach of a fundamental term of the contract."*

10. Hooper v British Railways Board [1988] IRLR 517, CA: A unilateral decision to reduce the pay of the employee will usually amount to a breach of contract, and the employer will not be able to argue that it acted 'with good intentions' or 'with reasonable and proper cause'.

11. Malik v Bank of Credit and Commerce International SA [1997] IRLR 462: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."* This test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of.

12. Braganza v BP Shipping Ltd [2015] UKSC 17, [2015]: If the claimant is objecting to the way that the employer exercised a discretion under the contract, it is not enough for the employee to argue that the decision was unreasonable; he or she must show that it was *"irrational"* under the administrative law Wednesbury principles, a much tougher test to satisfy. If the alleged breach of the term arises from generally bad behaviour by the employer, then the normal rules above apply but if issue of over the *"exercise of a discretion"* under the contract, then the employee must establish Wednesbury unreasonableness/irrationality.

13. British Aircraft Corpn v Austin [1978] IRLR 332: Refusing to investigate complaints promptly and reasonably is capable of amounting to a breach of trust and confidence. Any conduct which is *'so intolerable that it amounts to a repudiation of the contract'* can amount to a breach.

14. Blackburn v Aldi Stores Ltd [2013] IRLR 846, EAT: A breach of trust and confidence may include serious breaches by an employer of its internal disciplinary and grievance procedure.

<u>Witnesses</u>

15. The hearing was conducted remotely via CVP. The claimant failed to attend the hearing. On 6 January 2020 the claimant emailed saying *"I'm not doing the case on 8th January I have health issues and no representation."* On 7 January the Regional Employment Judge wrote to the claimant saying her application to postpone the hearing was refused as it was not supported by medical evidence. On 7 January at 21.30 claimant said emailed ET saying *"I'm not joining my health is not good I'm not having a heart attack over this."* I arranged for an email to be sent to the claimant saying that there was no medical evidence as to why she could not attend, that we would proceed in her absence if she failed to join the hearing, and I adjourned the hearing to 10.30 to await her response. We commenced the hearing at 10.30. At just after 10.30 the claimant emailed saying that this was very stressful for her, and referencing severe anxiety. She also sent a 'to whom it may concern' GPs letter from December 2020 which supported the claimant's application to study from home. The claimant's email states that the hearing should not go ahead without her, *"when I have no chance"* of attending, that she was awaiting a further Dr's letter.

16. In deciding to proceed with the hearing, having carefully considered the medical evidence, I noted the following: the Dr's letter did not suggest the claimant could not attend a remote hearing; on the evidence in the letter it appeared to be

supportive of the claimant undertaking study from home instead of travelling. This hearing was via CVP, i.e. a remote hearing meaning that the claimant could take part without having to physically attend a tribunal hearing. I concluded that there was no medical evidence which suggested that the claimant could not attend the hearing remotely, in fact the evidence suggested that a remote hearing would be preferable than a physical hearing. I concluded that the claimant could attend the hearing, but that she chose not to because of what she perceived to be the stress of attending. This, I concluded, was not a good reason to postpone.

17. I heard evidence from Mr Ian Watts the respondent's Director of Finance and the claimant's line manager from August 2019 to November 2019; from Ms Kasia Parfenyuk a HR business partner who was involved in the issue of the claimant's season ticket loans, and Mr Alan Germain a recruitment manager with the respondent who undertook a disciplinary investigation into the claimant's conduct.

18. Prior to hearing the evidence, I read the pleadings, all witness statements and some of the documents referred to in the statements. I was also given a reading list by Mr Jones.

19. I do not recite all of the evidence I heard, instead I confine the findings to the evidence relevant to the issues in this case, all of which was known to the parties during the investigation and disciplinary process.

20. This judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

<u>The relevant facts</u>

21. The claimant was employed within the Business Services LEL Commissioning Support Unit, latterly as Licence Management Officer. Her employment started 2 May 2018; she had continuous NHS employment from 15 September 2015.

22. The claimant applied for a season ticket loan in May 2018. The respondent's policy states that proof of purchase for a season ticket must be provided within 30 days, or the loan may have to be repaid in full and not in instalments (173). The claimant failed to provide the evidence, suggesting in emails that her ticket and receipt had been lost. This was accepted by the respondent at face value following a series of emails, and proof was not ultimately required by the respondent and the claimant paid this sum back monthly under the terms of the loan.

23. The claimant again applied for a season ticket in 2019; because of events the year before and also because the claimant was now raising other issues relating to her financial position (for example, her email of 16 April 2019 – page 164), and because of the manner the claimant was chasing-up her requests for payment, the respondent considered paying the money direct to the train

company, in the end this was paid direct to her (178). The Agreement stated that the claimant would be paid £5,612 to buy her annual season ticket and this would be repaid in 12 monthly repayments of £467.66 (171-2). The terms of the Season Ticket Loan Agreement, signed by the claimant on 11 July 2019 states:

a) "*Proof of purchase must be provided by the borrower to the lender within 30 days of receipt of the payment into the borrower's bank account. This proof must being the form of both (i) a receipt from the transport operator and (ii) a photocopy of the season ticket itself (including the photo card, if applicable)*; and

b) *The borrower further agrees that the lender will deduct the full value of £5,612.00 if proof of purchase is not supplied within the period specified...from the borrower's* next salary/wage.

24. The payment was made on 16 July 2019 meaning proof was required by 15 August 2019. She was asked by the Finance team for this proof on 14 and 29 August (180-182) and by her manager Mr Ian Wats on 5 September in a letter in which he requested this evidence and stated it would be regarded as a disciplinary matter if she did not provide it (183).

25. From 9 August 2019 the claimant had been on sick leave. She responded to Mr Watts email on 7 September saying she had not done anything wrong and was on sick leave; Mr Watts again sought proof of purchase on 9 September 2019.

26. The claimant had not submitted medical certificates for her absence from 9 August; none were provided in response to an email from Mr Watts –(9 September 2019– 186) and a letter was sent to the claimant's home address on 18 September 2019 requesting outstanding medical certificates from 9 August (188-9).

27. The claimant's contract of employment refers to the respondent's sickness absence policy, and her contract states that if she failed to comply with the requirement to provide medical certificates *"… may have their occupational sick pay withheld"* (129). The attendance management policy also states that an employee may be disciplined for failing to comply with its terms (99).

28. On 20 September 2019 the claimant emailed photos of two Med3 certificates, one dated 7 August which signed her off work from 7 August to 7 September 2019; the second dated 20 September 2019 which signed her off work from 8 September to 31 October 2019. The respondent asked for original certificates, pointing out that one of the certificates was backdated and the claimant would receive only SSP for this backdated period; the claimant responded she was abroad and she would ask her Mum to post a certificate. The claimant eventually provided original certificates (201).

29. The respondent had, said Mr Watts, significant concerns about the claimant's conduct – over the season ticket loan (proof of which had not been provided by

the claimant), the claimant's apparent failure to book annual leave and her failure to follow the sickness absence policy. A further issue arose - excessive use of the company issued mobile phone, the bill for which was paid by her employer and was £2,820 in June 2019. A decision was taken by Mr Watts to 'commission' an investigation into these issues under the disciplinary policy. This investigation was undertaken by Mr Gervais. The terms of reference of this are set out at pages 204-8, and state that possible findings could constitute allegations of a breach of confidence and/or fraud, which may amount to gross misconduct.

30. On 9 October 2019 the clamant was informed that because she had not provided evidence of the season ticket loan, the respondent *"would have no option but to deduct the full amount of the loan from your next salary payments…"* (209); she was subsequently told she would receive SSP for this period (225). On 11 October 2019 the claimant was emailed stating that the respondent would be undertaking an investigation and she was provided with details as set out above (210-213). The claimant sent an email the same day saying her phone had been tethered to her computer for work hence the large bill; she had lost her season ticket, she had failed to attach medical certificates to her emails (214). She was informed the investigation meeting would take place on 17 October (219-220).

31. From September 2019 to January 2020 the claimant's pay was withheld in full, a total deduction of £5,612, the amount of the season ticket loan (411).

32. Mr Gervais interviewed the claimant's prior line manager, about the 2018 season ticket issue; he investigated how it is possible to obtain a replacement for a season ticket if it is lost or stolen (230) and received a written response from Southeastern Railway stating "*the ticket office will have a record of your annual season ticket therefore there should not be a problem if you have also lost the receipt* (235-8). He interviewed Ms Barstyle, a Financial Accountant with the respondent who outlined the issues around the claimant's failure to provide evidence of season ticket purchase in 2018 and 2019.

33. The claimant requested a postponement of the investigation meeting on grounds of ill-health; this was cancelled and rescheduled for 30 October (266-7); it eventually took place on 4 November 2018. The claimant was asked about all issues; on the phone calls it was noted that many were to friends and took place at weekends, and included over 1000 SMS, including over 66 to a friend of hers. She was told how to provide evidence of purchase of her season ticket and she was told *"you need to do that this week. The allegation is very serious and it will be in your best interest, and show that you did buy the ticket…"* (292). The claimant did not provide evidence, in part she told the respondent on 15 November 2019, she forgot to do so because of significant ongoing issues in her personal life (312).

34. In his evidence Mr Germain described the issue of integrity: he said that a *"telling issue"* for him was that as he collected statements and evidence which showed that the claimant would often say *"'I will take this piece of action' and then it does not happen .. and her response later with a 'reason why' she did*

not carry out the task." He accepted that *"in some cases"* it was outside of her control, but he considered that there were issues of honesty: issues over the season ticket loan and whether she had used the money as required; taking leave not agreed by current or former manager; not able to provide a fit note in time. His concern was that the claimant had emailed Mr Watts while in Cuba; this was after the claimant had said she had lost all personal documents including her passport and phone; he stated that he accepted that there could be a valid reason why she had not provided proof of the season ticket, she said her bag had been stolen, "*but in fact this loss had occurred two months previously, and only now was referenced, it had not been previously revealed to them."* He stated that the claimant had not made a request for annual leave on the workforce system; the claimant never made a formal leave request. Mr Gervais stated that while he accepted that she may have mentioned this holiday to a manager (who was off sick and so he was unable to verify) she had not booked her leave on the holiday system which had been in place for a number of years.

35. Mr Gervais stated that on the season ticket issue he reached *"a balanced view";* there had been issues in 2018 with no proof of a lost ticket and receipt; and in 2019 *"the same thing – a season ticket application made … with lots of urgency to be paid the money directly … And within a week the season ticket and receipt were lost - and then allegedly she was not able to get a duplicate, then sickness absence" … So we had monies o/s on the loan and the claimant could not prove on a number of occasions that she had brought the ticket."*

36. The investigation report made recommendations in relation to all disciplinary issues that *"there was a case to answer"* in relation to all allegations; for example on the season ticket it refers to the numerous opportunities she was given to provide proof of purchase; that the claimant's explanations in relation to all the issues *"were not consistent and changed over time. Whilst some of 'the claimant's reasoning may seem possible they are certainly improbable."* (315-325). The claimant was sent a notice to attend a disciplinary hearing – she was given 7 days' notice (33-336), the hearing to take place on 25 November 2019. Thus hearing was postponed as the claimant submitted a medical certificate. She was referred to occupational Health appointment. The report recommended that the work issues needed to be resolved. On 2 December the claimant was written to asking he to attend the reconvened disciplinary hearing ;she responded referring to being off sock, her stress levels.

37. On 6 January 2020 the claimant sent a text to her manager saying "I would like to resign effective immediately" (380).

<u>Submissions</u>

38. Mr Jones argued that there was no unlawful deduction of wages. The claimant's schedule of loss claims £5,612 - which is the amount of the season ticket loan. Note page 533 – the preliminary Hearing in which the claimant not disputing that she should pay the season ticket sum, she was just disputing that it could be deducted *"in one go"*. There is *"no dispute"* that the claimant owed

this sum, and the claimant acknowledged that the respondent is entitled to claim this money back - on 11 October 2019 she expressly says she has taken legal advice and knows the respondent is entitled to claim this back (226).

39. Mr Jones argued that the contractual terms on the season ticket loan are clear – page 172 – the respondent can call in the loan or recover it from wages and it did so "after extended efforts to get the claimant to provide evidence that she had brought the season ticket … the respondent is entitled to claim this money back". There is no unlawful deduction from wages as there is a contractual agreement to deduct this sum.

40. On the sick pay issue; the claimant received her contractual entitlement to OSP *"unless she failed to comply with notification rules".* While the claimant says she was not given notice of these deductions, *"in fact she was repeatedly told that pay would be stopped in advance"* in addition the letter of 18 September – (188-189) "a formal marker" that wages will be stopped unless she complies. Her SSP was reinstated and in fact she was paid holiday pay for her Cuba holiday despite this not being a pre-booked holiday.

41. Mr Jones argues there was no breach of contract by the respondent; and in any event the claimant did not resign in response to any breach.

42. The allegation that she was required to go back to work under Mr Wats having raised a grievance. *"This is false. The claimant was not required to go back to work under Mr Watts"* the claimant was told she would work with another manager and as a fact the respondent *"did not require her to report to the same office as Mr Watts"* (272). He argued that the reason why the claimant resigned was because of the disciplinary issue.

Conclusion on the law and the evidence

43. I had not heard from the claimant. I accepted the claimant's case that she resigned as a result of what she considered to be a breach of contract by the respondent in deducting the season ticket loan from her wages, in failing to pay her contractual sick pay and in requiring her to report to Mr Watts against whom she had submitted a grievance.

44. I concluded that it was clear on the documents that the respondent was entitled to deduct from her wages the whole of the season ticket loan because she had not complied with the explicit requirement in a document that she had signed to provide proof of purchase within 30 days, she was fully aware of this term, and she failed to provide the proof despite several requests for her to do so, and she gave misleading and inconsistent account to her managers in as explanations for this failure. I concluded that the respondent was entitled to deduct from her salary the outstanding sum loaned to her for her season ticket. Accordingly the respondent as not acting in breach of contract and was not unlawfully deducting a sum from her wages in recouping the season ticket loan from her wages from September 2019 to January 2020.

45. I took into account on the season ticket loan issue that this was the second year that the claimant had failed to provide adequate evidence. In 2018 the claimant was fully aware that she was required to evidence the purchase of her season ticket. She did not do so and she again failed to do so in 2019. I concluded that the respondent acted within its policy in deciding that, after the issues occurring in 2018, it was entitled to require proof of purchase. I concluded that the respondent was entitled to look sceptically on the claimant's explanation, in particular her statement she could not obtain any proof of purchase. Accordingly, I concluded that the respondent acted within its contractual entitlement in deducting these sums from the claimant's salary. This did not amount to a breach of contract.

46. I also concluded that he claimant had failed to comply with the reporting requirements for her sickness absence, and accordingly the respondent under its attendance policy and on the terms of her contract of employment was entitled to pay her SSP for the periods not covered by a medical certificate, including the backdated period from 8 – 19 September 2019. Again, this did not amount to a breach of contract or an unlawful deduction from her wages by the respondent.

47. Insofar as the claimant alleges there was a breach of contract in Mr Watts remaining her manager, I concluded that there was no such breach. The respondent was entitled to require the claimant to report to him notwithstanding her grievance; in fact it agreed to change her line management report.

48. Accordingly, the claims of constructive unfair dismissal and unlawful deduction from wages fail.

Application for costs

49. The respondent makes an application for its costs in the following sums:
    a. £4,791.70 plus vat for solicitor's costs from the adjournment on 8 July 2020 to the date of hearing
    b. £1,250 plus vat for Barrister's 'brief fee' for attendance at the hearing.

50. I considered the Employment Tribunal Rules, Rule 77. The claimant was not present at this hearing. I considered that it was only reasonable for the claimant to be given an opportunity to make representations at a hearing in response to this application for costs. A separate notice of hearing will be sent out for a ½ day hearing to determine this application.

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EMPLOYMENT JUDGE M EMERY

Dated: 1 May 2021

Judgment sent to the parties
On **07 May 2021**

For the staff of the Tribunal office

………………………………