EMPLOYMENT TRIBUNALS

Claimant: Mrs S Jones

Respondent: Southport & Ormskirk Hospital NHS Trust

Heard at: Manchester (by CVP) **On:** 12 January 2021
14 and 15 January 2021
24 March 2021
(in Chambers)

Before: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: Mr B Henry of Counsel
Respondent: Mr Hatfield, Solicitor

JUDGMENT

The judgment of the Tribunal is that the claim of constructive unfair dismissal is successful.

REASONS

Introduction

1. The claim was brought by way of a claim form dated 21 November 2019 in which the claimant claimed she had been constructively dismissed from her role as a Sister at the respondent hospital.

2. The respondent denied that the claimant had been constructively unfairly dismissed in the grounds of resistance submitted on 30 December 2019. The respondent specifically denied any breach of contract that amounted to a fundamental breach that gave reason for the claimant to resign.

The Issues

3. The issues for the Tribunal to determine were as follows:

(1) Did the following amount to a breach of the implied term of mutual trust and confidence?

(a) Any delay in the submission of the claimant's industrial injury award application;

(b) Any failure to deal with the claimant's complaint of bullying;

(c) The management of the claimant's sickness absence; and

(d) Any deductions from the claimant's wages

(2) Did the claimant affirm any repudiatory breach?

(3) If not, did the claimant resign in response to those breaches?

Evidence

4. I heard evidence from the claimant on day one and on the morning of day two. In the afternoon of day two I heard evidence from Penny Sinclair, a Matron at the respondent hospital and responsible for the management of the claimant's sickness absence until March 2019. On day three I heard evidence from Nicola Orr, a Senior Sister and Ward Manager for the respondent hospital and responsible for investigating the claimant's grievance. I also heard evidence from Danielle Norton from the Payroll Department.

5. The parties agreed the evidence of Helen Hurst, a Matron at the respondent hospital responsible for management of the claimant's sickness absence after March 2019.

Relevant Legal Principles

6. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> "**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."**

7. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. It was held that unreasonable conduct is not enough, there must be a breach of contract which led to the constructive dismissal. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows

that the employer no longer intends to be bound by one or more of the essential terms of the contract.

8. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

9. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

10. The EAT in **Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT** said:

> **"The 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…"**

11. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

12. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

13. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015** the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
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> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**

> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
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> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
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> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

14. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

15. There is also an implied term that an employer will reasonably and promptly give employees an opportunity to seek redress for any grievance: **Goold WA (Pearmak) Ltd v McConnell [1995] IRLR 516**. Alternatively, failure to handle a grievance properly might amount to breach of the implied term as to trust and confidence if serious enough to be repudiatory.

16. In the case of **Assamoi v Spirit Pub Company (Services) Limited (formerly known as Punch Pub Co Limited) UKEAT/0050/11/LA** the Employment Appeal Tribunal confirmed that (paragraph 36):

> **"There is a fundamental distinction which, it is perhaps more easy to recognise than to define, between there being a fundamental breach of contract that an apology by an employer cannot cure and there being action by an employer that can prevent a breach of contract taking place."**

17. In the case of **Blackburn v Aldi Stores Limited [2013] IRLR 846** the Employment Appeal Tribunal determined that a failure to adhere to a grievance procedure was capable of amounting to or contributing to a fundamental breach. However, not every failure to adhere to such procedure will constitute a fundamental breach. The Employment Appeal Tribunal was clear that this is a question for the Tribunal to assess in each individual case.

Relevant Findings of Fact

Claimant's employment

18. The claimant was employed at the respondent hospital from 28 November 2005 until 15 September 2019. The claimant resigned on 16 July 2019 but her last day of employment, following a notice period, was 15 September 2019. When the claimant left the respondent's employment, she was a Sister on G Ward in the Neurology Department.

19. On 28 November 2017 the claimant was injured at work and was signed off sick with neurological difficulties until 8 July 2019. The terms and conditions of the claimant's employment provide that an employee will receive full pay in the first six months of sickness absence. An employee can receive half pay in the second six months of sickness absence, and no pay after twelve months sickness absence. The claimant was in receipt of full pay until 28 May 2018. From 28 May 2018 the claimant was in receipt of half pay.

20. The terms and conditions applicable to the claimant's employment also provide for payment of an injury allowance if an employee is injured at work. The allowance tops up sick pay to 85% of the normal salary for a period of 12 months. If the employee is also in receipt of contributory benefits, the value of those benefits is deducted from the total injury allowance payable. Non-contributory benefits are not deducted from the injury award. Prior to 2013 this injury allowance was called the NHS Injury Benefit scheme.

21. Payroll services are provided to the respondent by St Helens and Knowsley Hospital Trust. This provider is responsible for administration of the payment of an injury allowance. The NHS Business Support Department is responsible for the processing of injury award applications.

22. In January 2018 the claimant applied for the injury allowance. The claimant submitted her application to her line manager, Kath Todd, for approval.

23. The respondent's management of sickness absence policy sets out the procedure for dealing with serious attendance issues. These issues can either culminate in an attendance hearing leading to dismissal or ill health retirement. The policy also sets out procedures for phased return to work and in particular managing long-term sickness absence.

24. A line manager is expected to maintain regular contact with an employee who is off sick. A line manager is also asked to confirm the outcome of meetings in writing. It is incumbent upon the line manager to refer an employee to the Health and Wellbeing department. An employee is entitled to be accompanied by a trade union representative at any meeting, and where that representative is not available an alternative meeting date will be agreed.

25. If an employee is on long term sickness absence, there are monthly review meetings until the employee returns to work. Line managers are encouraged to consider alternative arrangements for meetings, such as over the telephone, to accommodate the employee's difficulties. Where possible redeployment or adjusted

duties are discussed, and the line manager is instructed to gain advice from the Health and Wellbeing department. If a successful return is unlikely, line managers are asked to also consider the use of an attendance hearing, following which, an employee may be dismissed.

Penny Sinclair management - 2018

26. On 15 February 2018, Penny Sinclair, a Matron, authorised the claimant's application for the injury allowance.

27. On 16 February 2018 the claimant attended a sickness review meeting with Penny Sinclair and a HR Manager. It was during that meeting that the claimant was informed of the authorisation for the injury allowance. It was agreed at that meeting that there would be an assessment of the claimant's condition before any decisions were made about a long-term posting.

28. On 2 March 2018 the claimant was assessed by the Health and Wellbeing Department. It was the view of that department that the claimant was not medically fit to return to work. That department advised that adjustments should be discussed when a return to work date was known. Whilst it was initially proposed that the claimant be subject to a review in four weeks, the date was pushed back to July because the Health and Wellbeing Deputy Manager, Michelle Chapman, was off sick.

29. On 17 April 2018 the claimant attended another sickness review meeting with Penny Sinclair. On that date, the claimant had a fit note until 30 April 2018 which required her to remain absent from work. The claimant was informed that there had been a reorganisation of the wards, but that her role remained the same. The next meeting was arranged for 20 June 2018.

30. The claimant received a letter in May 2018 informing her that she would be in receipt of half pay. The claimant had not received any confirmation of payment of the injury allowance to top up this reduction in pay.

31. When the claimant received her payslip for May 2018 it showed a deduction of £184.10 that was unexplained.

32. On 20 June 2018 the claimant attended a sickness review meeting with Penny Sinclair. The claimant informed Penny Sinclair that she had developed further symptoms that were being investigated. There was a discussion regarding the claimant's pay and Penny Sinclair agreed to contact Payroll to arrange for the claimant to be paid for any accrued outstanding leave from 2017/2018. A further meeting was arranged for the end of July 2018.

33. On 22 June 2018, Penny Sinclair completed a form to authorise the payment of injury allowance to the claimant.

34. On 26 June 2018 the claimant was informed by the Department of Work and Pensions that she qualified for industrial injuries disablement benefit because the incident at work had caused a loss of faculty.

35. On 4 July 2018 the claimant was assessed by the Health and Wellbeing Department. The department confirmed that the claimant was not fit to return to work and that adjustments would be discussed when a return to work was planned.

36. On 19 July 2018 the claimant was sent a letter informing her that her half pay had commenced on 12 June 2018. It was sent to the claimant's old postal address and received by the claimant at the end of July 2018.

37. On 23 July 2018 the absence department attempted to arrange a review meeting between the claimant and Penny Sinclair but was unable to do so because Penny Sinclair was on long-term sick leave.

38. On 24 July 2018 the claimant contacted the Payroll Department to complain that she was suffering financial difficulties as a result of incorrect pay. The claimant complained that the injury allowance had not been processed and made reference to taking advice from a solicitor and submitting an ET1 form. On the same date the Payroll Department arranged for the annual leave payment to be made to the claimant.

39. On 1 August 2018 the claimant was again assessed by the Health and Wellbeing Department. A report of the same date was sent to Penny Sinclair and confirmed that the claimant was still not fit to return to work. The Department reiterated that it was not possible to discuss adjustments until a return to work date was known. The report also recorded that the claimant was struggling with her finances because of the delay in processing her injury allowance and that the claimant was still awaiting a date for the next sickness review meeting.

40. On 1 August 2018 a letter was sent to the claimant informing her that the next sickness review meeting would take place on 9 August 2018.

41. The claimant attended this meeting with Emma Kildare, a Matron at the respondent hospital because Penny Sinclair remained off sick. It was recorded that the claimant was distressed because she was unable to get answers about her pay and her role, and that the claimant was awaiting further assessment and treatment. It was also recorded that the claimant had engaged a solicitor for advice.

42. It was noted that the claimant had received a payment of her outstanding annual leave and that a payment equivalent to the injury allowance would be made in August. The claimant was told the injury allowance would be paid from September 2018. It was agreed that the next review meeting would take place at the end of September.

43. By 16 August 2018 the Payroll Department had arranged for the equivalent injury allowance payment to be made to the claimant. The claimant queried whether the benefit she received would be deducted from that payment.

44. On 10 October 2018 the claimant met with Penny Sinclair and advised that she was having further tests for her conditions. The claimant was informed that if there was no indication of a successful return to work in the foreseeable future, she may be referred to an attendance hearing during which her future would be

discussed. The claimant was advised to take advice from the Health and Wellbeing Department about necessary adjustments.

45. The letter sent to the claimant to confirm the content of this meeting recorded that the pay issues had been resolved.

46. The claimant attended an assessment by the Health and Wellbeing Department on 24 October 2018. In the subsequent letter it was recorded that the claimant was unfit for all work.

47. The claimant was assessed by the Health and Wellbeing Department on 14 November 2018 and it was recorded that she was not fit to return to any form of work.

48. The claimant next met with Penny Sinclair on 28 November 2018. The claimant did not feel able to return to work in any form at that stage and the possibility of an alternative role was discussed. It was agreed that the next meeting would take place in the New Year. The claimant was told that if there was no indication of a successful return to work, she would be referred to an attendance hearing.

Claimant's grievance

49. On 6 November 2018 the claimant raised a grievance about the delay in processing the injury allowance and the ongoing deductions to her wage which had not been explained. The claimant also complained that the annual leave payment promised had not materialised and the claimant was unsure what she would receive from month to month.

50. The claimant asked that the grievance ensure that non-contributory benefits were not deducted from the injury allowance and that she be provided with a proper breakdown of pay received between May and September 2018. The claimant's grievance also contained complaints about the management of her sickness absence.

51. On 6 December 2018 the HR department provided the grievance handler, Nicola Orr, with a timeline of events. On the same date, the claimant submitted her own timeline.

52. On 11 December 2018 Payroll informed the HR department that the only benefits that would be offset against the injury allowance were incapacity benefit and severe disablement allowance. The HR team was also referred to the relevant policy at sections 22.8, 22.9 and 22.10 and, in particular, parts 1 and 2 of the enquiry form sent to the Department of Work and Pensions. Parts 1 and 2 seek information about Incapacity Benefit and Employment and Support Allowance. Parts 3 and 4 seek information about the payment of Industrial Disablement Benefit.

53. On 17 December 2018 the claimant met with the grievance handler, Nicola Orr. On 19 December 2018 Nicola Orr raised queries with Payroll and asked for a detailed monthly breakdown of all monies paid to the claimant from December 2017, clarification of the benefit deductions and clarification of a deduction in September.

54. The claimant and Nicola Orr agreed that the grievance would only deal with the payroll issues. The management of sickness absence was to be dealt with under the management of sickness absence policy.

55. The claimant attended a follow-up grievance meeting on 20 February 2019 with Nicola Orr during which, it was discussed that the benefit received by the claimant was non-contributory and should not be deducted. The claimant was provided with a 12 month salary statement. It was agreed she would go away and cross reference with her payslips and confirm any outstanding pay issues. It was agreed that Nicola Orr would contact Payroll about the benefit deduction.

56. On 26 April 2019 the claimant contacted the Director of Human Resources having been unable to resolve her pay issues.

57. In April 2019 the claimant met with the Chief Executive of the respondent hospital to discuss her concerns about bullying and pay issues.

58. As a result, the Chief Executive made contact with the Director of Human Resources.

Penny Sinclair management - 2019

59. The claimant next met with Penny Sinclair on 4 February 2019. The claimant and Penny Sinclair had agreed to postpone the January meeting in order for the claimant to obtain further medical advice.

60. During that meeting the claimant confirmed that she would return to an administrative role. The claimant was informed that a further referral would need to be made to the Health and Wellbeing department to obtain advice about adjustments. The claimant was also informed that this report and any adjustments would be considered prior to referring her to an attendance hearing. It was agreed that they would meet again on 5 March 2019.

61. The claimant attended a Health and Wellbeing appointment on 6 February 2019 at which the claimant informed the physician that she hoped to return to work as soon as possible. The physician advised that the claimant would benefit from a phased return over four weeks.

62. In February 2019 the claimant told Penny Sinclair that she was being bullied by her line manager and colleagues on the ward. During that month the claimant chased Penny Sinclair as to whether she had investigated her complaint.

63. The claimant was unable to meet with Penny Sinclair on 5 March 2019 because the claimant's trade union representative was unavailable. Instead, Penny Sinclair sent the claimant a letter in which she informed the claimant that she wanted further advice from the Health and Wellbeing department about how adjustments could be accommodated at work. The claimant was informed that the current position was not sustainable and was asked whether she had any ideas as to how to resolve the issues with her colleagues. The meeting was rescheduled for 27 March 2019.

64. The claimant met with Penny Sinclair on 27 March 2019 at which the adjustments recommended in the Health and Wellbeing report of 6 February 2019 were discussed. It was agreed that a risk assessment would be arranged and that the claimant would remain off sick until the end of April 2019. It was also agreed that the claimant would meet with Stephen Mellors, the Head of Nursing, to discuss her complaint of bullying.

Helen Hurst management

65. By 29 April 2019 the claimant had been assessed by Access to Work and Penny Sinclair informed of the outcome. In April 2019, Helen Hurst, a Matron for the respondent hospital, took over the management of the claimant's sickness absence. Helen Hurst asked for a further assessment by the Health and Wellbeing department, and this was arranged for 18 June 2019.

66. On 10 May 2019 the claimant's trade union representative informed the HR department that there had been no attempt to return the claimant to work since the Access to Work report had been completed. A response was received confirming the Occupational Health appointment on 18 June 2019 and arranging a catch-up on 15 May 2019.

67. The claimant met with Helen Hurst on 15 May 2019. It was agreed that the claimant would meet with the Head of Nursing on 4 June 2019. Helen Hurst informed the claimant that she would return to her substantive post and her role and responsibilities would be discussed on her return.

68. On 5 June 2019 the claimant met with Helen Hurst and Stephen Mellors, the Head of Nursing. During that meeting the claimant discussed the bullying by colleagues and the adjustments required to return to work.

69. On 18 June 2019 the claimant underwent a risk assessment for her return to work.

70. On 28 June 2019 Helen Hurst informed the claimant that she should attend work on 3 July 2019 to discuss an imminent return. On receipt of that information the claimant was relieved and thanked Helen Hurst.

Culmination of pay issues

71. Following direct intervention from the Director of Human Resources, the claimant met with Nicola Orr and Danielle Norton of the Payroll Department on 22 May 2019. At that meeting Payroll asked the claimant to provide evidence that the benefit she was receiving was non-contributory. It was agreed that if such evidence could be provided, there would be a reimbursement of all deductions. The Payroll Department informed the claimant that they could only act upon information received from the respondent hospital.

72. The claimant forwarded an email to the Payroll department that she had received from the NHS Business Service Authority. The advice given in that email was that the NHS injury benefit was non-contributory.

73. On 31 May 2019 the Payroll Department updated the claimant's trade union representative that they had resubmitted a request to the Department for Work and Pensions for confirmation that the industrial injuries disablement benefit was non-contributory and were awaiting a response. The trade union representative was also informed that until such confirmation was received the Payroll Department was not authorised to make any reimbursement to the claimant.

74. The claimant's trade union representative informed the HR Department that in light of the failure to reimburse the claimant, the claimant had contacted ACAS.

75. On 4 June 2019 the Payroll Department received a response from the Department for Work and Pensions and took the view that the benefit the claimant received was contributory and therefore should be deducted.

76. On 11 June 2019 the claimant appealed against the outcome of the grievance.

77. On 19 June 2019 the Payroll Department confirmed to the HR department that the Department for Work and Pensions benefit received by the claimant was industrial disablement benefit.

78. On 27 June 2019 the claimant was still not in receipt of the reimbursement and therefore emailed the Chief Executive and the Director of Human Resources. The claimant complained that not only had she not received the reimbursement, but she had also only been paid £774 in wages for the month of June. The claimant complained that she was unable to pay her bills and was incurring bank charges.

79. On 1 July 2019 Danielle Norton provided an update as to the Payroll Department's position. It was explained that the form sent to the Department for Work and Pensions asked a standard question as to whether the claimant was in receipt of industrial disability benefit. The form had been completed on that basis and as a result the deduction had been made.

80. Danielle Norton had made enquiries with the NHS Business Support Department to establish why it thought this would be a non-contributory benefit and a response was outstanding. It was also explained that the claimant's pay had been reduced in June 2019 because the injury allowance had expired. Danielle Norton explained the reason for the delay in the payment of the injury allowance was because the claimant's initial absence had been recorded as sickness due to a delay in receipt of the form confirming the claimant had suffered an industrial injury.

81. On 3 July 2019 the HR Department emailed the Payroll Department to say that they had carried out their own research and discovered that the industrial injury benefit that the claimant received was in fact non-contributory and supported the claimant's position that it should not be deducted. The Payroll Department was informed of the grievance and the potential Employment Tribunal claim and asked for an urgent and prompt response. An extract from the Government website was included in that email that stated:

> *"3.2 How to claim Industrial Disablement Benefit*

You do not need to have paid any contribution in order to claim industrial disablement benefit."

82. In the meantime, it was agreed that because the claimant's pay had been reduced in June 2019, she would return from sick leave onto annual leave with an eventual return to work on 8 July 2019.

83. In early July attempts were made to provide the claimant with an advance on her outstanding annual leave that she had not taken during her sickness absence. However, by the date the claimant returned to work on 8 July, this advance had still not been paid and she subsequently declined to receive it.

84. On 9 July 2019 Danielle Norton of the Payroll Department emailed the HR Department to agree that the benefit the claimant was in receipt of was non-contributory. Danielle Norton confirmed, however, that the deductions would continue to be made because this was standard practice when the Department for Work and Pensions completed the form confirming payment of industrial disablement benefit. The HR Department was informed that if they decided that the deduction should not be made, a request would need to be made by them to Payroll to reimburse the claimant.

85. On 16 July 2019 the claimant resigned from her position. The claimant gave the following reasons as the cause of her resignation:

(a) The unprofessional management of the Ward Manager;

(b) Ostracised by colleagues;

(c) Threats during her sickness and absence meetings to medical discharge;

(d) The ongoing payroll issues that had a detrimental impact upon her finances.

86. It was agreed that the claimant would work for two weeks and then take the rest of her notice period as leave.

87. On 19 August 2019 the claimant received the outcome to her grievance appeal. In that letter it recorded that following further research it was agreed that the benefit deducted should be repaid. The claimant received the reimbursement on 26 July 2019. The respondent's HR Department apologised to the claimant for the protracted time it had taken to resolve the issue.

88. On 15 September 2019 the claimant completed her last day of employment with the respondent. In her exit interview the claimant cited:

- a lack of support whilst of sick;
- bullying;
- loss of confidence in the respondent;

- not wanting to be a nurse any more

as reasons for her resignation.

Submissions

Respondent's Submissions

89. The respondent submits that the Tribunal should consider the case of **Kaur** in which the Court of Appeal set out five questions what must be asked by the Tribunal before reaching a decision on a constructive unfair dismissal case.

90. It was the respondent's submission that the claimant's case falls short of a significant breach of contract that went to the root of her employment contract which meant that the respondent was no longer bound by that contract. The respondent contended that the claimant has made allegations that went back to 2018 but she did not resign until July 2019. The Tribunal was reminded that if this is a last straw case, the last act could not be merely trivial or unreasonable.

91. The respondent submits that if a claimant cannot show bad faith and a refusal to honour the contract, then the breach is not significantly serious for resignation. The respondent asked the Tribunal to note that the claimant gave a number of reasons for her resignation and that in evidence the claimant revealed that she did not resign for the reasons set out in either her resignation letter or her exit interview.

92. The respondent contends that, the situation could not have been so bad for the claimant because she waited a long time before resigning. The reasons given in the July 2019 resignation were those that existed in the November 2018 grievance.

93. The respondent contends that the claimant does not complain about any breach between November 2018 to May 2019. The respondent says the claimant accepted in evidence that the respondent had not breached her contract during that six month period.

94. The respondent contends that it received external advice from Payroll and awaited confirmation before it took a legal decision. It Is submitted that if a breach is caused by a third party, it is beyond the control of the respondent.

95. The respondent contends that the claimant did not resign because of pay and absence management. It is the respondent's case that the claimant resigned because she did not want to return to work where she had been isolated and was overwhelmed and therefore resigned. The respondent contends that at the time the claimant resigned she knew that the respondent accepted the deductions were wrong and that she would receive payment.

96. The respondent contends that the HR Department was entitled to rely on Payroll advice, who in turn, were entitled to rely on the information provided by the Department for Work and Pensions.

97. The Tribunal was reminded that the Payroll Department, whilst an NHS Trust, is a separate entity to that of the respondent.

Claimant's Submissions

98. The claimant submits that whilst the Payroll Department was a third party, it relied upon the decisions made by the respondent's HR Department. It was merely a transactional service and it was down to the respondent to decide whether the claimant's deductions should be made.

99. The claimant submits that the HR Department were clearly capable of making decisions as evidenced in the email of 8 July when the HR Department conducted its own research and decided that the benefit was non-contributory.

100. The claimant agreed that the case of **Kaur** was good guidance but reminded the Tribunal that the test is an objective one and the intentions of the employer are not determinative.

101. The claimant confirmed that this was a last straw case. The Tribunal was asked to consider the case of **Malik**.

102. The Tribunal was asked to note the claimant returned to work because she thought matters would resolve and was keen to give it a chance.

103. The claimant submits there has been no explanation as to why the injury allowance paperwork was not submitted by Penny Sinclair until 26 June, and this is why the claimant's initial absence was recorded as sickness and she suffered deductions in pay.

104. The claimant submits that it was only by October 2018 that she had some regularity to her pay, and that the irregularity had caused much distress because she was the main wage earner. The claimant submits there were two pay issues.

105. The claimant submits that despite submitting the grievance in November 2018 there was no attempt to resolve it until she had a substantive meeting in May 2019. The claimant submits that five minutes of Google searching reveal the answer that she was in receipt of a non-contributory benefit.

106. It is submitted that the claimant was never in receipt of consistent payslips and by June 2019 she had a reduction in pay - despite being signed fit since February 2019.

107. The claimant submits that the respondent sent an email to the Payroll team on 3 July, but this was not actioned, and as a result she had no choice but to resign.

Discussion and Conclusion

Submission of injury award form

108. The claimant submitted her form to her immediate line manager, Kath Todd, with who she had a difficult personal relationship. The claimant's application did not receive line manager approval until Penny Sinclair looked at it on 15 February 2018.

109. Throughout Penny Sinclair's evidence she maintained that she was reliant on the HR department for advice whilst managing the claimant's sickness absence. It was her evidence that she scanned the form to the HR department to process.

110. However, the timeline of events provided by the HR department for consideration by the grievance handler, records that Penny Sinclair only raised queries about the payment of the allowance with HR in April 2018. The timeline records that Penny Sinclair was advised that forms would need to be completed and returned to HR. The next entry on the timeline is that the forms were completed and sent to HR after 22 June 2018.

111. When Penny Sinclair was asked in evidence why she had only submitted the necessary paperwork in June 2018, she was unable to remember. I find that there was a delay in the submission of the industrial injury award form and this had a detrimental impact upon the claimant's pay.

112. As a result of the delay the claimant's sick pay was reduced immediately by half on 28 May 2018 and to no pay on 28 December 2018. It also meant that the injury allowance was not paid to the claimant until October 2018 and from May – September 2018 the claimant suffered a significant shortfall in her monthly pay.

113. There were some attempts to pay the claimant the equivalent amount in August and September 2018, but these amounts appear to have been deducted in the subsequent months before the injury allowance payment was made in October 2018.

114. This situation was compounded by the fact that the claimant did not consistently receive her payslips each month and when she did, it was not clear why there had been such deductions.

115. By October 2018 the claimant was in receipt of the injury allowance. In July 2018 the claimant had taken advice from a solicitor and had talked about submitting an Employment Tribunal application. However, it appears that having received the injury allowance, the claimant decided to take things no further. This is corroborated in the letter from Penny Sinclair of 10 October 2018, who records the claimant's pay issues as "resolved".

<u>Relationship with claimant's colleagues</u>

116. The claimant first complained about the issue with her colleagues during the grievance process which started on 6 November 2018. However, at the meeting with Nicola Orr, it was agreed that the grievance would only deal with the pay issues and that the management of the claimant's sickness absence would be dealt with in accordance with that policy.

117. The next opportunity the claimant had to discuss the matter was in the February 2019 sickness review meeting with Penny Sinclair. The sickness review meeting on 5 March 2019 did not take place and the claimant received a letter from Penny Sinclair with an update which included a question as to how the claimant thought she could resolve the issue with her colleagues. At the sickness review

meeting on 27 March the suggested resolution was to arrange a meeting with the claimant and the Head of Nursing.

118. Penny Sinclair had no further involvement with the claimant's sickness absence after this meeting, and this was taken over by Helen Hurst.

119. I have read the witness statement of Helen Hurst and there does not appear to have been any progression of the claimant's complaints about bullying after the initial interaction with Penny Sinclair. The meeting with the Head of Nursing was only progressed after the claimant complained to both the Chief Executive and the Director of Human Resources.

120. Following that meeting on 5 June 2019 I have not seen any evidence that there was an attempt by the respondent to manage this complaint. Therefore, the claimant returned to work on 8 July 2019 with the issue unresolved. In evidence the claimant said she wanted mediation so that she would not be anxious on her return. In evidence the claimant admitted that the atmosphere was tense and everybody acted in a professional manner rather than the previous friendly relationship. The claimant admitted to going home in tears.

121. It was put to the claimant in evidence that the real reason for her resignation was because of the difficulties with colleagues. The claimant asserted that if that had been the only reason, she would never have returned to work and the issue with her colleagues on her return to work compounded the ongoing pay situation.

122. I find that there was a failure to adequately deal with the claimant's complaint of bullying. On the claimant's return to work the complaint was outstanding and contributed to her decision to resign.

Management of sickness absence

123. The claimant complains that the management of her sickness absence, and in particular the threats to her future employment, contributed to her reasons to resign.

124. The delay between sickness review meetings in June 2018 to August 2018 was because Penny Sinclair was on long-term sick leave and did not return until 3 September 2018. In the interim, the HR department arranged for Emma Kildare to stand in and carry out the sickness review meeting. On the day of Penny Sinclair's return to work, she sent an email to Emma Kildare seeking an update so she could progress the management of the claimant's sickness absence.

125. The delay between the meeting on 15 February 2019 and 27 March 2019 was because the claimant's trade union representative was unavailable for the meeting scheduled on 5 March 2019. The claimant was still provided with an update by Penny Sinclair.

126. The delay between March 2019 and May 2019 followed Penny Sinclair handing over control of the management of the sickness absence to Helen Hurst. The claimant complains that she often had to chase dates for meetings and whilst this may have been the case, I find that the meetings were held in accordance with the policy.

127. It was understandably a concern for the claimant that references were made to an attendance hearing. However, as detailed in the policy, if a line manager is of the view that there is no indication of a successful return in the foreseeable future, it is incumbent upon them to discuss the possibility of an attendance hearing with an employee.

128. It appears from the chronology that the first time this was seriously suggested to the claimant was on 10 October 2018. By that date the claimant had been off for nearly a year with serious and developing conditions. It was not unreasonable, or against policy, for Penny Sinclair to raise these issues from this date.

129. By 4 February 2019 the claimant felt able to return to work with an adjusted role. Whilst the claimant was advised at that meeting of the possibility of an attendance hearing, she was also advised that advice would be taken from the Health and Wellbeing department about adjustments and would be considered before any referral to an attendance hearing. This was in accordance with the respondent's policy.

130. There was delay following the claimant declaring she was fit to return in February 2019, to her actual return to work in July 2019.

131. Initially, the claimant's trade union representative was unavailable and then Penny Sinclair needed to obtain further advice from the Health and Wellbeing department about the necessary adjustments.

132. Further delay seems to have then been caused by the change in the management of the claimant's sickness absence. Whilst the claimant had obtained an Access to Work report, there does not appear to have been progression with the referral to Health and Wellbeing department about adjustments until early May 2019, by which time the first available appointment was 18 June 2019. Following this appointment, the claimant returned to work within a three week period.

133. I understand that the claimant must have found the delay between February 2019 to July 2019 frustrating and at times, unexplainable. However, it appears that it was caused mainly by justifiably delayed meetings and a change in the management of the claimant's sickness absence and did not amount to a breach of the claimant's contract.

Pay Issues

134. Once the claimant was in receipt of the injury allowance, the industrial injuries disablement benefit she received from the Department for Work and Pensions was deducted.

135. The respondent's policy states at paragraph 22.10 that:

> *"Contributory state benefits received for loss of earnings will be offset at the rate at which they are actually received by the employee. All other benefits or payments received should be ignored."*

136. The claimant was in receipt of industrial injuries disablement benefit. This is a non-contributory state benefit. It is received by a person who has suffered a loss of faculty as a result of industrial injury.

137. Prior to 2013, the injury allowance was known as the NHS Injury Benefit Scheme. This is the explanation for the heading of the form sent to the Department for Work and Pensions, which at the time of the final hearing, had not been updated.

138. Penny Sinclair was correct to record that the claimant's pay issues had been resolved by 10 October 2018. However, also in October 2018, there was a deduction of the non-contributory benefit from the injury allowance, which created a new pay issue.

139. After the claimant submitted her grievance in November 2018, enquiries were made by the HR department to the Payroll department. The Payroll team leader advised the HR department as to the relevant paragraphs of the policy and stated her view that incapacity benefit and severe disablement allowance should be deducted from an injury allowance. Despite this, there seems to have been no further research undertaken by the HR department as to whether industrial injury disablement benefit should also be deducted.

140. As a result of the lack of research and opinion from the HR department on this matter, the Payroll department deducted this benefit from the injury allowance. The HR department relied upon the expertise of the Payroll department, but the Payroll department relied upon the HR department's instructions to do anything differently. The result of this was that the claimant was underpaid.

141. Nicola Orr made enquiries of the Payroll department. She was able to obtain a 12 month salary statement in order that the claimant could cross refer with her own records. At an interim meeting on 20 February 2019 the claimant reiterated that the benefit was non-contributory and Nicola Orr agreed to go back to the Payroll department. It does not appear that Nicola Orr did any of her own research or sought advice from the HR department.

142. The claimant became so desperate to resolve the issue that she resorted to meeting with the Chief Executive and contacting the Director of Human Resources. It was only after direct intervention from the Director of Human Resources that a meeting was arranged with the claimant, Nicola Orr and the Payroll department. Even by this date, Nicola Orr had not taken her own view on, or sought HR's view on, whether industrial injury disablement benefit was a contributory benefit.

143. Danielle Norton asked the claimant to provide evidence that it was non-contributory benefit, despite the Payroll department being the experts in payroll matters and providing this service to the respondent.

144. Not surprisingly, the claimant was unable to forward specific evidence to satisfy the Payroll department and it raised a query with the Department for Work and Pensions. However, the query that was raised with the Department for Work and Pensions was sent on an old NHS Injury Benefit form, which included, in section 3, a question about industrial injury disablement benefit, despite this benefit being non-contributory.

145. The scheme is clear: non-contributory benefits should not be deducted. In evidence Danielle Norton could not explain why the form was set out in the way it was, other than it was a standard question. It was Danielle Norton's evidence that if that section of the form was completed by the Department for Work and Pensions, the benefit was deducted – this was despite Payroll previously informing HR that only sections 1 and 2 of the form were relevant.

146. Neither the Payroll department, when providing a service to the respondent, nor the HR department when instructing the Payroll department to carry out that service on behalf of the respondent, took any ownership of whether in fact the benefit should be deducted. There was merely a reliance on an outdated form that if completed, was to the detriment of the claimant.

147. As a result of this intransient position the claimant did not receive any reimbursement of the deducted benefit, in her May pay. The claimant's appeal on 11 June 2019 was not enough for either the Payroll department or the HR department to question the information received from the Department for Work and Pensions.

148. The claimant resorted to contacting both the Chief Executive and the Director of Human Resources for a second time. In addition, the claimant was only paid £774 in wages because by this date the injury award had ceased, and she was still absent from work.

149. It took until 3 July 2019 for the respondent's HR department to carry out research and to put it to the Payroll department that the industrial disablement benefit was non-contributory. The Payroll department did not respond to this email without a prompt from the HR department, and continued to maintain the position that the benefit should be deducted.

150. At the meeting on 22 May 2019, Danielle Norton was clear that the Payroll department was a facilitative department that relied on instructions from the respondent. Danielle Norton was right in this regard. In the absence of the respondent telling the Payroll department that it was doing anything wrong, it continued to deduct the benefit.

151. The onus was on the respondent to listen to the claimant and to take its own position and instruct the Payroll department accordingly. The respondent cannot absolve responsibility for this situation by stating that it relied upon the services of the Payroll department as a third party. The Payroll department administered a functional process for the respondent.

152. It was incumbent upon the respondent to check that the Payroll department was correctly administering the scheme so that employees were not at a disadvantage. The respondent had an employee in front of them telling them that there was incorrect processing of her pay yet, did not take the matter into their own hands.

153. Despite having incontrovertible evidence from her own research on 3 July 2019, Christine Roscoe of the HR department awaited a response from the Payroll department which came on 9 July. That response did not contradict what Christine

Roscoe had discovered. Despite this, there was no instruction to the Payroll department to reimburse the claimant. It is only after the claimant resigned that the HR department took ownership of the issue and instructed the Payroll department to make the reimbursement.

154. I find that the respondent failed to properly administer the claimant's pay which resulted in an underpayment of wages to the claimant from October 2018 – June 2019.

Claimant's resignation

155. By 16 July 2019 the actions and inactions of the respondent had seriously damaged the claimant's trust and confidence in the respondent. The reimbursement, prompted by the claimant's resignation, on 26 July 2019 was not sufficient to repair the damage.

156. I do not agree with the respondent's submission that the reasons given by the claimant in her resignation letter or in her exit interview are different to what was asserted at this Tribunal.

157. The delay in submitting the injury award form created serious pay issues for the claimant for a number of months. Whilst the claimant was able to resolve this issue without raising a grievance or resigning, the erroneous deduction of her state benefit followed immediately. It took some seven months for the claimant to get an instruction from the respondent that there be a reimbursement.

158. However, the pressure was put on the claimant to prove the non-contributory status of the benefit and no responsibility was taken by the respondent's HR department – the experts in personnel issues. The claimant had to resort to appealing a grievance she thought had been resolved and speaking for a second time to the Chief Executive and the Director of Human Resources before the Human Resources department conducted research and questioned the processes of the Payroll department.

159. Following the meeting with Payroll in May 2019, it appears that the claimant would have accepted the reimbursement as a resolution as she had previously accepted the correct payment of the injury award in October 2018. This did not happen. For two consecutive months the claimant did not receive reimbursement.

160. The claimant returned to work a week after the respondent had failed to pay the reimbursement in the June payroll. On the claimant's return to work there had been no attempt by the respondent to resolve her complaint of bullying. The claimant returned to a hostile work environment and this was the last straw.

161. The claimant's trust and confidence in the respondent was seriously damaged as a result of the cumulative issues that began with the delay in the submission of the injury award form, the failure to properly investigate the claimant's complaint of unlawful deductions and concluded with the failure to address the claimant's complaint of bullying. The reimbursement of the erroneous pay position during the claimant's notice period, was not sufficient to repair the damage that had been done.

162. The respondent's actions/inaction showed the claimant that it no longer intended to be bound by the employment contract – it repeatedly failed to challenge the payroll department and ignored the claimant's complaints of bullying. The respondent conducted itself in this way without reasonable and proper cause – I heard no evidence as to why the respondent accepted the payroll department's stance without question or why there was no effort to investigate the bullying complaint. As a result, the claimant lost all trust and confidence in the respondent.

163. The fact that the claimant had previously confirmed that the delay in the submission of the injury award form had been resolved, does not stop that act forming part of the cumulative act upon which the claimant relies as the cause of her resignation.

164. In **Kaur,** the Court of Appeal determined that if a claimant had previously affirmed a breach, they can still rely upon that breach if there were further breaches which together, amount to a fundamental breach of the implied term of trust and confidence. None of the breaches on their own have to amount to a fundamental breach, provided on a cumulative basis, they amount to a fundamental breach of the implied term of trust and confidence.

165. The failure by the respondent to investigate the claimant's complaint of bullying was not a fundamental breach, but it was more than a trivial breach, such that it amounted to the last straw for the claimant and led to her resignation.

166. These acts cumulatively amounted to a breach of the implied term of mutual trust and confidence. The claimant did not affirm that cumulative breach – she resigned within a week of returning to work. The claimant resigned in response to the cumulative breach.

167. The claimant's claim for constructive unfair dismissal is therefore successful.

Employment Judge Ainscough
Date 18 May 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
20 May 2021

FOR THE TRIBUNAL OFFICE