EMPLOYMENT TRIBUNALS

Claimant: **Ms S. Lougheed**

Respondent: **Maxident Ltd**

Heard by: **London South** **On: 13 to 15 October 2021**

Before: **Employment Judge T R Smith**

Members **Ms A. Boyce**

Mr C. Rogers

Representation:-

Claimant: Mr W. Brown (solicitor)

Respondent: Mr A. Williams (solicitor)

JUDGMENT

1.The Claimant's complaint of unlawful deduction from wages is not well founded and is dismissed.

2.The Claimant's complaint of constructive unfair dismissal is not well founded and is dismissed.

3.The Claimant's complaint of direct sex discrimination is not well founded and is dismissed.

Reasons given pursuant to rule 62(3)

The Issues.

1.The issues agreed at the start of the hearing with the parties, along with any concessions, made were as follows: –

Unlawful deduction from wages

2.Was the Claimant underpaid between October 2017 and February 2018 (the first deduction)?

3.Was the Claimant not paid for the 4, 5, 6, 11, 12, and 13th of October 2018 (the second deduction)?

4.Was the Claimant not paid from 17 October 2018 until her resignation on 03 December 2018 (the third deduction)?

5.Were all or any of the deductions subject to a complaint that was presented in time, and if not was the Tribunal satisfied that it was not reasonably practicable for the complaint to be presented before the end of the relevant period of three months and was then presented within such further period as the Tribunal considered reasonable?

Direct Sex Discrimination

6.Did the Respondent on 17 October 2018 tell the Claimant to go and have her fingernails cut and, as she walked away, did Dr Mohsen slam the door on her back?

7.Was that less favourable treatment?

8.If so was it because of her sex?

Constructive Dismissal

9.Was the Claimant dismissed by the Respondent on 03 December 2018 or did she resign?

10.The Claimant contended she relied upon an express breach of her contract namely payment of wages and/or a breach of the implied term of trust and confidence.

11.If the Claimant was dismissed it was conceded by the Respondent that any resultant dismissal was unfair due to a lack of procedure.

Section 111A confidentiality of negotiations.

12.Neither party sought a formal ruling on this matter.

13.Mr Williams did not object to the Claimant mentioning in her evidence that she was approached by the Respondents HR advisers, Face 2 Face (“Face 2 Face”) to ask if she was looking to leave the Respondent’s practice and if so the Respondent was prepared to make an offer to her and a sum of money was mentioned (but not to the Tribunal). The Claimant indicated this was not a proposal she wish to pursue.

Preliminary Issues

14.At the start of the hearing the Tribunal suggested a timetable with the parties, which both advocates accepted was reasonable. Both advocates are to be commended for dealing with this matter expeditiously, whilst fully arguing all possible reasonable arguments that could be made on behalf of their respective clients.

15.The Claimant mentioned at the start of the hearing that she was dyslexic. She had arranged for a supporter to be present. To assist the Claimant, relevant extracts of any document referred to were read over to her. The Tribunal also emphasised that if the Claimant had any difficulties she was to highlight the difficulty to the Tribunal. At no stage during the proceedings did the Claimant identify any such subsequent difficulty. Fortunately the case was not document heavy and references to documentation was extremely limited.

16.When the Claimant gave evidence her supporter was at all times visible to the Tribunal.

17.The Tribunal agreed with the parties that it would initially look at the issue of liability and, if thereafter, it found wholly or partly for the Claimant, would address the issue of remedy, if time allowed.

The Evidence

18.The Tribunal had before it one statement from the Claimant.

19.The Claimant also produced a statement from her sister Ms B. Massicote.

20.For the Respondents the Tribunal had statements from:-

- Dr M. Mohsen director and majority shareholder of the Respondent
- Ms O. Rusinska, practice manager.

21.The Tribunal heard oral evidence from all the authors of the above statements.

22.The Tribunal had before it a master bundle which consisted of 159 pages.

Findings of Fact

23.There were numerous evidential disputes between the parties. The Tribunal has not sought to resolve each and every one of those disputes, only those that were relevant to making findings in respect of the issues it had to determine.

The Pleadings

24.Given the Respondent raised a time point the Tribunal considered it helpful to set out the appropriate preliminary procedural history.

25.The Claimant presented her claim form on 26 February 2019.

26.Prior to lodging her claim form she engaged in early conciliation, contacting ACAS on 23 January 2019. An early conciliation certificate was issued on 07 February 2019.

27.The Claimant did not address in her statement, or evidence in chief, any reason why, if all or part of her unlawful deduction from wages claim was out of time, why time should be extended.

Background

28.At the time of the events complained of, the Claimant was employed by the Respondent, a dental practice providing NHS and private care, based in Nunhead in London.

29.There was a conflict of evidence between the Claimant's statement and her contract of employment as to her start date. The Claimant conceded that her contract employment was probably the more accurate and therefore the Tribunal concluded that she commenced employment on 01 April 2005.

30.She worked for the Respondent as a dental nurse. The duties of a dental nurse included assisting a dentist in administrating treatment, including handling surgical equipment.

31.Every time a dentist treated a patient a dental nurse was required to be present.

32. The practice was purchased by Dr Mohsen in December 2016 from Dr Massoud Djahed.

The Claimants continuity of employment was unaffected. Apparently the Transfer of Undertakings (Protection of Employment) Regulations 2006 applied to the transaction.

33.Dr Mohsen is a practising dentist and owns a total of three dental practices. He attempted to visit the Nunhead surgery, where the Claimant was based, approximately once a week. The purpose of the visit was principally to check

invoices and to pay them. As will be seen, later in this judgement, the time he spent practising as a dentist at the surgery was extremely limited.

34.At the time of the complaints the structure of the Respondent was as follows:-

- Dr Mohsen was the owner director.
- Dr Djahed. continued to work in the practice as a dental surgeon
- Mr Wright a further dentist was employed in the practice
- The administrative staff principally consisted of Ms Rusinska; receptionist more latterly practice manager.
- There were a total of four dental nurses one of whom was a trainee who also covered reception as and when necessary.
- When a dental nurse was absent the Respondent used another nurse from an associated practice, or if they could not cover internally an agency nurse.

The Claimant's contract

35.The Claimant was issued with a contract of employment (39 to 40).

36.She was contracted to work Monday and Wednesdays.

37.On a Monday her contractual hours were from 9 am to 5:30 pm and on a Wednesday from 10 am until 6 pm.

38.She was contracted to work 15 hours per week, excluding lunch and other routine breaks, and was initially paid £8 per hour. The lunchbreak was for a period of one hour.

39.The Tribunal concluded the Claimant had a minimum guaranteed contractual hours of 15 per week.

40.The Tribunal found that from time to time there was an increased demand for dental services. As a result dental nurses were asked whether they would work additional shifts, and if they agreed, they were paid at their normal hourly rate.

The contract also provided *"changes to the day-to-day arrangements will be agreed with the principals".* The Tribunal interpreted that to mean that any significant changes to the contract requires the agreement of both parties, reinforcing the common law position.

41.There was no provision for contractual sick pay. Only statutory sick pay was payable, subject to the appropriate qualification provisions, if the Claimant was absent due to ill-health.

42.When Dr Mohsen took over the practice he increased the Claimant's remuneration from £8 to £10 per hour.

43.The Claimant was paid monthly, on the last day of the month.

44.Certainly from when Dr Mohsen acquired the practice, and possibly before, a clocking in/clocking out system had been introduced .

45.Each month every employee received a copy of the print out, usually on or about the 25th of the month, as did the Respondent. Unless either party noted any errors those records were passed to the Respondent's accountant who then produced payslips and arranged for payment to be made into the recipient's bank account.

An employee was free to take their print out home to check against their own records. The Respondent was prepared to look at any concerns, even after wages had been processed, and if an error was found then to make an amendment the following month.

46.It is appropriate to record at this juncture that there was no evidence before the Tribunal that the Claimant challenged her time printouts.

The first alleged deduction

47.The Claimant was initially acting as a dental nurse to Mr Djahed.

48.They did not enjoy the best of relationships.

49.When Dr Mohsen took over the practice he decided, with the Claimant's consent, to reallocate her to a female dentist, which both parties could only recall by her given name of Nebila.

50.The Tribunal found that due to an influx of work the Claimant worked more than her contractual two days a week. The Claimant said in evidence it was four days a week, although the Tribunal noted in a subsequent grievance investigation, in respect of an alleged underpayment of wages, the Claimant said it was three days per week (92).

51.In any event the Tribunal concluded there was a period (which the Tribunal had insufficient evidence to precisely identify) when the Claimant was working more than her minimum two contractual days.

52.Nebila left the practice in October 2017 and there was a drop in the Claimant's work

53.The Claimant contended that Dr Mohsen then reduced her pay to £8 per hour and continued to pay her that rate until she resigned (which would bring into play the National Minimum Wages Act).

54.The Tribunal did not accept that assertion on the weight of the evidence.

55.The Claimant's account was contradicted by the documentary evidence before the Tribunal. Having regard to the Claimant's payslips in the bundle, the Claimant was recorded as being paid at the rate of £10 per hour.

56.On 03 May 2018 the Claimant raised a grievance via, Evelyn 190 Centre, an advice agency, ("the agency") seeking £650 representing what she says was the approximate alleged underpayment of wages from October 2017 to February 2018.

57.No indication was given as to how this figure had been arrived at.

58.The Respondent engaged Face 2 Face to investigate the Claimant's grievance and a meeting was arranged with the Claimant for 06 June 2018.

59.The conclusion reached following the investigation undertaken by Face 2 Face (85 to 93) was that no further action should be taken.

60.The reason for this conclusion was on the basis of the evidence produced, Face 2 Face could not find any evidence to support the Claimant's grievance.

61.It is proper to mention the Claimant was subsequently critical of the Face 2 Face report because the author had not looked at her payslips. The Tribunal found the criticism unjustified on the particular facts of this case.

62.In the Tribunal's judgement this would not have assisted because the Claimant's case was that her payslips did not correspond with the sums paid into her bank account. The payslips effectively overstated her actual earnings compared with what she received into her bank account. On the Claimant's own case therefore, if she received a smaller sum into her bank account, it followed that only her bank statements would have assisted and they were in the possession custody or power of the Claimant. They were not produced to Face 2 Face or to the Tribunal, although would have been reasonably obtainable had enquiries been made with the Claimant's bank.

63.The Tribunal had sympathy with Face 2 Face in investigating the grievance because the Claimant could not give any specific dates when she said there were underpayments.

64.Face 2 Face recommended the rejection of the grievance *"unless evidence can be provided by SL for the company to review"* . In other words if the Claimant could provide some detail the matter would be revisited .

65.The Claimant does not give as a reason for her resignation the adequacy or otherwise of the Face 2 Face investigation. Even if she had relied, wholly or in part, on the adequacy of the investigation the Tribunal would have found that there was no breach of the implied duty of trust and confidence, in respect of the investigation and the conclusion reached.

66.It was during this investigation that Face 2 Face asked if the Claimant was looking to leave the Respondent's practice and, if so, the Respondent was prepared to make an offer to her and a sum of money was mentioned (but not to the Tribunal). The Claimant indicated this was a not an avenue she wished to pursue and nothing more was mention of the matter.

Hygiene

67.No dentist may practice without a dental nurse. A dental nurse was therefore assigned to each dentist. The Claimant latterly worked for Mr Wright. The Tribunal heard no evidence to suggest they enjoyed anything other than a satisfactory professional relationship.

68.Part of Ms Rusinska's responsibilities included responsibilities for policies and procedure including infection control.

69.Hygiene is a key issue in the treatment room. It is also a matter of concern to independent regulators of dental practices. If hygiene concerns are not adequately addressed, ultimately a dental practice can be forced to close.

70.For the purpose of these proceedings there are two regulators worthy of note, firstly the Care Quality Commission and secondly the Cross Infection Control Commission.

71.The Claimant was a very experienced dental nurse. She was aware of what was known as the *"bare below the elbow"* policy. This required, inter alia, that staff wore no jewellery below the elbow, no nail varnish and their nails had to be short.

72.The policy was equally applicable to male and female staff.

73.On 05 July 2018 the practice was subject to a cross infection control audit. The practice was scored out of 100 and did well, achieving a score that averaged 93% (53).

74.The inspector found a number of matters of concern, one of which was the Claimant's fingernails which were regarded as too long for undertaking clinical duties. The auditor required immediate action and for the practice to remind all clinical staff that long fingernails were not permitted and they had to comply with the Department of Health *"bare below the elbow"* guidance. The Respondent's evidence, that was not challenged, was the Claimant remonstrated with the auditor as to the assessment made in respect of her fingernails

75.As a result of the auditor's report, following the inspection, a meeting was convened by Dr Mohsen reminding all staff of the need for short fingernails and the other requirements of the Department of Health policy.

76.The Claimant was absent from work due to stress between 13 August and 27th of August 2018 and then again, due to the need to recover from an operation, between 29 August and 31 August 2018.

77.The Claimant attended a return-to-work interview on 03 September (105) with Ms Rusinska and again complained as to the payment of her wages. Ms Rusinska suggested that the Claimant discuss the matter with Dr Mohsen. Ms Rusinska also pointed out to the Claimant her nails were too long and the Claimant agreed to get them cut. It would appear she did not, given subsequent events.

17 October 2018.

78.Matters came to a head on 17 October 2018**.**

79.There is a marked difference in the evidence as to what occurred on that day.

80.On the one hand the Claimant alleges that halfway through her shift Dr Mohsen told her go home. She rang her sister to get advice and Dr Mohsen slammed the door on her back and she screamed. She went outside, contacted the police and subsequently obtained a crime reference number. The Claimant contended that it was the assault which was an act of sex discrimination.

81.The Respondent's case, put simply, was that Dr Mohsen noted at the Claimant had long fingernails and told her to cut them. She refused and said she would only let a beautician cut them. The Respondents took HR advice and on the basis of that advice the Claimant was told to go and get her nails cut and then come back

to work, but she refused. She insisted that she was given an instruction in writing.

82.The Respondent then again contacted their HR advisers and a letter was handed to the Claimant which she refused to accept.

83.The Claimant walked out and never returned.

84.The Respondent has not been contacted by the police.

85.The Tribunal had to resolve the evidential conflict. It reminded itself that the burden of proof fell upon the Claimant.

86.On the balance of probabilities the Tribunal considered that the burden had not been discharged. That does not mean the Tribunal found the Claimant did not tell the truth, but that the weight of evidence favoured the Respondent's account.

87.The Tribunal reached this conclusion for the following reasons: –

- There was an inconsistency between the Claimant's account and that of her sister Ms B. Massicote. Ms B. Massicote was adamant that she was speaking to the Claimant on the phone when she heard her crying out *"ouch".* On the Claimant's oral evidence, when questioned by the Tribunal, she said she did not speak to her sister until after the alleged assault. That is also consistent with the evidence of Dr Mohsel who did not see the Claimant use her mobile phone during the incident. Ms Rusinska gave similar evidence. It follows, if the Claimant was right, her sister could not have heard a cry of *"ouch*" because the alleged assault had already taken place. Allied to this point at no stage did Ms Rusinska hear the Claimant cry out or a door bang, and the Tribunal found her to be a compelling witness.
- The Tribunal considered it relevant to the assessment of credibility that the Claimant made no reference in her statement, or in her evidence in chief, to the fact that Dr Mohsen had raised with her the fact she needed to get her fingernails cut. On her account it sounded as though Dr Mohsen just told her to go home and then assaulted her. It was only in cross examination she accepted he expressed concerns about her fingernails, told her to get them cut, that she then refused and insisted on the instructions in writing which was then produced and which she then refused to accept.
- Following on from the above point the Tribunal considered that Dr Mohsen gave the Claimant a perfectly lawful instruction namely to cut her nails, particularly given the recent external inspection where the Claimant's nails

was a cause for concern for the auditor . Compliance with the Department of Health policy had then been emphasised to all staff by Dr Mohsen.

The Tribunal considered it likely that the Claimant would react when told to have her nails cut given she had argued with the independent auditor.

- The incident apparently happened in the reception area of the practice. The Tribunal considered it improbable that Dr Mohsen was prepared to assault a member of staff, particularly when at least one patient was present.
- The Tribunal was prepared to accept the Claimant did report matters to the police, on her sister's advice, who had not witnessed the incident, but found it concerning that she did not produce either the CAD (that is the transcript of a telephone call) or the case report . Whilst this may have been self-serving evidence, it would least have showed what the Claimant reported to the police at the time and whether it was consistent with her statement to the Tribunal. While the Tribunal noted the Claimant said the police informed her she could access the relevant documentation online, and she could not because she had dyslexia, she has a sister and had used an advice agency, who both could have assisted her.
- The Tribunal had the evidence of Ms Rusinska which was tested on cross examination. Her account was consistent with that of Dr Mohsel. In particular the Tribunal noted that at no stage were the Claimant and Dr Mohsen alone together. On Ms Rusinka's account it was the Claimant who became upset and started shouting in reception. The Tribunal considered that was plausible because it was not disputed that the Claimant had insisted on something in writing to say she had to have her nails cut. It is likely therefore when the written instruction was produced she became annoyed.
- The Tribunal noted a statement produced from a patient Ms Provenzano. She did not identify the parties but said she heard a female voice shouting and a male voice telling the woman to calm down, as she (the patient) came out of the lavatory . She saw the female person arguing with a man in front of the receptionist and the patient expressed the view that she felt sorry for the receptionist who was trying to persuade the woman to leave. This is broadly consistent with the Respondent's evidence. The Tribunal however

has given this statement less weight because the author was not called, although it is understandable that a patient would not want to become involved in litigation.

- The Claimant saw her GP after the incident and the GP recorded that the Claimant said she was suffering stress at work There is no reference to any assault. The Tribunal is conscious the Claimant only produced a fit note and it may well be that she told her GP that she had been assaulted. Putting aside that this would be self-serving, the Claimant could have obtained an extract from her GP records which could have shown consistency in her evidence. No such evidence was before the Tribunal
- The Tribunal found a number of aspects of the Claimant's evidence generally to be somewhat unreliable. By way of illustration she was wrong on her start date. According to the pay slips the Claimant was wrong to say that she continue to be paid £8 pounds an hour until she resigned. Finally for reasons that will become clear the Tribunal doubted the Claimant's allegations that she was bullied and harassed by Dr Mohsen having regard to the specific examples she gave. The Tribunal will return to this matter, later, in its judgement.

88.Dr Mohsen apparently wrote to the Claimant on 19 November 2018 (119) with a view of the meeting of 30 November 2018 to discuss further the concerns. The Claimant did not attend as she contended she did not receive the letter.

89.The Claimant resigned employment by letter dated 03 December 2018 (121) the letter stated: –

The Evelyn 190 centre has written to you on multiple occasions requesting you to pay outstanding wages. You have continued to ignore the letters and to this date I have still not been paid.

Your representative wrote to myself and my representative offering a sum of money on the condition that I leave the practice. This was rejected due to the discourteous nature of the offer and the ridiculously small amount which you had offered.

On the last day I worked at the practice, the 17th October 2018, the harassment I had put up with was horrific. You told me to get out the surgery and I requested you put this in writing, but you constantly refused.

You became physical on this day, pushing the door against my back and pushing me really made me fear for my safety. You proceeded to chase me out of the building. I had called the police after this whilst I was emotional and in tears due to the utter distress caused by your actions. The police had advised me to go home and I proceeded to do so.

I have since attended my GP and have been issued with a medical certificate due to the work-related stress I have suffered, and this has acted as a catalyst to the build-up of depression. I have been placed on anti—depressants and the dosage has been increased.

Because of the obnoxious incident I had received on that day, for my own safety, I am unable to return to work.

I do hold the view that I have been unfairly dismissed and will continue to do so.

90.In the Claimant's evidence she contended that Dr Mohsen had subjected her to ongoing bullying and harassment. She made two specific allegations. Firstly on occasions she said that Dr Mohsen would tell her that instruments were not clean, and secondly he would ask the receptionist to reprimand the Claimant for unspecified underperformance. None of these featured in the Claimant's letter of resignation as the principal reasons why she left her employment. The Tribunal, for reasons set out later in its judgement did not find merit in either assertion.

91.The Claimant was invited to a meeting to discuss her resignation on 10 December 2018 but did not attend. The Claimant alleged she did not receive the letter. The Tribunal considered it improbable that two letters sent to her within a short period of time were not received. The Tribunal was satisfied that, given the Respondent was using an HR consultancy, that such letters would have been drafted and sent.

Submissions

92.Both advocates made submissions on the facts. No law was mentioned. The Tribunal does not mean any disrespect to either advocate by not repeating those submissions, but took each and every submission into account in reaching its conclusion. The mere fact a specific submission has not been recorded does not mean it was not considered.

Conclusions

93.When looking at the Tribunal's conclusions, its findings of fact should be read into its conclusions. Simply because the Tribunal has not repeated each and every previous finding of fact or a legal principle does not mean it was not applied.

Unlawful deduction from wage

94.Section 23 of the Employment Rights Act 1996 provides: –

(*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 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

(b)….

(c)….

(d)….

(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, or

(b)….

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)….

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.

(3A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4)Where the employment Tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the Tribunal may consider the complaint if it is presented within such further period as the Tribunal considers reasonable.

95.The Tribunal has also had full regard to section 13 and 14 of the Employment Rights Act 1996.

96.The first deduction relied upon, from October 2017 until February 2018.

97.If the Claimant was paid on 28 February 2018 then her complaints should have been presented by no later than 27 May 2018. Her complaints was not presented until 26 February 2019. There was no ACAS early conciliation certificate in the intervening period.

98.This claim is therefore out of time.

99.The Claimant led no evidence as to why it was not reasonably practicable for her to present her claim within the statutory time period and the legal burden is upon her. In the circumstances therefore this aspect of the Claimant's complaint of unlawful deduction from wages must be dismissed on the grounds the Tribunal does not have jurisdiction.

100.The second deduction is, contrary to the Respondent's submission, in time and one over which the Tribunal has jurisdiction.

101.The Claimant's wages were paid at the end of each month. In calculating time, time runs from when the sum should be paid (section 23(2) (a) Employment Rights Act 1996).

102.Payment should be made on 31 October 2019. Absent ACAS early conciliation the claim form should have been presented by 30 January 2020. The Claimant entered into ACAS early conciliation during the primary limitation period and therefore has the right to take advantage of section 23 (3) A) which in turn refers to section 207B of the Employment Rights Act 1996.

103.The Tribunal applied section 207B.

104.The Tribunal concluded the Claimant is entitled to an extension of time of one month from date B, that is 07 February 2019 and therefore time would expire on 07 March 2019 and the claim form was presented within the extended period.

105.However this simply surmounts the jurisdictional hurdle. The Claimant must establish, on the balance of probabilities, what was properly payable to her.

106.For the avoidance of doubt the Tribunal did not find that the first and second deduction amounted to a series of deductions. They were separate, discrete and unconnected. One related to an underpayment and one related to the non-payment. There was also a temporal gap. There was not a series of deductions.

107.The Tribunal noted that there were wage slips in the bundle for the month of October 2018. The Claimant's case were that the wage slips were wrong in that they did not reflect what was paid into her bank account. The Tribunal noted that in October 2018 the payslip recorded the Claimant received basic pay for 44.75 hours at £10 per hour totalling £447.50 together with sick pay of £184.10. Having regard to what the Claimant said she was working, 15 hours per week that appeared, on the face of matters, to be a fair reflection of what she should have received.

108.It was therefore for the Claimant to show that there had been a deduction (which of course includes underpayment) by means, for example of the production of her bank statements. She did not do so. No specific reason was given why they were not produced.

109.In the circumstances the Tribunal found the Claimant had not established, on the balance of probabilities, that she had not been paid what was properly payable to her and therefore her complaint in respect of the second deduction had to be dismissed.

110.Turning to the third deduction, that is the period from 17 October 2018 until resignation on 03 December 2018, as a precondition to a claim the Claimant had to show she was ready willing and able to work or alternatively had some justifiable excuse. It was common ground she did not attend work in the above period.

111.The Claimant did however submit sick notes and under the terms of the Claimant's contract she was entitled to SSP. The Claimant confirmed that she received SSP. This is consistent with her wage slip (page 155). There was no evidence before the Tribunal that she did not receive a full entitlement to SSP.

112.The Claimant therefore received what she was properly entitled to under the terms of her contract. In the circumstances therefore the Claimant's complaint in respect of the third deduction had to be dismissed.

Constructive dismissal

113.Section 95 (1) of the Employment Rights Act 1996 defines dismissal as follows: –

"(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) …

(c) the employee terminated 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."

114.For an employee to succeed in a claim of constructive dismissal the employee must satisfy the following four conditions on the balance of probabilities.

- One, there must be a breach of contract by the employer. This may be either an actual or anticipatory breach.
- Two, that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justifies the employee leaving.
- Three, the employee must leave in response to the breach, that is, it must have played a part in the employee's decision, and not some other unconnected reason, see **Wright -v- North Ayreshire Council [2014] ICR 77.**
- Four, the employee must not delay too long in terminating the contract in response to the employer's breach, or have done anything else which indicates acceptance of the change to the basis of the employment, otherwise the employee may be deemed as waived the breach and agreed to vary the contract. Whether an employee has waived the breach, or what is sometimes described as affirming the contract, is fact sensitive. There is no fixed time within which the employee must make up his or her mind. Factors that may be relevant include the nature of the breach, whether the employee has protested and what steps, if any, the employee has taken after the alleged breach to show an intention still to be bound by the contract.

115.The Court of Appeal in **Western Excavating (ECC) Ltd -v-Sharp 1978 IRLR 27** made it clear that the question of whether there was a constructive dismissal is

determined in accordance with the terms of contractual relationship and not in accordance with the test of reasonable conduct by the employer.

116.That said reasonableness may not be wholly irrelevant and may have some evidential value in a constructive dismissal claim, see **Courtaulds Northern Spinning Limited -v- Sibson 1978 ICR 329.**

117.There is implied into every contract of employment a term of trust and confidence, as finally affirmed by the Supreme Court in **Malik -v- Bank of Credit and Commercial International SA 1997 IRLR 62** in which the term was defined as follows: –

"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".

118.The correct approach to determine whether there has been a breach of the term of trust and confidence, according to the Court of Appeal in **Eminence Property Developments Ltd-v-Heaney 2010 EWCA Civ 1168,** is as follows: –

"Whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract"

119.There can be a constructive dismissal if there are a series of events that occur over time which, when considered together, show that there has been a repudiatory breach of contract. In such a case the last action of the employer which leads to the employee resigning need not in itself be a breach of contract. The question the Tribunal must answer is, does the cumulative series of acts taken together amount to a repudiatory breach of the contract, see **Lewis -v- Motorworld Garages Ltd 1986 ICR 157.**

120.The Tribunal identified the reasons the Claimant gave for her resignation which can be summarised as follows.

121.Firstly she complained that she had not been paid her contractual wages and the Respondent had ignored letters from the advice centre. Whether or not any complaints of unlawful deductions from wages is out of time is irrelevant to whether the Claimant may rely upon that omission for the purposes of a constructive unfair

dismissal claim (see **Motorworld Garages Ltd**). Even if the claim, as a stand-alone claim, is out of time it may be considered, along with other incidents, which taken together may be said to amount to a fundamental breach of contract

It follows therefore that the Tribunal did not regard the fact that the first deduction was out of time had any relevance to the constructive unfair dismissal claim.

122.Secondly a financial offer had been made to her.

123.Thirdly she complained of the incident on 17 October 2018 and in particular the alleged assault which made her fear for her safety.

124.Fourthly in the Claimant's statement she alleged Dr Mohsen would talk down to her and shout out so patients could hear "*this instrument is not clean"*

125.Fifthly she said Dr Mohsen got the receptionist to reprimand her for underperformance

126.The Tribunal's analysis on each of these issues is as follows.

127.It was however for the Claimant to prove that the Respondent was in breach of contract. The Tribunal accepted that a repeated underpayment or non-payment of wages could amount to a fundamental breach of contract. However here, the Tribunal was not satisfied that any such underpayment or non-payment had been established for the reasons already given.

128.Further it was factually incorrect to say that the Respondent ignored the Claimant's concerns as regards her pay. They engaged independent consultants, Face 2 Face, to look at matters and a report was produced, and the outcome conveyed to the Claimant.

129.On the second issue there was no suggestion whatsoever before the Tribunal that, for example, the Claimant was told that she was to take a settlement or she would be dismissed. The Tribunal rejected any notion that the Respondent was seeking to dismiss the Claimant. If it was it could have commenced disciplinary proceedings following the report from the external auditor as regards the Claimant's nails. It did not.

130.On the third issue, had the Tribunal found that the Claimant had been assaulted it would have been prepared to infer that such behaviour would amount to a fundamental breach of contract. However for the reasons already given the Tribunal is not satisfied that any such assault took place. The Tribunal was satisfied the Respondent gave the Claimant a lawful instruction and the Claimant did not want to comply with that instruction.

131.Turning to the fourth issue the Tribunal considered that even if the words *"this instrument is not clean"* were used, by the very nature of dental treatment it would have to be in the presence of a patient. It did not consider that to be harassment or bullying but a statement of opinion. More significantly, however it considered the likelihood of such a conversation taking place between the Claimant and Dr Mohsen was extremely unlikely. Dr Mohsen only worked in the practice as a dentist for a short period of approximately two months, every Friday to cover a colleague who was absent due to ill-health. The Claimant was not contracted to work on a Friday. The Tribunal therefore considered the likelihood of the incident occurring as alleged by the Claimant was limited. She had not discharged the burden of proof on this ground

132.Dealing with the final issue the Tribunal found that Ms Rusinska did pass on messages for Dr Mohsen. That was neither demeaning nor in inappropriate when Dr Mohsen was not at the practice on a daily basis and she was the practice manager. Nor was it inappropriate at the return-to-work interview for Ms Rusinska to tell the Claimant to get her nails cut given the Respondents responsibility to abide by the bare below the elbows Department of Health stricture.

133.Looking at the matters therefore relied upon by the Claimant both individually and collectively the Tribunal is satisfied the Claimant has not established that there was a fundamental breach of her contract of employment.

134.In the circumstances it is not necessary to consider any argument as to affirmation of the contract.

Sex Discrimination

Burden of proof

135.The burden of proof is set out in section 136 of the Equality Act 2010.It does not change the requirement on a Claimant that in a discrimination case is for the Claimant to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the Tribunal could infer an unlawful act of discrimination, see **Royal Mail Group Ltd -v-Efobi 2021 UKSC 33**

Substantive law

136.Direct discrimination is defined in section 13 (1) EQA 10 as follows: –

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

137.The legislative test is therefore broken down into two elements namely less favourable treatment and the reason for that treatment. In some cases, however, it may be appropriate to ask the latter question first, see, **Shamoon -v-The Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** as explained in **Stockton-on-Tees Borough Council -v-Aylott [2010] IRLR 994** where it was suggested that it would often be appropriate to start by identifying the reasons for the treatment the complainant complained of. If the answer was that the reason was a protected characteristic then the finding of less favourable treatment was likely to follow as a matter of inevitability.

138.The test of what amounts to less favourable treatment is an objective one. The fact that a complainant believes they have been treated less favourably than a comparator does not of itself establish that there has been less favourable treatment: **Burrett v West Birmingham Health Authority [1994] IRLR 7.**

139.Direct discrimination is concerned with less favourable, rather than unfavourable, treatment. Unreasonable treatment is not less favourable treatment, see **Glasgow City Council-v- Zahar [1998] ICR 120** and unreasonable behaviour cannot found an inference of discrimination, although a lack of explanation for the unreasonable treatment (as opposed to the unreasonableness of the treatment) might found such an inference: **Bahl -v- Law Society [2004] IRLR 799**.

140.As the statutory definition requires less favourable treatment that in turn requires a comparison to be made..

141.Section 23 EQA10 states :

"(1) On a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case.

142.The second element is the treatment must be because of the protected characteristic. The courts have divided cases of direct discrimination into two categories, the first whether treatment in issue is discriminatory on its face and the second where the treatment is not objectively discriminatory but the Tribunal has to know something about the Respondent's reasons for their actions in order to know

whether the less they will treatment could be said to be because of the protected characteristic.

143.In the first category motive is irrelevant although motivation is not. That said motive or intention will plainly be compelling evidence pointing to a finding of unlawful discrimination: **Nagarajan -v- London Regional Transport [2000] 1 AC 501.**

144.In the second category it is not sufficient for a complainant to show they been treated less favourably than their chosen comparator. It is only if the protected characteristic is a substantial or operative reason, though not necessarily the sole or intended reason, for the less favourable treatment that liability is established. The Tribunal is concerned with what consciously or sub consciously was the alleged discriminators reasons for the behaviour.

145.The Tribunal deal with the issue of direct sex discrimination quite simply.

146.To the extent it is said that the Respondent's policy of *"bare below the elbow"* amounted to direct sex discrimination the Tribunal rejected any such contention.

147.The Respondents applied a national policy aimed at infection control and it applies equally to both male and female staff. In such circumstances the fact that the Claimant was required to have short fingernails would apply equally to a male dental nurse and a male dental nurse would have also been told to cut their nails if they were too long.

148.The Tribunal considered the appropriate comparator was a male dental nurse although the Claimant had referred to a male dentist Mr Peter Wright.

149.However the point is academic as to who was the correct comparator because the same policy in respect of finger nails would have applied to him.

150.The reason the Claimant was treated in the manner that she was, that is being told to have a fingernails cut, was not due to her protected characteristic of sex but because of the infection control policy.

151.The Tribunal did not find that the Claimant was assaulted as she alleged. She has not shown facts from which, in the absence of any other explanation, the Tribunal could infer an unlawful act of discrimination.

152.If the Tribunal was wrong on its primary finding that there was an assault it was not persuaded that a male dental nurse in similar circumstances would not have been treated in the same manner.

153.It follows therefore that this complaint must be dismissed.

154.In summary therefore, for the reasons given all the complaints of the Claimant must be dismissed.

Employment Judge T.R. Smith

Dated: 01 November 2021