EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102176/2020

Hearing Held by Cloud Video Platform (CVP) on 20, 21 and 22 July 2021

Employment Judge E Mannion

Ms Pauline Ritchie	**Claimant Represented by Deirdre Flanigan Solicitor**
South West Community Cycles	**Respondent Represented by Glynis Duffy, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the claimant was constructively unfairly dismissed and the respondent is ordered to pay the following:

1. Basic award: £828.00

2. Compensatory award: £7205.53

3. The respondent made unauthorised deductions from wages and is ordered to pay the following:

   (a) Unauthorised deduction from 30 Oct 2018 – 21 February 2019: £127.83

(b) Unauthorised deduction from 22 February 2019 – 7 January 2020: £9,850.49

REASONS

Introduction

1. This is a claim of constructive unfair dismissal and unlawful deduction of wages. In respect of the latter claim, the respondent conceded that there was an unlawful deduction of the claimant's wages for the period 31 October 2018 to March 2019 which amounts to £127.83. The claimant claimed for an additional unlawful deduction from her wages from February 2019 to termination of employment in January 2020 which is disputed by the respondent.

2. The claimant gave evidence on her own behalf. Margaret Hood, Chief Executive and Project Director as well as the claimant's line manager; Alastair Cochrane, Mechanic; and Margaret O'Rourke (nee Miller) Chair of the Board all gave evidence on behalf of the respondent. There were some issues with the productions but, ultimately, the Tribunal had documents from both parties. Additional documents provided during the course of the hearing were added to the bundle and are referred to by either the new page numbers or document number. At the end of the oral evidence the parties were directed to provide written submissions, which was their preferred option.

Relevant law

3. Section 95 of the Employment Rights Act 1996 provides:

> (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 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"

Section 13 of the Employment Rights Act 1996 provides:

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

a. The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

b. The worker has previously signified in writing his agreement or consent to the making of the deduction.

Issues

4. The Tribunal has to determine the following issues:

4.1 Did the claimant suffer an unlawful deduction from wages?

4.2 When was the claimant's employment terminated?

4.3 If the claimant resigned, was it in response to a breach of her contract?

4.4 If so, was the breach a fundamental or material breach?

4.5 If so, did the claimant resign in response to that breach or did she affirm the contract?

Findings in fact

5. The Tribunal makes the following findings in fact:

5.1 The respondent is a charitable organisation which focuses on the health and community benefits of cycling. It repairs and sells second hand bikes and has a fleet of bikes for hire. It arranges cycle events. Groups or individuals can book a coach led ride. They have an

address at Pollockshaws West Train Station, 2092 Pollokshaws Road, Glasgow, G43 1AT.

5.2 The claimant's employment with the respondent began on 1 September 2017. She was employed as a Cycle Coach. Her role involved the promotion of and participation in group led cycles and other cycling duties. She was originally employed on 21 hours per week and this increased to 28 hours per week after the claimant was employed for 8 months. It was also agreed that as the claimant was dealing with waste disposal for the respondent organisation, she would be paid an additional hour per week and so her contractual pay was based on 29 hours per week although she was only required to work 28 hours per week.

5.3 The claimant was provided with a contract of employment at the outset of her employment in September 2017.

5.4 On 13 August 2018, the claimant emailed Mrs Hood and Mrs O'Rourke (nee Miller) requesting a HR meeting (pg 100). The purpose of the meeting to discuss the claimant's workload and the number of hours she had recently been undertaking. She provided a breakdown of hours worked in previous weeks (pg 101) and the value of the additional hours worked which was calculated as £1,476.70. Mrs Hood and Mrs O'Rourke (nee Miller) were concerned that this was a request for payment but this was not the case. The claimant set out the value of the additional hours to evidence her increasing workload. The claimant's hours of work and workload were discussed as well as her contractual role.

5.5 On 14 October 2018, the claimant sent a document referred to as a whistleblowing complaint to the Board of the respondent organisation (pg 109). This followed a meeting with Mrs O'Rourke (nee Miller) and Mr Chris Luke, board member. The board met to

consider the issues as set out in this document and found there was no basis for the concerns raised.

5.6 On 30 October 2018, the claimant was suspended from work. She was informed of her suspension by Mrs O'Rourke (nee Miller) just before the end of the working day. The respondent emailed the claimant at 18.37pm that evening with the subject title "suspension" (pg 137) which stated that the claimant was suspended to allow an investigation into misconduct and that a letter would follow by post. The respondent witnesses gave evidence that a letter (pg 138) was hand delivered to the claimant's home address and sent by recorded delivery the following day. The claimant denied receiving these letters and indicated a level of distress that Mrs Hood had hand delivered the letter to her home.

5.7 The claimant was suspended primarily because she failed to answer questions by Mrs Hood and Mrs O'Rourke (nee Miller) in respect of timesheets which they stated had not been provided.

5.8 The following day, the respondent took witness statements from three members of staff in respect of an altercation between the claimant and Mr Cochrane which occurred on 30 October 2018. The claimant and Mr Cochrane had a conversation where both parties raised their voices.

5.9 On 9 January 2019, Danielle Devine of the respondent organisation emailed the claimant to her personal email account seeking details of the respondent social media accounts and passwords (pg 149). This was a different personal email account to the account where the suspension email was sent on 30 October 2018. The claimant did not read this email at the time it was sent.

5.10 The respondent wrote to the claimant by letter dated 15 February 2019 (pg 150). The envelope posting this letter bears the postmark of 18 February 2019 and so it was posted on that date (pg151). This letter requested that the claimant attend an investigation meeting on 21 February 2019 under the respondent's disciplinary process to discuss various incidents of misconduct and noted that Tom O'Hara, Board Member would be in attendance at this meeting along with Danielle Devine, Admin and Finance Officer.

5.11 The respondent's disciplinary policy (pg 78) provides that an employee is entitled to be accompanied by a fellow employee "at all stages of the formal disciplinary process".

5.12 On 20 February 2019 at 16.14pm, the claimant emailed Mr O'Hara (pg 154) stating that she received the letter that day inviting her to the investigation meeting. She stated that she would not be in attendance the following day due to the short notice provided and as she wanted to take advice from her representative. The respondent emailed the following day (21 February 2019) at 12.24pm (pg 153) stating that the claimant was required to make herself available under the terms of her suspension and had failed to do so. As a result the respondent viewed the claimant as "AWOL" and indicated that her pay would be stopped until she co-operated with the respondent. A further meeting was scheduled for 5 March 2019 at 1pm.

5.13 The claimant did not attend the meeting on the 5 March 2019 and emailed what she understood to be Mrs O'Rourke (nee Miller)'s email address on the 4 March 2019 advising that she was taking legal advice and would not be in attendance at that meeting. This email was not received by the respondent as it was sent to an incorrect email address.

5.14 Without prejudice discussions took place between the claimant and respondent over the course of March, April, May and June 2019.

5.15 The respondent stopped paying the claimant her wages on 21 February 2019. This did not recommence.

5.16 On 23 July 2019, the claimant's trade union representative emailed Mrs O'Rourke (nee Miller) (pg 164) noting that the claimant had not been paid and as she had not resigned from her post, nor was she dismissed by the respondent she continued to be an employee of the respondent. The respondent did not reply to this email.

5.17 A further email was sent by the claimant's trade union representative on 31 July 2019 to Mrs O'Rourke (nee Miller) and Mrs Hood (pg 163), referring to the email of 23 July and again advising that the claimant was in ongoing employment with the respondent. The email asked for a response within 5 days and made a Subject Access Request. The respondent did not respond to this email.

5.18 On the 22 August 2019 a payment of £1,416.61 was made directly into the claimant's bank account by the respondent (pg 206). On the 29 August 2019, the respondent prepared a P45 document stating that the claimant's employment with the respondent organisation came to an end on 26 April 2019. The respondent asserts that the P45 was posted to the claimant by Mrs Hood who prepared the P45 and made the above payment to the claimant. The claimant did not receive this P45. The respondent did not advise the claimant in writing or otherwise that she would be in receipt of monies or what the £1,416.61 amounted to. The respondent did not advise the claimant, in writing or otherwise, that her employment had come to an end.

5.19 On 5 September 2019 the claimant wrote to Mrs Hood at the respondent organisation raising a grievance (pg 165) noting that she was an employee of the respondent organisation. The grievance referred to the following:

a. *That I have been suspended since 30 October,*
b. *That SWCC has not investigated the allegations against me and has made no action to return me to work,*
c. *That despite the terms of my suspension being on full pay, I have not been properly paid since Feb 2019,*
d. *I have received some monies in late August 2019, but have not received a pay advice slip*.

5.20 The respondent organisation wrote to the claimant on 23 September 2019 (pg 166) acknowledging receipt of her grievance and arranging a grievance meeting with an external and impartial consultant from Penninsula. 5.21 This letter did not challenge the claimant's view in her grievance that she was an employee of the respondent organisation and made no reference of the fact a P45 had been prepared and sent to HMRC the month prior.

5.22 After some rescheduling, the grievance meeting ultimately took place on 29 October 2019 and chaired by Saragh Reid of Penninsula. A report dated 25 November 2019 was prepared by Ms Reid and sent to the respondent in or around that date.

5.23 The respondent disagreed with the outcomes in the report and it was discussed by Mrs Hood and the Board in a Board meeting on 11 December 2019.

5.24 By letter dated 2 December 2019, the claimant wrote to Mrs Hood (pg 177) noting the delay in dealing with the grievance which was lodged on 5 September and the response which remained

outstanding despite a grievance hearing taking place on 29 October. This letter noted that the claimant was not receiving any pay from the respondent, continue to be on suspension and was in "a precarious employment position with regard to my employment status". The letter requested a response by 5pm on 11 December 2019.

5.25 On 10 December 2019, the claimant's trade union representative emailed Mrs Hood (pg 178) indicating that it had been 6 weeks since the grievance hearing and that he understood the respondent had received a report from Ms Reid who chaired that hearing. He noted that the claimant continued to be without pay and was suspended and advised that this appeared to be a deliberate act to frustrate the employment relationship. It also indicated that the delay in dealing with the grievance was a repudiatory breach of contract.

5.26 The respondent did not respond to the claimant's letter of the 2 December or her trade union's email of 10 December. The last piece of correspondence from the respondent was their letter of 17 October 2019 (pg 168) inviting her to the grievance meeting on 29 October.

5.27 On 7 January 2020, the claimant resigned from her post with the respondent (pg 179) citing the following as breaches of contract upon which she was relying as the basis for her resignation

a. Your failure to adequately resolve my suspension from work;
b. non payment of wages from March 2019;
c. lack of response to my grievance letter of 5 September;
d. lack of any response to my letter of 5 December.

5.28 The respondent did not reply to this letter either to acknowledge it or challenge the basis of the resignation on the basis that the claimant's employment terminated at an earlier date.

5.29 The claimant felt a loss of confidence after her resignation. She was unsure how she would explain how her role with the respondent came to an end and the lack of a reference to prospective employers. She underwent training with Department for Work and Pensions on CV preparation, interview skills and general confidence building.

5.30 The claimant began a role with the Department for Work and Pensions on 20 July 2020 and she continues in this role.

Observations on the evidence

6. The claimant gave her evidence in a clear way and I considered that she gave an honest account of events as she remembered them. The respondent's witnesses were less clear and at times were often inconsistent with the respondent position put forward or with evidence from other respondent witnesses. For example, Mrs O'Rourke (nee Miller) found it difficult to answer the questions asked of her by Ms Duffy and to remember facts and events. I considered that Mrs O'Rouke (nee Miller) was genuinely trying to assist the Tribunal that detail was lacking from her answers due to a failure of memory and lack of preparation rather than to impede the Tribunal.

7. As is to be expected, there were areas of dispute between the parties. One such area concerned the contract of employment. The respondent provided a contract from 2017 and a second contract from 2018 which formed part of the bundle at pgs 49 – 53 and document 6b. These documents are unsigned. The 2018 document was provided during the course of the claimant's evidence and it was explained by Ms Duffy that this was retained along with other documents from the claimant's locker in an envelope. The claimant disputed that these are the correct documents, noting that she signed her contract of employment in blue ink and recalls that it was on headed paper. She gave evidence that she signed the employment contract and returned it to the employer. She did not have an alternative contract to provide to the

Tribunal. Having considered the positions put forward, although the documents provided are unsigned I accept that the contracts at pg 49-53 and document 6b of the bundle are the contracts of employment which were entered into by the parties.

8. There was a dispute as to what has occurred on the 30 October 2018, which is the date on which the claimant was suspended, and the reasons behind this suspension. I note however, that the fact the claimant was suspended was not in and of itself a determining factor in her decision to resign. She does not claim that the Respondent had insufficient grounds to suspend her or that she viewed the decision to suspend as a repudiatory breach. Instead, she was concerned with the fact that her suspension remained unresolved as at the 7 January 2020. As a result, I have not made any findings of fact in respect of the disputed events of the 30 October as they have no bearing on the legal questions to be determined.

9. The evidence from the respondent on when exactly the claimant's employment terminated was most unclear. Mrs Hood asserted that she did not have the authority to take the decision to dismiss an employee; this was a decision of the Board who instructed her to complete and send the P45 to the claimant in August 2019. She could provide no explanation as to why the claimant was not informed in writing at the time of sending the P45 that her employment had terminated. Mrs Hood confirmed that in or around the same time, another employee of the respondent was dismissed and was notified in writing that their employment had come to an end. She surmised that the date of 26 April 2019, the termination date on the P45, was a mistake on the part of the Board who terminated her employment in line with the fixed term nature of the contract of employment. Mrs O'Rourke (nee Miller) stated that the Board did not make a decision to dismiss the claimant. Instead her contract expired as the funding for her role was contingent on her being at work, which she was not. This funding brought her role to an end at the end of April. She did not recall instructing Mrs Hood to complete and send a P45 in August.

10. The contracts provided as part of the bundle outline that the role is "funded until 31 May 2019 with a potential to extend depending on additional funding". They also include a notice clause requiring either party to give 4 weeks' written notice in order to terminate the employment contract. The contract does not explicitly state that the contract is a fixed term in nature and expiring on 31 May 2019 unless further funding can be found. No notice was given to the claimant, either written or oral.

11. I find that in August 2019, the Board of the respondent organisation took the decision to terminate the claimant's employment contract and Mrs Hood was instructed to make the payment of £1,416.61 and prepare a P45. The P45 was sent to HMRC but not to the claimant. The termination date of the 26 April 2019 on the P45 does not correspond with the contracts which outline that funding for the post is available until 31 May 2019. The evidence on why 26 April 2019 was chosen was vague and evasive to the point that I cannot make a clear finding as to why this date was chosen or what it related to.

Respondent's submissions

Constructive unfair dismissal

12. The respondent's position is that the claimant's contract was lawfully terminated when she was issued her P45, relying on ***Kerry Foods v Lynch*** *[2005] IRLR 680* submitting that where an employer indicates an intention to lawfully terminate a contract of employment, there can be no repudiatory breach.

13. Ms Duffy submitted that the breaches relied upon by the claimant are denied and that the claimant herself engaged in detrimental and poor behavior, noting a number of examples occurring in the lead up to 30 October 2018.

14. When the claimant lodged a grievance on 5 September 2019, they engaged an external provider to assist and chair the grievance hearing on 29 October 2019. A report was prepared by the external provider date 5 November 2019 but the respondent's Board disagreed with the findings of this report and they considered how to move forward as a result. There was a seasonal shut down

of the respondent business between 17 December 2019 and 8 January 2020. There was no breach (material or otherwise) in not confirming the outcome of the grievance hearing to the claimant prior to her resignation.

15. Ms Duffy submitted that the claimant had a number of opportunities to resign prior to her resignation on 7 January 2020, from March 2019 when her paid suspension came to an end; when without prejudice discussions did not reach a conclusion; in July 2019 when her trade union representative wrote about "deliberate …attempts to frustrate the contract and trust and confidence; in the period from July – September 2019; in the period from the grievance hearing on 29 October 2019 and prior to her resignation. She submitted that the claimant affirmed the breaches.

Unlawful deduction of wages

16. The claimant was suspended on full pay on 30 October 2018. She was invited to a disciplinary investigation meeting scheduled to take place on the 21 February 2019 but indicated she would not attend as she had insufficient notice. The claimant had 24 hours' notice of this meeting and this is reasonable. The claimant did not have a right to be accompanied to that investigation meeting as it is not a formal meeting under the disciplinary process. The respondent informed the claimant on 21 February 2019 that they viewed her failure to attend the meeting as a breach of the terms of her paid suspension and she would not receive any pay until she attended a further meeting on 5 March 2019. The claimant did not attend the meeting on the 5 March 2019 and did not attempt to reschedule this meeting. The claimant made herself unavailable for work by making herself unavailable to attend the investigation meetings.

17. Ms Duffy referred to a number of cases in connection with the point that wages are properly payable during suspension while the employee is ready, willing and able to work as required including ***North West Anglia NHS Foundation Trust v Greg*** *2019 IRLR 570*. I was not referred to specific passages or sections of these cases which the respondent intended to rely.

18. ***North West Anglia NHS Foundation v Greg*** sets out at paragraph 52 the circumstances under which a deduction of wages may be lawful or unlawful which includes that if an employee does not work, they must show they were ready, willing and able to perform work to avoid a deduction in pay.

19. The respondent submitted that the claimant's pay was not reinstated and questioned why this was not challenged until the grievance on 5 September 2019, by which time the claimant had been dismissed. The claimant's suspension was paid from their reserves from 30 October 2018 to 21 February 2019 and would have continued to be paid had she not been in breach of the terms and conditions of her paid suspension.

20. The respondent had difficulty in evidencing attempts to contact the claimant in the period January – March 2019 as the employee, Danielle Devine, tasked with corresponding with the claimant was dismissed and destroyed evidential material.

21. A good will gesture was made by the respondent in making a payment of £1,416.61 to the claimant at the time of completing her P45. This was in respect of additional hours worked in 2018.

Remedy

22. Reference to ***Shipperley v Nuclear Information Systems Ltd*** *UKEAT/0340/06* as an authority that the conduct of the employee is relevant at remedies stage. The claimant's behavior and conduct by failing to adhere to the terms, conditions and requirements of her paid suspension should therefore be taken into account.

23. Reference to ***Polkey v A E Dayton Services LRS*** *[1987] IRLR 503* and a submission that any compensation should be reduced by 100% on the basis that they were entitled to withdraw pay during the suspension due to the claimant's conduct and that they lawfully terminated her contract yet carried out as best they could a fair grievance process.

24. Ms Duffy submitted that a total amount of income is not declared in the schedule of loss with reference to specific payments shown on bank statements. She also submitted that an increase to an award of compensation should not be made by the Tribunal as there was no breach of the Acas Code of Practice on Disciplinary and Grievance Procedures. The grievance was dealt with although there was no requirement to do so as the claimant's employment had terminated. There was no requirement to follow a procedure of hearings etc prior to her dismissal as she had less than 2 years' service.

25. Reference to ***Griffiths v Treeworks (West Wales) Ltd*** *ET/1608922/09* and a submission that the Tribunal have regard for the size and resources of the respondent, noting that the claimant's dismissal was the first of its type or kind that the respondent carried out. Ms Duffy submitted that the respondent was naïve in regard to correspondence to the claimant, particularly around her termination of employment. She also submitted that even if there had been a breach of the Acas code as regards the grievance, the claimant may still well have resigned in any event and raised a claim.

Claimant's submissions

Constructive unfair dismissal

26. The claimant's position is that her employment with the respondent came to an end when she resigned on 7 January 2020. This was in response to a repudiatory breach of her contract of employment, whereby the respondent continued to ignore her grievance and failed to pay her wages. This was a breach of the implied term of trust and confidence.

27. The claimant did not delay in resigning in response to these breaches. She gave the respondent the opportunity to resolve her grievance. When it became clear a response was not forthcoming, she resigned in response. She did not affirm the breach by continuing to work without resigning.

28. Ms Flanigan submitted that the claimant's employment did not come to an end earlier than the date upon which she resigned and did not come to an end in the circumstances as set out by the respondent. She submitted that

the respondent's position in their ET3 that termination was by mutual agreement is incorrect. Her contract was not terminated when the respondent stopped paying her wages in February 2019. While ceasing to pay an employee might indicate that their employment has terminated, in this case, the claimant's pay was stopped for the reasons set out by the respondent in their letter of 22 February 2019 where they stated that she was not participating in the investigation process. Further the claimant's employment was not terminated when a P45 was sent. It was conceded by Ms Flanigan that sending a P45 can in certain circumstances imply a dismissal, but this was not the case here as no dismissal was communicated and the claimant gave evidence that the first she saw of her P45 was in the bundle prepared for the hearing. Termination did not arise when the claimant was paid £1,416.61 in August 2019, noting that Mrs Hood's evidence was that this payment was for additional hours requested in August 2018.

29. Ms Flanigan submitted that the Tribunal must take into account the conduct of both parties where there is ambiguity in respect of a termination date and infer from said conduct when the employment relationship came to an end.

30. Reference was made to ***Kelly v Riveroak*** *UKEAT/0290/25* where the EAT found that where there are no 'contra-indications' the sending of a P45 can imply a dismissal. In this case, there were contra-indications such as the communication with the claimant in respect of her grievance, the respondent appointing an external consultant to facilitate a grievance meeting and a grievance report was prepared which did not indicate the claimant was no longer an employee. Ms Flanigan submitted that the respondent did not appear to be of the view that the claimant was no longer an employee.

31. The facts of the case were distinguished from ***Kirklees Metropolitan Council v Robert John Radecki*** *[2009] EWCA Civ 298, 2009 WL 873816* where there was an agreement between the parties that Mr Radecki's employment would terminate on a particular date. There was no such agreement as between the claimant and the respondent and the respondent failed to lead any evidence which would indicate such an agreement.

32. Reference to ***Martin v Glynwed Distribution Ltd*** *[1983] IRLR 198* and the quotation at 519:

'Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who *really* ended the contract of employment?"'

33. The Tribunal was referred to a number of cases in respect of the constructive dismissal element of the claim and in particular to ***Western Excavating Ltd v Sharp*** and the principles set down by Lord Denning on constructive dismissal, that an employee can treat themselves as constructively dismissed where the employer's conduct goes to the root of the contract and shows that the employer no longer intends to be bound by that contract. An employee may resign in response to such a breach and must make their mind up soon after the conduct take place otherwise, if they continue with their employment without leaving, they will be regarded as affirming the contract and will lose the right to treat themselves as discharged.

34. Both ***Mahmud v Bank of Credit and Commerce International*** and ***Baldwin v Brighton and Hove City Council*** held that the duty of mutual trust and confidence is an implied term of the employment contract and that an employer should not conduct himself in a manner calculated or likely to destroy or damage the trust and confidence that exists between employer and employee.

35. Reference to ***Tullett Prebon plc v BCG Brokers; Bournemouth Higher Education Corporation v Buckland****;* and ***Leeds Dental Team v Rose*** and the findings in those cases that whether the employer has committed a fundamental breach is judged according to an objective test.

36. Reference to ***Wood v WM Car Services Ltd*** which found that the Tribunal is to look at the employer's conduct as a whole and determine whether, judged reasonably and sensibly, the employee cannot be expected to put up with this conduct.

37. Reference to ***Lewis v Motorworld Garages Ltd*** which set out the "last straw doctrine", that a course of conduct can cumulatively amount to a fundamental breach of contract upon which a constructive dismissal claim is made. ***Waltham Forest v Omilaju*** found that even if the last straw is relatively insignificant, it must contribute something to the breach.

38. Reference to ***Morrow v Safeway Stores plc*** that a breach of the implied term of trust and confidence is inevitably a fundamental breach and ***Wadham Stringer Commercials (London) Ltd v Brown*** that the circumstances which led the employer to act in breach of contract are irrelevant to the question of whether that breach is fundamental.

39. Reference to ***WA Goold (Pearmak) Ltd v McConnell and another*** that a failure to deal with an employee's grievance can amount to a breach of contract in certain circumstances.

Unlawful deduction of wages

40. The claimant remained ready, willing and able to work during her period of suspension. The respondent stopped paying her salary from 21 February 2019 onwards.

41. Reference to ***North West Anglia NHS Foundation Trust v Gregg*** *2019 IRLR 570* and the finding that wages are properly payable when an employee is suspended from work so long as they are ready, willing and able to work.

Decision

Was there an unauthorised deduction from the claimant's wages from 21 February 2019 onwards?

42. Having considered the evidence and submissions, I am satisfied that there was an unauthorised deduction from the claimant's wages from 21 February 2019 until the termination of employment. Both parties have referred me to ***North West Anglia NHS Foundation v Gregg*** which considered whether the NHS trust was entitled to withhold the salary of a suspended doctor. The Court of Appeal found that they were not entitled to do so and that the

deductions from his wages were unlawful. When coming to their decision, the Court of Appeal at paragraphs 54 - 60 outlined that the starting point when deciding if an employer can deduct pay while the employee is suspended is the contract of employment. If there is no express term allowing for the deduction of pay during a suspension, is there an implied term or custom and practice of such deductions? If not, the common law principle, that the employee is ready, willing and able to work should be considered. The Court of Appeal expressed that "a considerable degree of caution is necessary" before coming to the conclusion that a suspended employee is not 'ready, willing and able' to work.

43. The contracts of employment as between the claimant and respondent (pgs 49-53 and document 6b) did not include an express term permitting the respondent to make deductions or withhold pay from the claimant during a disciplinary suspension.

44. I was referred in evidence to an email (pg 137) sent to the claimant on 30 October 2018 informing her of her suspension. This confirmed that the claimant was "suspended on contractual pay." I was also referred to a letter of the same date (pg 138) which again confirms the suspension "on contractual pay". This letter confirmed that "suspension from duty on contractual pay is not regarded as disciplinary action. It is merely a holding measure pending further investigations where it is undesirable for an individual to remain on duty" and reminded the claimant that she continued to be an employee of the respondent and bound by the terms and conditions of employment. The letter also stated that the claimant was required to make herself available to attend an investigation meeting during her normal working hours. The claimant asserted in evidence that she did not receive this letter and was upset at the thought that it was hand delivered to her house. Neither the email nor the letter are contractual documents. They do not form a part of the employment contract with the claimant. Both documents confirmed that the claimant was entitled to receive her contractual pay while suspended. Had it been the intention of the respondent that pay during suspension would be withheld or deducted for any reason, and specifically for the failure to be

available for or attend investigation meetings, this would have been included in either of these documents. Therefore, I do not view that these documents evidence an implied right to withhold pay during suspension, should the claimant fail to make herself available to attend meetings during the period and I heard no evidence in that regard.

45. There was no evidence of any custom or practice allowing for the withholding of pay or the practice of making deductions from pay during a period of suspension.

46. I turn therefore to whether the claimant was ready willing and available for work from 21 February 2019 onwards. The respondent's position was that the claimant was not ready, willing and able to work because she declined to attend an investigation meeting on 21 February and a rescheduled investigation meeting on 5 March 2019.

47. I refer to the findings of fact above in respect of the correspondence between the parties regarding the investigation meetings. The position put forward by Mrs Hood in evidence was that as the claimant was not available to attend the investigation meetings, the respondent stopped paying her wages. As outlined above, the respondent had no contractual entitlement to do so.

48. The respondent submitted, that by refusing to attend the investigation meetings, the claimant was unready, unwilling, and unavailable to work. The claimant in evidence stated that she was ready and willing to attend work but that she wanted to take advice in advance of attending the scheduled investigation meetings.

49. The respondent failed to evidence why after the 5 March, they continued to view the claimant as unready, unwilling and unavailable to work. There was no suggestion that the investigation continued after that date or that further investigation meetings were scheduled. Any failure by the claimant to make herself available for these meetings ceased on 5 March.

50. I do not view the claimant's refusal to attend the investigation meetings as an indication that she was not ready, willing and available to work. Being

unavailable or unwilling to attend an investigation meeting is not the same as being unavailable or unwilling to work. I heard no evidence that the investigation or the disciplinary process continued after 5 March and yet the respondent continued to withhold the claimant's pay. All deductions from her wages from 21 February 2019 to the termination of employment were therefore unlawful and unauthorised.

51. The respondent concedes that there was an ongoing unlawful deduction from 30 October 2018 – 21 February 2019 which amounted to £127.83 over the period.

Did the respondent terminate the claimant's employment in August 2019?

52. The respondent completed a P45 dated 29 August 2019. They contend that this was posted to the claimant but she denies receiving it. I accept the claimant's position that she did not receive this P45. The claimant engaged with the respondent when she received correspondence inviting her to investigation meetings. Her trade union representative also wrote to the respondent about the non-payment of wages in July 2019. The claimant lodged a grievance a week after the date on the P45. Had the claimant received the P45, it is likely she would have corresponded with the respondent about this.

53. The termination date on the P45 is 26 April 2019. The P45 was not accompanied by a letter to the claimant confirming her dismissal. There was no further notification from the respondent in respect of the termination.

54. On 5 September 2019 the claimant wrote to Mrs Hood (pg 165) raising a grievance against the respondent. This letter started "As an employee of South West Community Cycles…" This letter was acknowledged by the respondent on 23 September (pg 166) confirming details of a grievance hearing. This letter did not address the statement that the claimant viewed herself as an employee. No reference was made to the fact that a P45 had been sent to the claimant the previous week. Further correspondence from

the respondent on the 7 and 17 October failed to address the employment status of the claimant and a grievance hearing went ahead on 29 October.

55. I have been referred to ***Kelly v Riveroak Associates Limited*** which looked at whether the issuing of a P45 had the effect of terminating the contract of employment. That case is not on all fours with the one under consideration, particularly as both parties in Kelly believed that the contract was at an end, although the reasons for the termination differed, and both parties acted as if the contract had ended. The EAT in the circumstances held that the employment relationship concluded on receipt of the P45. Nothing after that date indicated that the employment relationship was continuing.

56. While submissions were not made by the parties on the case of ***Miss A Sandle v Adecco UK Limited*** *UKEAT/0028/16/JOJ*, it is relevant to the question to be determined. In that case Justice Eady QC finding that the communication of the dismissal was key, asserted at paragraph 40

"*A dismissal may be by word or deed, and the words or deeds in question may not always be entirely unambiguous; the test will be how they would be understood by the objective observer. Further, as the case law shows, an employer's termination of a contract of employment need not take the form of a direct, express communication. It may be implied by the failure to pay the employee (Kirklees), by the issuing of the P45 (Kelly) or by the ending of the employee's present job and offer of a new position (Hogg). In each of those cases, however, there was a form of communication; the employee was made aware of the conduct in question, conduct that was inconsistent with the continuation of the employment contract and in circumstances where there were no other contraindications. The question is: given the facts found by the ET, given what was known to the employee and to the relevant circumstances of the case, what is the conclusion to be drawn? Has the employer communicated its unequivocal intention to terminate the contract?"*

57. Taking that into consideration, I note that there is a lack of express communication from the respondent in respect of the decision to dismiss. The P45 was the only express communication of the dismissal and I find, as

outlined above, that this was not received by the claimant. As the claimant continued to be suspended and was not receiving any pay from the respondent, there were no other indications to her that her employment had come to an end. Indeed, the respondent made a payment to the claimant in August at the same time as preparing the P45. They did not inform the claimant of this payment or what it related to. This payment was made into her account where her wages were normally paid.

58. The respondent, upon receiving the claimant's grievance, had an opportunity to clarify that the employment relationship had come to an end and reference the P45 which the respondent had prepared. Instead the respondent engaged in that grievance process, paying for an external consultant to act as grievance hearer. The respondent witnesses did not provide any evidence on their decision making at this time and why they proceeded to hear a grievance from a former employee. Further, at no point when corresponding about the grievance or during the grievance hearing itself did they reiterate that the employment relationship had come to an end or that the grievance was proceeding despite the fact that the claimant was no longer employed by the respondent.

59. Having considered the respondent's actions, I do not accept that the respondent communicated its unequivocal intention to terminate the claimant's contract as at the 29 August 2019 or at all.

Did the claimant resign in response to a repudiatory breach of contract?

60. The claimant resignation letter set out four reasons for her resignation:
    (i) The respondent's failure to adequately resolve her suspension from work;
    (ii) non payment of wages from March 2019;
    (iii) lack of response to her grievance letter of 5 September;
    (iv) lack of any response to her letter of 5 December.

61. I accept that the reasons set out in her resignation letter (pg 179) are the reasons for the claimant's resignation. I note that the final bullet point refers

to the claimant's letter of 5 December. In fact, the claimant wrote to the respondent by letter dated 2 December. It is understood that this is the letter the claimant refers to when setting out her reasons for resignation.

62. In evidence the claimant stated that she resigned at that point as she "had to admit to myself that they [the respondent] had no intention at all of acknowledging me at any level and I was without a reference and had to make decisions about how to move back into the work environment." When asked whether it was the conduct as a whole or one particular incident which led to her decision to resign, she replied that "there was no way that the situation could continue….it was detrimental to me and no way it could continue any longer. They were not going to be professional about anything. I don't know why they thought this was proper business practice to choose to ignore me." She confirmed in cross examination that the lack of a response by the respondent to her letter of the 2 December and her union representative's email on 10 December was the breach she relied upon.

63. ***Western Excavating v Sharp*** confirms the well-established principles of constructive dismissal, namely a significant breach by the employer, going to the root of the contract, which shows the employer no longer intends to be bound by the contract, which the employee relies upon soon after it occurs to resign. This is considered from an objective standpoint as per ***Leeds Dental Team v Rose*** which confirmed that there is no need to show a subjective intention on the part of the employer to destroy or damage the relationship to establish a breach. The contractual term in this case is the implied term of trust and confidence.

64. In this case, the breaches the claimant is relying on span in or around a year with the failure to respond to her or her representative's correspondence in December 2019 the last straw.

65. It was clear from the evidence that from the point of suspension onwards, the relationship between the parties was strained. Following the claimant's suspension, there was limited interaction between the parties. The first contact relating to the disciplinary process was in February 2019, almost 4

months after her period of suspension. The decision to stop paying the claimant, taken on 21 February is one that impacted further on the relationship. I appreciate that the parties engaged in without prejudice discussion between March and June but these did not come to any resolution. The claimant continued to be suspended, continued to receive no pay and it was in this context that the claimant's representative wrote on 23 July that he was taking advice on the respondent's "deliberate attempts to frustrate the trust and confidence" the claimant was entitled to hold in the respondent organisation. This was the first instance where a breach or potential breach of the implied term of trust and confidence was referred to by the claimant or someone acting on her behalf. The respondent did not reply to this email.

66. Following the grievance hearing on 29 October 2019, a grievance report was prepared for the respondent dated 25 November 2019. It was not shared with the claimant at that time as the respondent did not agree with the findings and recommendations. The claimant contacted the respondent by letter dated 2 December 2019 (pg 177) stating she was aware the respondent was in receipt of the grievance report, and had been for approximately two weeks and sought a response to her grievance by 5pm on 11 December. This letter, addressed to Mrs Hood, stated that if a response was not provided "I will have no option but to conclude that SWCS have no intention of responding to or resolving my grievance and as such I will take formal legal advice with regard to you reparatory [sic] breach of contract". A further email was sent by the claimant's trade union representative to Mrs Hood on 10 December (pg178) noting that the grievance hearing took place 6 weeks previously and that there has been no response to date, which may constitute a repudiatory breach of contract. The respondent did not reply to either the claimant's letter of 2 December or her union representative's email of 10 December. The reason provided by Mrs Hood in evidence was that the Board did not agree with the contents of the report, this was discussed in a Board meeting on 11 December when they decided to take further advice. The lack of response was also impacted by the closure of the organisation for Christmas from 17 December onwards.

67. Ms Flanigan's submissions referred to the implied term of trust and confidence and an implied term that an employer would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. No evidence was led which would allow the Tribunal to consider whether there was an implied term that the respondent would reasonably and promptly afford a reasonable opportunity to the claimant to obtain redress of her grievance and so I cannot make a finding on whether this was an implied term of the claimant's contract. I do accept however, that there is an implied term of trust and confidence in the employment contract as between the respondent and the claimant.

68. The claimant's letter of resignation included two reasons which relate to the grievance and lack of response thereon. Initially, there was an attempt by the respondent to engage with the claimant and resolve her grievance. This engagement ceased once the grievance hearing took place. The claimant was not provided with any update or any explanation as to why the respondent was not in a position to inform her of the outcome. It is accepted that the Board of the respondent was not in agreement with the outcomes in the report prepared. However, the respondent received correspondence from the claimant on the 2 and 10 December indicating that she was most unhappy with the lack of response and delay and viewed this as a potential breach of contract. A Board meeting took place on 11 December where the report was discussed. After this, no response was sent to the claimant. For all intents and purposes, the correspondence of 2 and 11 December was ignored. The respondent had a week after the Board meeting and before closing for the Christmas period but failed to send a response to the claimant during this time. The respondent is entitled to consider the grievance report and indeed address any issues that it might have with the contents. The grievance was lodged on 5 September and as at the 11 December, the respondent did not have an outcome that it was happy to share with the claimant. The claimant was not aware that the respondent was unhappy with the grievance report or that they intended to seek further HR advice thereon. There was nothing but silence from the respondent following the grievance hearing and the prompts to engage with the claimant on the 2 and 10 December were not taken up

and so the claimant continued to be in the dark about how the respondent intended to resolve her grievance. Had the respondent engaged with the claimant, advised her why there were delays and kept her informed of the progress and reasons for delay, I do not believe the implied term of trust and confidence would have been breached to the same extent. That unfortunately was not the case and as a result the respondent breached an implied term of the claimant's contract.

69. I also have to consider the alleged breaches in respect of the claimant's suspension which was ongoing at the point of resignation and the failure to pay wages which was again ongoing at the time of resignation. A failure to pay wages is a clear breach of an express term in the employment contract. The main feature of the employment contract is that the employee will provide work in exchange for wages. Here, the claimant had been suspended under the disciplinary process but as outlined above in respect of the unauthorised deduction of wages claim, the respondent had no contractual or legal entitlement to cease paying the claimant's wages.

70. Suspension is a feature of the disciplinary process. The claimant's reasoning in her resignation letter or in evidence was not about the fact she was suspended on 30 October 2018 but the fact that her suspension remained unresolved and was continuing at the time of resignation on 7 January 2020. Again the ongoing nature of the suspension comes under the implied term of trust and confidence. I am aware that after the attempt to have an investigation meeting with the claimant on 21 February and 5 March 2019, the parties engaged in without prejudice discussions. Those discussions broke down in June 2019 and at that stage it would appear to me from the evidence heard that there was no further progress in respect of the outstanding disciplinary process although the claimant remained suspended. It is the respondent's position that the claimant was dismissed by the issuing of the P45 in August 2019 but this does not explain why the claimant remained suspended from June to August or why the respondent did not correct the claimant who in her grievance of 5 September referenced the ongoing suspension. Further there was no explanation provided as to why the

disciplinary investigation meeting with the claimant was scheduled for February 2019, some four months after she was suspended. I am not aware of any correspondence or discussion as between the respondent and the claimant in respect of her suspension outside of the initial email and letter informing her of her suspension. The Acas Code of Discipline and Grievance, which does not have contractual effect, is clear that suspension should be kept under review and for as short a period as possible. This was not the case here and as a result, I find that the respondent's actions in relation to the ongoing nature of the suspension breached the implied term of trust and confidence.

71. ***Morrow v Safeway Stores*** *[2001] UKEAT 0275_00_2109* confirms that where there is a breach of the implied term of trust and confidence this means that "inevitably, that there has been a fundamental or repudiatory breach going necessarily to the root of the contract."

Did the claimant resign in response to the breach?

72. The claimant's evidence both in examination in chief and cross examination was clear that the failure to respond to the December correspondence was the catalyst for resignation which occurred on 7 January 2020. Included in her letter of resignation were examples of previous conduct which as above amount to fundamental breaches of the implied term of trust and confidence and the express terms regarding payment of wages. The respondent submitted that at various points the claimant affirmed the contract and argued that if, for example, she viewed the non-payment of wages as a repudiatory breach, she should have resigned when her suspension became unpaid. The respondent's position was that the claimant had various opportunities to resign but did not do so in response to the breaches referred to but instead affirmed the contract.

73. I do not accept this position and refer the parties to Underhill LJ's decision in ***Harpreet Kaur v Leeds Teaching Hospitals NHS Trust*** *[2018] EWCA Civ 978* which confirms the legal position on affirmation of previous breaches in cases where the last straw doctrine is argued. In applying ***London Borough***

of Waltham Forest v Omilaju *[2004] EWCA Civ 1493* Underhill LJ confirmed that where the last straw event forms part of a series, it does not "land on an empty scale" and as a result "an employee who is the victim of a continuing cumulative breach *is* entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation."

74. The resignation letter refers to four breaches – the failure to resolve the claimant's suspension; the failure to continue to pay her wages; the failure to resolve her grievance; and the failure to respond to correspondence sent. As outlined above, each failure is a fundamental breach of contract. What I have considered is that the failure to respond to the December correspondence did not occur in a vacuum. It came after months of uncertainty and inaction regarding the claimant's suspension and wages. I accept that there was engagement from the respondent initially following the lodging of the grievance, which was brought on the basis that the claimant continued to be suspended and was not in receipt of pay, but this engagement waned, particularly after the grievance hearing and once the respondent received the outcome report. The claimant's correspondence on 2 December alerted them to her view that the delay suggested the respondent had no intention of responding to or resolving her grievance which she viewed as a breach of contract. They did not respond to this and the claimant subsequently resigned on 7 January, citing failure to respond to this letter as one of the reasons for her resignation. The respondent's conduct in respect of this correspondence therefore did not land on an empty scale and based on ***Kaur*** I cannot disregard the earlier conduct by the respondent based on affirmation. In respect of the last straw, I find that the claimant did not affirm this breach but instead relied on it and resigned in response to the breach.

75. I therefore conclude that the claimant resigned in response to a fundamental breach of contract and did not delay in doing so.

Was the dismissal fair?

76. In finding that there was a dismissal under Section 95 of the Employment Rights Act 1996, I must consider the fairness of this dismissal under Section 98(4) of the Employment Rights Act 1996.

77. I heard evidence from the respondent witnesses as well as submissions from Ms Duffy which refer to difficulties in the personal life of Mrs O'Rourke (nee Miller) from 2018 onwards. Submissions also outlined that the respondent is a small organization with minimal previous experience of these internal processes, namely discipline and grievance and at times were naïve in its actions and approach to correspondence. While this is appreciated and understood, I am aware from the evidence that the respondent during the period February 2019 – August 2019 dealt with two other employees under the disciplinary procedure and dismissed them. I am also aware that the respondent had access to external HR advice at all times and sought specific advice in relation to the claimant's suspension, in advance of the decision to withhold her pay and on receipt of the claimant's grievance. The desire to seek further HR advice on the outcome of the grievance hearing was provided as a reason for the failure to reply to the claimant's correspondence in December. The size and resources of the respondent are taken into account, as are the substantial merits of the case but considering equity, I do not find that the respondent acted reasonably.

Remedy

Unlawful deduction of wages

78. It is conceded by the respondent that there was an unlawful deduction from wages between the period 30 October 2018 to 21 February 2019. This amounts to £127.83.

79. Ms Duffy submitted that the claimant was required to offset or mitigate the ongoing loss suffered for the period 21 February 2019 onwards and asked questions of the claimant as to the extent that she engaged with agencies

such as the Department of Works and Pensions to inquire about benefits or other income she would be entitled to during this time.

80. There is no requirement for a claimant to mitigate their loss where they are in receipt of no pay or where their pay has been reduced. This is not a requirement of an unlawful deduction of wages claim. Indeed in these situations, the claimant continues to be employed and so the opportunity for mitigating income either in the form of state benefits or another job would not be relevant. This is an entirely separate matter to the obligation on a claimant to mitigate their loss when claiming unfair dismissal.

81. Ms Duffy also makes submissions in respect of payments received by the claimant, potentially from her partner in 2019. I was not referred to these specific documents in evidence nor were the documents or the amounts put to the claimant. Even if the claimant had been asked what these payments referred to, as above, there is no obligation on the claimant to offset or mitigate her loss under that head of claim. I have made no finding of fact in respect of these amounts as they were not put to the claimant, or referred to by any respondent witnesses in their evidence.

82. The claimant's net weekly pay was £250.38. She was in receipt of no pay for 45 weeks from 21 February 2019 to 7 January 2020. Her net loss over this period was £11,267.10. In her schedule of loss, the claimant has deducted the amount of £1,416.61 which was received in August 2019. The total amount due to the claimant under this head of claim is £9,850.49.

Constructive Unfair Dismissal

83. A schedule of loss and counter schedule of loss were provided by the claimant and respondent. While the respondent did not agree that the various levels of compensation as claimed by the claimant, the figures for the claimant's gross and net salary were agreed.

84. Taking the formula as set out in Section 119 of the Employment Rights Act 1996 the effective date of termination is 7 January 2021 and the claimant was 49 years old at that date. The claimant has 2 years continuous service. In

calculating the basic award, the correct multiplier is 3 weeks at £276 gross pay per week giving a total basic award of £828.

85. The basic award may be reduced under Section 122 of the Employment Rights Act where it is just and equitable to do so based on the claimant's conduct before the dismissal. Ms Duffy in her submissions seeks a reduction "generally" to any award of compensation. As reductions to the basic and compensatory awards are handled differently, I will address reductions to both awards separately. Relying on ***Shipperley v Nucleus Information Systems Limited***, Ms Duffy submitted as that the claimant's conduct and behaviour resulted in respondent's decision to withholding of suspension pay as the claimant was not "adhering to the terms, conditions and requirements of being subject to paid suspension and when she also became effectively AWOL in the respondent's view as of the 22 February 2019". I do not accept that it is just and equitable based on the claimant's conduct in or around the 22 February 2019 to reduce the basic award. The claimant informed the respondent that she would not be attending the investigation meeting the following day she was not given sufficient notice and wanted to speak to her trade union representative. She received the invite to the hearing at approximately 1pm and emailed the respondent re same at 16.14 that afternoon. While the respondent is not in agreement with this approach, it is not unreasonable for a claimant to want some time to prepare for an investigation meeting and take advice. The requirement to make herself available for such meetings needs to be balanced against the requirement to give reasonable notice of same. I conclude that the basic award should not be reduced.

86. The claimant is seeking a compensatory award covering past losses only. She began employment with the Department for Work and Pensions on 20 July 2020 and so her loss ends on that date. She is seeking loss of wages from 8 Jan – 20 July 2020 and pension loss during that same period.

87. There is an expectation that a claimant mitigates their loss as provided for in Section 123(4) of the Employment Rights Act 1996. The burden of proof is on

the respondent to show that the claimant acted unreasonably in failing to mitigate their loss. ***Wilding v British Telecommunications Plc*** *[2002] IRLR 524* confirmed that it is not enough for the respondent to show there were reasonable steps the claimant could have taken but failed to do so. The respondent must instead show that the claimant acted unreasonably by not taking them. ***Tandem Bars Ltd v Pilloni*** *UKEAT/0050/12* found that as the burden of proof falls to the respondent, if they do not provide evidence on the claimant's failure to mitigate their loss, there is no obligation on the Tribunal to make such a finding.

88. I considered the Ms Duffy's submissions that the claimant has failed to mitigate her loss, suggesting that limited weight should be placed on the oral evidence of the claimant, and questioned the lack of documentary evidence of any income or benefits from February to July 2020 onwards. Ms Duffy specifically referred in her submissions to a number of payments as evidenced on bank statements which formed part of the bundle. I was not referred to these documents in evidence and these payments were not put to the claimant on cross examination. As a result I cannot make findings of fact on these figures or factor them into my considerations.

89. I do not accept that the claimant failed to mitigate her loss. The fact that documentary evidence was not made available is not fatal, as the burden of proof sits with the respondent. The claimant gave a cogent account of her efforts following her resignation. She confirmed in evidence that she suffered a loss of confidence as a result of what occurred with the respondent and struggled with how she might address the lack of reference with potential employers. To assist with this, she underwent training with Department for Work and Pensions focusing on interview skills and with Skills for Scotland in CV writing and confidence building. She stated that she looked for work with other cycling organisations but there were no opportunities for paid work with these organisations. She volunteered for a week or two in February and March 2020 with these cycling organisations in the hope that she would stay active as a coach. She advised that cycling is a small knit community and so people were aware of some of what had occurred. As a result, she decided

to look for roles outside of cycling. In July 2020 she began a role with the Department for Work and Pensions. She applied for and received Universal Credit and this was between £300-400 per month which would amount to a maximum of £2,800. These steps are reasonable ones to take and the respondent has not put forward any evidence to suggest that the claimant acted unreasonably during this 7 month period.

90. Ms Duffy's submissions on mitigation also included reference to the claimant's conduct which resulted in her suspension and the decision to withhold pay during that suspension. Mitigation is not focused on the actions of the claimant during the course of their employment but instead on whether they took reasonable steps post dismissal to secure an alternative source of income.

91. Section 123(6) of the Employment Rights Act 1996 allows for a reduction to the compensatory award where it is just and equitable to do so where the dismissal was "to any extent" caused or contributed to by the claimant's conduct. It is Ms Duffy's submission that the claimant's actions led to the withdrawal of pay during her suspension citing ***Shipperley v Nucleus Information Systems Ltd***. Mr Shipperley claimed constructive dismissal in circumstances where he resigned following the non-payment of wages by the respondent. However, there was evidence that the respondent was unable to pay wages due to the claimant's efforts in conjunction with colleagues to destabilise the company, making it easier for said claimant and colleagues to acquire the business. The non-payment of wages occurred in December and Mr Shipperley resigned in January.

92. The test on contributory fault does not look at the blameworthiness of the conduct but instead whether it caused or contributed to the dismissal. The non-payment of wages by the respondent was one of the breaches cited by the claimant in her letter of resignation. It is a matter of fact that the respondent withheld the claimant's pay in reaction to her refusal to attend the investigation meeting on 21 February 2019 for reasons referred to above. However, I have found that the respondent did not have a legal basis to

withhold this pay and indeed it amounts to an unlawful deduction of wages. It is therefore not just and equitable to reduce the claimant's compensatory award in the circumstances.

93. Ms Flanigan submitted that there is no basis to make a ***Polkey*** deduction as a procedure was not followed prior to the dismissal. Ms Duffy contends the respondent attempted to carry out "as best they could, as fair as a procedure as was possible" in relation to the claimant's grievance, asserting again the right to withhold suspension pay and the position that the respondent terminated the claimant's employment prior to her resignation.

94. A Polkey deduction can be made to an award of compensation upon assessment of whether a fair procedure would have made a difference to the decision to dismiss. This can include a resignation and such deductions are not restricted to ordinary unfair dismissal claims. The question is whether the claimant would have resigned had the respondent done everything right from a procedural perspective – had her suspension and the lack of wages been resolved in a timely fashion, had the respondent concluded the grievance without delay and replied to her correspondence. Taking into consideration the claimant's evidence that she resigned because the situation (the unresolved suspension, the non-payment of wages, the lack of resolution to her grievance, the failure to respond to correspondence) was detrimental to her and could not continue, I conclude that it is likely there would be no resignation by the claimant had the respondent complied with fair procedures. A deduction to the compensation award is therefore not made on these grounds.

95. Mrs Duffy submitted that regard should be had for the respondent's financial circumstances which I understand from the evidence led to be quite dire due to a lack of funding in recent times. While I am saddened to hear the financial difficulties faced by the respondent, there is no legal basis for either the basic award or the compensatory award to be reduced to take into account financial difficulties the respondent may be taking.

96. Finally, Ms Duffy submitted that there should be no uplift to the compensatory award for a failure to comply with the Acas Code of Practice on Discipline and Grievance. It is noted that the claimant's schedule of loss does not include a claim for an uplift for failure to comply with the Acas nor has Ms Flanigan submitted that an uplift should be applied or set out a basis justifying an uplift. I conclude therefore that there is no uplift to the compensatory award.

97. The claimant's net wages were £250.38 per week. She was out of work from the 7 January – 20 July 2020 which is 27.86 weeks. Her loss of earnings in this period amounts to loss of £6,974.87. She was a member of the Nest pension scheme and the respondent contributed 3%. Her pension loss for this period amounts to £230.66. The total amount of compensatory award payable to the claimant is £7,205.53.

Employment Judge:	**Eleanor Mannion**
Date of Judgment:	**08 October 2021**
Entered in register and copied to parties:	**11 October 2021**