EMPLOYMENT TRIBUNALS

Claimant: Ms B Obeng

Respondent: Doc Cleaning Limited

Heard at: London Central (via CVP) **On:** 15th & 16th March 2022

Before: Employment Judge Nicklin

Representation
Claimant: Ms L Chapman, Counsel
Respondent: Mr A Williams, Solicitor

Interpreter: Mr A Owoo

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video, conducted using Cloud Video Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic.

RESERVED JUDGMENT

Bold numbers in square brackets refer to the hearing bundle

1. The Respondent's name is amended in these proceedings to Doc Cleaning Limited.

2. It is the judgment of the tribunal that:

   2.1. The Claimant's claim of constructive unfair dismissal is not well-founded and is dismissed.

   2.2. The tribunal does not have jurisdiction to hear two of the Claimant's complaints of unlawful deductions from wages (which pre-date August 2019) because they are time barred by virtue of section 23(4A) of the Employment Rights Act 1996.

   2.3. The tribunal does have jurisdiction to hear the remaining, subsequent complaints of unlawful deductions from wages because they consist of a series of deductions, the last of which was presented in time.

   2.4. Of the complaints presented in time, the Respondent did not make any unlawful deductions to the Claimant's wages. All such claims of unlawful deductions from wages are accordingly dismissed.

REASONS

Introduction

1. By a claim form presented on 13th August 2021, the Claimant brought claims of:
    1.1. Constructive unfair dismissal; and
    1.2. Unlawful deductions from her wages in respect of arrears of pay and unpaid holiday pay.

2. The claim was listed for this final hearing upon receipt. There had been no previous case management of the claim. The listing was for two days to hear the evidence and decide the claim.

3. During the course of the morning of the first day and having initially discussed the issues with the representatives, it became apparent that the parties were not agreed as to the factual issues which were engaged in the constructive dismissal and pay claims. The parties were given time to try and agree a list of issues. The Respondent had prepared for the hearing in the belief that the primary complaint as to constructive dismissal was an allegation that the Claimant's signature had been forged on various contract variation documents, in breach of the implied term of trust and confidence. The Claimant's draft list of issues produced at the hearing included, in addition to the contract variation issue, alleged failures to pay the Claimant dating back to 2018, a failure to deal with the Claimant's grievance and the alleged treatment of the Claimant on 17th May 2021 in response to having raised a grievance.

4. In the circumstances, submissions were made about the draft list of issues and I gave an oral decision on the afternoon of the first day of the hearing[1]. I concluded that the constructive dismissal claim had been brought by the Claimant on the basis for which she contended, although there had been a lack of preparation and foresight in ensuring that the issues were clarified (and better particulars provided if necessary) in advance of the full merits hearing.

5. As regards the claim as to pay, whilst the Claimant relies on these matters as part of her allegation of a breach of the implied term of trust and confidence, her claim form identified that she had a claim for outstanding wages and holiday pay dating back to 2018. The draft list of issues was the first proper particularisation of the pay (and relevant dates) being sought by the Claimant. As the parties were both represented throughout, the parties should have sought to identify and agree these issues in advance of the hearing. The Respondent took a pragmatic approach to the late clarification of these issues and was willing to proceed with the hearing without seeking any adjournment. Where a new matter had been clarified in the list of issues of which the Respondent's witnesses were unaware, I indicated they could give brief evidence in chief about those matters, prior to being cross examined by the Claimant's counsel. Both parties then agreed that the claims were ready to proceed.

[1] The reasons given for my decision were set out orally at the hearing, with translation. Written reasons for that decision will not, therefore, be given unless a party requests such reasons within 14 days of the date this judgment is sent to the parties.

6. Having dealt with the list of issues, it was apparent that there would be insufficient time to hear the evidence and cross examination of the witnesses, hear submissions, deliberate and give judgment. I therefore informed the parties that judgment would be reserved. Both parties confirmed that they could present their evidence and submissions by the end of the second day. The representatives duly agreed a helpful timetable as to the witness evidence and the length of their cross examination. This allowed for the time allocated to be fairly and proportionately used. I concluded that this was in accordance with the overriding objective and would deal with the case justly and fairly without any further delay or additional expense to the parties.

7. Given the allocated hearing time, I decided to hear matters relating to liability under the claim and, if necessary, a further hearing could be arranged to consider any remedy. I explained to the parties that, whilst remedy would therefore be deferred, I would need to hear all of the evidence regarding any amounts as to outstanding wages or holiday pay during the evidence at this hearing in order to determine whether there had been any (relevant) deduction(s).

8. The Claimant attended the hearing and gave sworn evidence on the morning of the second day of the hearing. The tribunal was assisted throughout by Mr Awoo, an interpreter who translated the entirety of the proceedings for the Claimant in Twi. The Respondent called four witnesses who all gave sworn evidence: Ms Jane Malone (HR Director), Ms Leigh Goldsmith (HR Manager), Ms Patricia Oliva (Operations Manager at the Claimant's place of work) and Ms Evelyn Foriwaa (Supervisor at the Claimant's place of work).

9. I was provided with an electronic bundle running to 343 pages and witness statements for each of the five witnesses. I also had a skeleton argument prepared on behalf of the Claimant (although this document did not fully set out the issues on which the Claimant wished to rely, as clarified at the hearing) and the draft list of issues prepared between the parties during the course of the first day.

10. The parties agree that the Respondent's name should be amended to its full corporate title. I have therefore made this amendment in the tribunal's judgment, above.

Issues

11. Having regard to the draft list of issues considered on the first day of the hearing, the liability issues I must decide are set out below. I have reproduced this, as far as possible, from the document sent to me on the first day and formulated any legal issues as required. It was confirmed by the Claimant's counsel that the Claimant's wages and holiday pay claims were pursued as complaints of unlawful deductions from wages (section 13 of the Employment Rights Act 1996):

    Constructive unfair dismissal

    11.1. Did the Respondent, without reasonable and proper cause, by its conduct, fundamentally breach the implied term of mutual confidence and trust? The conduct relied on is:

    Pay

11.1.1.1 Between November 2018 until the cessation of the Claimant's employment, the Claimant contends that the Respondent unreasonably failed to pay the Claimant the correct amount owed to her on multiple occasions, in breach of the term of mutual trust and confidence. In further breach of said term, the Respondent failed to respond to the Claimant's concerns in a reasonable timeframe, if at all, or to investigate.

Examples of the Respondents behaviour that the Claimant relies on are:

(i) On 28.11.2018 was not paid for NMG contracts of 2.5 hours (£19.57) and was assured by Ms Oliva that this will be paid in two weeks' time. It was not, despite complaints in December 2018.

(ii) The Claimant complained of a shortfall in her wages for December 2018. The Claimant says she reported this to her Area Manger who was covering for Ms Oliva. This was resolved 09.02.2019.

(iii) On 09.02.19 the outstanding NMG hours were finally paid, but 2 weeks' pay remained outstanding.

(iv) Between 09.01.2019 and 03.04.2019 the Claimant made multiple complaints to Ms Oliva about unlawful deductions from her wages, but Ms Oliva allegedly failed to take action to resolve this.

(v) On 17.04.2019 the wages complained of as outstanding as of 09.01.2019 were finally paid, but the Claimant's contracted hours with Bannatyne Gym were reduced by 30 minutes a day without any explanation.

(vi) In April 2019 the Claimant raised the deduction of her hours from Bannatyne Gym with Ms Oliva and that she was told that the reduction was to cover an increase in wages. When the Claimant indicated that this was an illegal act, Ms Oliva told her to "take it or leave it".

(vii) On 4.05.19 the Claimant extended her hours from 30 minutes to 60 after being directed to do so the Respondent's client, Momenta. The Claimant says she was never paid for the extra hours worked.

(viii) On 06.07.09, [*note: this date provided by the parties in the list is plainly wrong*] following a conversation with the Momenta client, the Claimant says she was approached by Ms Foriwaa in an aggressive manner and told to go straight to the office and speak to Ms Oliva, who instead of paying the Claimant what she was owed, accused the Claimant of telling the client she had not been paid for it.

(ix) On 20.11.2020, the Claimant was told to take her holidays and was threatened that she would lose it if she did not take it. The Claimant expected to be paid holiday pay of £756.00 but was instead paid £215.00.

Contractual issues

(i) The Claimant asserts that in unreasonable breach of the term of mutual trust and confidence, the Respondent forged her signature on several contract variation documents to indicate she had agreed to cease work for multiple clients. As a result the Claimant was barred from receipt of furlough pay for those contracts.

Grievance

(i) In an unreasonable breach of the mutual term of trust and confidence, the Respondent failed to follow any grievance procedure or properly investigate the Claimant's grievance of around 11.12.2020, in time or at all.

(ii) In further breach of the term of mutual trust and confidence, the Claimant was targeted on account of raising the grievance. On 17.05.2021, the Claimant says that Ms Oliva was aggressive to the Claimant in a telephone call and threatened to dismiss her if she did not return to work. The Claimant says that her grievances remained unresolved. This was the final breach/"last straw" that caused the Claimant to accept the Respondent's repudiatory breach of contract.

11.2 If so, did the Claimant affirm the contract of employment before resigning?

11.3 Was that conduct a reason for the Claimant's resignation on 20th May 2021?

11.4 If the Claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA");

11.5 If so, was the dismissal fair or unfair in accordance with section 98(4) of the ERA, and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

11.6 When having regard to the above, did the Respondent follow a fair dismissal procedure?

Unlawful deductions from wages: arrears of pay and holiday pay

Time limits

12. Was any deduction relied upon made before the period of two years ending with the date of presentation of the complaint (13th August 2021)? If so, as the claims are for unpaid wages and/or holiday pay (within the meaning of section 27(1)(a) of the ERA), the tribunal does not have jurisdiction to consider so much of a complaint which relates to those deductions (section 23(4A) of the ERA).

13. In respect of any deductions not limited by section 23(4A), were the Claimant's complaints of unlawful deductions from wages presented before the end of the period of three months beginning with the date of the deduction(s) relied on (or the last deduction in a series of deductions) under section 23(2) and (3) of the ERA, as adjusted by the ACAS Early Conciliation process?

14. If not, is the tribunal satisfied that (a) it was not reasonably practicable for the complaints to be presented before the end of the time limit and (b) that they were presented within such further period as the tribunal considers reasonable pursuant to section 24(4) of the ERA?

Deductions

15. The Claimant asserts that she was not paid the following amounts by the Respondent, which she says she was owed under her contract:

15.1. November 2018 to April 2019: 55 unpaid hours (NMG contract) at a rate of £10.85 per hour, in total £596.75

15.2. January 2019 to March 2019 15.5 hours of unpaid holiday pay (Momenta contract) at a rate of £10.85 per hour, in total £168.75

15.3. 29 May 2020 to May 2021 unpaid wages of 30 mins per day for Momenta, for 5 days (2.5 hrs per week x 104 weeks) total: £5642.00

15.4. 29 May 2020 to May 2021 unpaid wages of 2.5 hrs per week (x 204) for Bannatyne total: £5642.00

15.5. 1 October 2020 to 21 May 2021, 32 weeks unpaid furlough pay (weekly hours of 39.5 x 37 weeks) at a rate of £10.85 per hour, total: £14571.55

15.6. 1 September 2020 to 16 September 2020, the Claimant says that was not paid the full amount owed to her under the furlough scheme: unpaid 18 hours at a rate of £10.85 per hour, total: £195.30.

15.7. 17 September 2020 to 30 September 2020, the Claimant says that she was not paid the full amount owed to her under the furlough scheme: unpaid 36 hours at a rate of £10.85 per hour, total: £390.60

16. The Claimant asserts that the last series of unlawful deductions ended on 21st May 2021.

Findings of Fact

17. I make the following findings of fact.

18. The Respondent is in business providing a range of cleaning and associated services to its commercial clients. These include large office type buildings throughout London and the South East of England. The site relevant to this claim is a large commercial building known as Tower 42, located on Broad Street in London ("the Site"). Since February 2016, the operational management of the Respondent's services at the Site has been overseen by Ms Patricia Oliva, the Operations Manager. Reporting to Ms Oliva at the site is Ms Evelyn Foriwaa, who is employed as a Supervisor and has performed that role since 1999. She supervises the cleaning staff deployed by the Respondent under the Respondent's contracts with its various commercial clients at the Site. Prior to the COVID-19 pandemic, the Respondent held between seventy and eighty different contracts with companies operating from the Site.

19. The Claimant was employed by the Respondent as a Cleaning Operative (the Claimant describes herself as a Cleaner, but there is no practical distinction) from 16th April 2013 until termination of her employment on 20th May 2021.

20. The Claimant worked for a number of the Respondent's clients across the Site. Deployment and hours formed part of the Claimant's contract of employment. As business needs changed, there would typically be an agreement between the parties for the Claimant to work slightly different hours or for a change of client at the site for whom she was to provide cleaning services. These changes were carried into effect by written, signed variations to the Claimant's contract.

21. The Claimant worked at the Site during her employment. She did not raise any complaint about her employment or treatment until November 2018.

22. The Claimant complained that she had not been paid her full wages on 28th November 2018 in respect of her work for a client known as NMG. The Claimant accepts that, having chased for payment, this was resolved, after a complaint to Ms Oliva, by April 2019. I accept that the Claimant raised the issues of her wages on several occasions during this period. She later complained by email about this pay period (2018-19) on 13th December 2020 [**153-4**].

23. I accept Ms Oliva's evidence that any disputes about pay during that period were resolved at the time. I found Ms Oliva to be a reliable and compelling witness who took care with her answers and was not prone to exaggeration. Further, despite raising the issues with her 2018-19 pay (concerning work for NMG) on 13th December 2020, it was not apparent what complaint the Claimant was making at this later date about pay issues, given the matters had been resolved and paid by 17th April 2019.

24. In April 2019, the Claimant noticed that her working hours for Bannatyne Gym had been reduced by 30 minutes per day. I accept Ms Oliva's evidence that this was a variation to all cleaning operatives working for that client because of a request from the client to reduce the service provision. Ms Oliva communicated this change to staff at the time and any necessary variation to employee contracts was carried out at that time. I prefer Ms Oliva's evidence on this issue for the reasons set out above. The Claimant was doing her best to recount matters but I found her evidence on matters concerning pay to be confused and unclear. A variation such as this was a client led decision. The Respondent is a company in which its service work is led by client demand. That is clear from the significant number of contract variations which have taken place during the Claimant's employment at the Site. I find no evidence to suggest that the Claimant had been specifically targeted in this regard and it is more likely than not that the Claimant's hours were varied in response to this change in demand.

25. The Claimant was subject to a further contract variation in relation to work for another client, Momenta, on 4th May 2019 in which her hours were increased by 30 minutes. The Claimant alleges that she was not paid for this increase in hours. I accept Ms Oliva's evidence that this is not correct. The email referring to pay during 2018-19, sent on 13th December 2020 [**154**] refers to work for Momenta but it highlights a concern about holiday pay from January to April of that year. It makes no mention of an issue in May, despite referring to historic pay complaints from 2018 which had already been resolved. There is no other evidence to demonstrate any shortfall in pay or a complaint about it at the time.

26. I find that the Claimant was not spoken to aggressively about matters concerning her Momenta hours by Ms Foriwaa or Ms Oliva. Similar to Ms Oliva, I found Ms Foriwaa to be a straightforward and honest witness who was doing her best to recall matters. In her witness statement, the Claimant sets out a narrative about events concerning her Momenta hours from April 2019 to around July 2019. The issues concerning this period with Momenta were not explored with these witnesses in oral evidence and, in any event, I am satisfied that neither witness acted aggressively towards the Claimant in responding to issues concerning pay having regard to the matters that were put to them.

27. On or about the 27th March 2020, the Claimant was advised that she would be furloughed pursuant to the government's Coronavirus Job Retention Scheme ("CJRS") with effect from 1st April 2020. This was confirmed by letter dated 7th April 2020 [**76**]. The Claimant was informed that she would receive 80% of her pay as a furloughed worker. She was then required to take a week of annual leave during her period of furlough in the week commencing 8th June 2020 [**78**].

28th August 2020

28. On 27th August 2020, the Claimant was contacted by Ms Foriwaa and asked to attend a meeting at 1.30pm with Ms Oliva at the Site the following day. Whilst

the Claimant was still furloughed, the purpose of this meeting was to inform the Claimant (as well as three other cleaning operatives, albeit in separate meetings) of contractual changes arising because of the Respondent's clients. In particular, Momenta had cancelled its lunchtime cleaning service and, another client, NMG, had left the building thereby ending its contract with the Respondent.

29. I make the following findings about the meeting on 28th August 2020:

  29.1. The Claimant attended this meeting at the Site. Her entrance and exit at the Site is recorded on this day on the cardholder logs supplied by the Respondent [**178**];
  29.2. Ms Oliva told the Claimant that Momenta had cancelled the lunchtime contract and NMG had left the building;
  29.3. At this meeting, the Claimant signed the contract variations for Momenta and NMG. The Claimant's signature is recorded on these variations [**81-82**] along with the date of the meeting. There is a significant dispute between the parties on this point and I set out below, at paragraph 48, my reasons for finding that the Claimant did sign these documents at the meeting and accepted the variations to her contract;
  29.4. The Claimant was not given copies of these documents at the meeting. At that time, there was a policy in place for such matters to be dealt with by HR;
  29.5. The Claimant then left the building shortly after.

30. The Claimant was later told that there was no further work with Forest Brown, another client at the Site. A contract variation document was prepared in relation to this client, effective from 1st September 2020 [**83**]. The Claimant signed this document on 2nd September. I accept the Respondent's account of this variation. Ms Foriwaa's evidence was clear that she had been asked by Ms Oliva to arrange the variation on 1st September. Ms Foriwaa recorded these events in a short statement prepared on 10th December 2020 [**140**]. I am satisfied that she had a better recollection of matters when this statement was made as compared to any witness preparing a later statement for these proceedings.

31. Ms Oliva was then informed that another client, Shook Hardy and Bacon, wished to reinstate their cleaning services from 1st September 2020. The Claimant was re-engaged to work on flexible furlough from 2nd September 2020. This was confirmed in a letter dated 11th September 2020 [**84-5**]. The cardholder logs show the Claimant resumed attendance at the Site from 2nd September.

17th September 2020 meeting

32. Ms Oliva asked to meet again with the Claimant. The Claimant accepts this meeting took place, at the end of her shift. At this meeting, the Claimant was offered and accepted a 10 hour per week shift for DVB Bank at the Site. A further variation to include this work was agreed on this date and duly signed by the parties on this date [**87**]. This agreement also included acknowledgement that the Claimant was no longer working at Bannatyne. The Claimant began this work for DVB Bank on 21st September 2020 (with Bannatyne ceasing on the same date).

Shook Management

33. The Respondent was then informed that Shook, Hardy and Bacon was cancelling its contract from 1st October 2020. Ms Oliva contacted the Claimant and explained this development. Ms Foriwaa then arranged for the Claimant to sign a further contract variation to acknowledge the change, dated 1st October 2020 [**89**].

34. On 14th October 2020, the Claimant became concerned that she had not been properly paid for Shook and Bannatyne contract work. The Claimant's son contacted the Respondent's HR department via LinkedIn. Ms Malone became aware of this referral on 23rd October 2020. Having checked the Respondent's management system, Ms Malone could not see that there were any pay issues but referred the matter to Ms Oliva by email on 27th October 2020 [**93**]. I have found no evidence to support the claim as to unpaid pay during this period. The payslip for the pay period 28th September 2020 to 11th October 2020 (paid on 14th October 2020) [**295**] shows pay for work and furlough in relation to Shook and the new DVB Bank contract. It has not been made clear why the Shook pay is wrong. As regard the Bannatyne contract, the Claimant signed a contract variation on 21st September 2020 agreeing that this work had ended. Her last furlough pay for that contract was in the previous pay period (14th – 27th September 2020) and this accords with the variation signed on 17th September 2020 [**87**]. None of the later pay periods include Bannatyne pay.

The Claimant's attendance at the Site on 17th November 2020

35. On 17th November 2020, the Claimant attended the Site and, in the presence of Ms Foriwaa, spoke to a Service Desk Manager and a Facility Manager from the Site. The Claimant asked to speak to the General Manager. There is a contemporaneous record about this visit to the Site, made by Ms Foriwaa on the same day at [**96**] in the bundle (and followed by Ms Oliva on the same day at [**94**]). I accept those documents as a record of what occurred having regard to my findings about Ms Foriwaa and Ms Oliva as witnesses. The Claimant complained that she had not been properly paid for Bannatyne or Shook furlough payments since September. Ms Oliva reported the incident to HR and contacted the Claimant by message to try and discuss her concerns about pay. Ms Oliva proposed a meeting the following day on 19th November 2020 [**98**].

36. Following Ms Oliva having raised the matter with HR, Ms Goldsmith wrote an email to the Claimant dated 19th November 2020 explaining her current working arrangements and pay [**99**]. This explained that, following her contract variations, she was not entitled to furlough for those clients and the Respondent could not claim furlough monies under the CJRS from HMRC where the work for a particular client had ended. I accept that account. As the work for other clients had ended, the Respondent could not maintain a furlough arrangement and the Claimant was not entitled to further furlough pay. As above, her pay arrangements changed in October 2020 following the changes implemented in September.

37. There was a delay in response but a meeting was arranged. However, the Claimant changed her mind and did not attend this meeting. She was then on annual leave until 4th December 2020.

38. As regards this period of leave, the Claimant alleges that she was told to take her holidays and was threatened that she would lose her leave if she did not take it. She says in her witness statement that she was 'forced' to sign a holiday form 'under pressure'. I do not accept this account. It was not put to the

Respondent's witnesses and there is no other evidence supporting such an allegation. The Claimant accepts she took leave that she had accrued.

Further furlough arrangements

39. DVB Bank had, by this point, indicated that it wished to reduce its service provision as many staff were working from home. As a result of this change, the Claimant was placed on furlough from Monday 7th December 2020. Ms Oliva sent a message to the Claimant to confirm this had happened, prior to her return from leave [**101** and **103**]. Ms Malone also wrote to the Claimant formally confirming the change on 7th December 2020 [**105**]. This was emailed to the Claimant by Ms Goldsmith on the same day [**110**].

The Claimant's complaint and allegation in December 2020

40. On 8th December 2020, the Claimant emailed Ms Goldsmith asking for a photocopy of her contract variation(s) from August [**111**]. This was acknowledged. On 9th December 2020, Ms Goldsmith sent the Claimant, by email, copies of 5 contract variations which she had signed. The Claimant replied at 7.40pm that day [**117**] saying:

> *Thank you for your email*
> *I saw all of them*
> *This is badly none of them is not my*
> *signature.*
> *I just met Patricia once since this year August .*
> *I sign just one sheet with five company*
> *They are momenta, N M G and Forrest*
> *Brown she was told this are gone.*
> *That was not true only one company*
> *gone which is N M G*
> *And she told me those are remain*
> *Which was Shook and Bannatyne.*
> *All of them are one sheet*
> *After the meeting i red before I signed up. This show me that Patricia*
> *copy my signature*
> *I mean those signatures is not mine*
> *So please I need the proper one*
> *Thank you for your time*
> *Hope i will hear from you* (sic)

41. The Claimant therefore alleged that her signature had been copied and she had only signed one of these variations.

42. Ms Goldsmith replied at 9.37pm as follows:

> *Hi Bridget,*
> *Thanks for your email. I think allegations like this are very serious and therefore if you are 100% that these are not your signatures, we will have to bring an external examiner to verify the signatures. As these are pdf copies, I will check with Patricia to see if she has the originals as I am sure she will. Therefore, I will be in contact once I have confirmed with Patricia if she has the orginals, in which case we will send them to an external examiner to see if all the signatures are authentic.*
> *If they are authentic, then allegations of potential fraud will be treated with disciplinary action, likewise if they are not original signatures, we will treat this as a matter for disciplinary also.*
> *Kind regards*
> *Leigh Goldsmith* (sic)

43. In cross examination, it was suggested to Ms Goldsmith that she was threatening disciplinary action against the Claimant in any case (i.e. whether a

forgery occurred or not). This was plainly not the case. I accept Ms Goldsmith's evidence that this matter would be investigated. She answered questions in evidence robustly and was clear as to what happened and the matters in her own knowledge. If the allegations were untrue, she was telling the Claimant that disciplinary action would follow. If there was a forgery, that other person would be disciplined.

44. A chain of emails followed this exchange. In particular:

44.1. On 10th December 2020 at 10.37am, Ms Goldsmith wrote to the Claimant and said:

> *Hi Bridget,*
> *Thanks for your email. I am going to speak to Patricia this morning and raise your concerns with her. I will try to find out what has happened and what has gone on here. Are you happy for me to investigate this further or would you like to raise this formally as a grievance?* (sic)
> *Kind regards*
> *Leigh Goldsmith*

44.2. An email from the Claimant to Ms Goldsmith at 11.26am that day said:

> *Hi Leigh*
> *Thanks for your email*
> *Yes that is why I said any further information let me know.*
> *I just did favourof D O C Otherwise I should be reported to police*
> *I'm still waiting to hear you back* (sic)

44.3. Ms Goldsmith responded 11 minutes later:

> *Hi Bridget,*
> *Okay no problem, leave it with me and I will update you once I have some further information on this.*
> *Kind regards*
> *Leigh Goldsmith* (sic)

44.4. On 11th December 2020 at 5.43pm, the Claimant wrote to Ms Goldsmith:

> *Hi Leigh*
> *Thank you for your email*
> *My avidence is that, this signature is Not how I sign and the data i met Patricia was 28 August 2020 Other avidence is after I met her*
> *My first payslip show on 16 September that The job that she told is gone was not on the payslip Evelyn also signed two of them and I did not do meeting with her. How can she sign my signature?*
> *And other issues : I already told that I did this company(Forrest Brown)meeting with Patricia.*
> *According to the one sheet show that Evenly is the one who signed F B*
> *Why did she signed without doing any meetingling with me?*
> *I like to hear from you* (sic)

44.5. On 14th December 2020 at 3.41pm [**158**], the Claimants wrote to Ms Goldsmith:

> *Hi Leigh*
> *I just want to let you know the reason why Evelyn and Patricia doing all those things they doing fraud.*
> *They are frauding D O C So that they don't want any old people at the Tower 42 as I'm saying you can check old people wages…* (sic)

45. On 15th December 2020 at 5.47am the Claimant accepted she had signed three forms but alleged that none of the variations had her signature on them [**161-62**]. At 12.58pm that day, the Claimant said, among other things, that the signatures were not how she signs her signature [**165-66**]. At 1.21pm that day, Ms Goldsmith sent an email to the Claimant [**165**] explaining that, having inspected the variations, she was satisfied that the signatures matched each and other and those dating back to 2016. She explained that she had requested statements from Ms Oliva and Ms Foriwaa along with telephone call logs (to arrange meetings) and cardholder pass logs (for entry to the Site). It was proposed that Mr Turner, the Operations Director, could meet the Claimant. The Respondent had concluded that there was no case to answer as to alleged forgery.

46. I accept Ms Goldsmith's evidence that this was dealt with informally and not part of the Respondent's grievance procedure. If the matter had been dealt with on such formal terms, the method of investigation would have been different because Ms Oliva would not have been as involved; she would have simply been a witness. I am satisfied that the Respondent took care to identify the manner in which the Claimant wished to proceed with the issue. The option of raising a formal grievance was set out in Ms Goldsmith's email (see the exchange at paragraph 44.1 – 44.3 above) and it was acknowledged that Ms Goldsmith would proceed to investigate and "*update* [the Claimant] *once I have some further information…*". If the Claimant believed that Ms Goldsmith had misunderstood her instructions as to how she wished the matter to be handled, she did not make this clear following the reply she received.

47. The Claimant was also offered the opportunity to meet with the Operations Director, Mr Turner about this issue. A meeting was proposed for Thursday 17th December 2020. The Claimant declined this offer and confirmed she had reported the matter to the police [**163-4**]. In response, Ms Goldsmith explained that the Respondent was continuing to investigate but the Claimant replied explaining that it no longer needed to investigate. Following further correspondence on 15th January 2021, the Claimant again told Ms Goldsmith that the Respondent did not need to continue with any further investigation into the matter [**246**].

The written contract variations signed between August – October 2020

48. I accept the Respondent's evidence that each of the written contract variations were accepted and signed by the Claimant on the dates recorded for the following reasons:
    48.1. I accept Ms Oliva's and Ms Foriwaa's accounts of these variations, as set out above.
    48.2. In her evidence before the tribunal, Ms Goldsmith explained that she found the Claimant's account of these allegations to be inconsistent and that they did not make sense. I find that the Claimant's account of these allegations to be confused and unclear. For example, in her early morning email of 15th December 2020, she claims to have signed three forms but declines to accept that the documents bear her signature and that they have been copied. She also says that, in 2020, she met Ms Oliva only once. That is plainly incorrect because she accepts, at paragraph 41 of her witness statement, that she met Ms Oliva on 17th September 2020 where the new work for DVB Bank was discussed. I am

therefore unable to place much weight on the Claimant's assertions in these emails.

48.3. I also find that the Claimant's allegations are inherently unlikely. There is no reason at all for the Respondent to forge these signatures and dishonestly lead the Claimant into a position where she had less work. The contracts to which she had been deployed had ended. There was accordingly no basis to retain the Claimant on furlough for such a contract (given that the Respondent would have no entitlement to claim furlough from HMRC for any such period) and neither was there any basis to retain her for such work on full terms given there was no work to do and no client.

<u>The Claimant's resignation in May 2021</u>

49. The Claimant continued on furlough owing to business need. However, the Respondent was then informed by DVB Bank that it wished to resume service. Ms Goldsmith sent an email to the Claimant [**248**] and Ms Oliva telephoned her on 17th May 2021.

50. During the telephone call with Ms Oliva, the Claimant was informed that work was to resume on 19th May 2021. Having regard to my findings about her witness evidence, I prefer and accept Ms Oliva's evidence that the Claimant was shouting at her on the telephone, explaining that she was not going to return and that she would need to contact her solicitor going forward. This account is also corroborated by the contemporaneous email sent by Ms Goldsmith on the same day [**248**], which records those events, as reported by Ms Oliva. I do not accept that Ms Oliva was acting aggressively in this telephone call, as alleged by the Claimant.

51. The Claimant did not attend for work as requested. On 20th May 2021, the Claimant sent a letter of resignation to the Respondent [**250**]. In her letter, the Claimant relied on what she described as 'ill treatments' and cited the following allegations:

51.1. Lying to her about the non-existence of work;
51.2. The alleged forgery of her signatures;
51.3. Unilaterally reducing her years of service (referring to emails concerning a dispute about the year her employment commenced – although this is not in dispute in the claim before the tribunal);
51.4. A concern about holiday entitlement and pay; and
51.5. Ms Oliva refusing to pay the Claimant for NMG work between 28th November 2018 and 3rd April 2019.

52. Ms Goldsmith sent an email to the Claimant the following day [**251**]. Ms Goldsmith sought to clarify that this was not a resignation arising in 'the heat of the moment' and is what she really wished to do. She also addressed the issues set out in the letter. The email concludes asking the Claimant to confirm within 5 days whether or not she wished to retract her resignation and, if not, the Respondent would respect her wish and accept it. The Claimant did not respond and, accordingly, the Respondent sent a letter dated 28th May 2021 accepting her resignation [**258**].

<u>Other pay claims</u>

53. The Claimant alleges that on 20th November 2020 she was told to take her outstanding holiday and, upon payment of holiday pay, there was a shortfall of

£541 (on the basis she was paid £215 and claims to have been entitled to £756). There is no evidence before the tribunal to substantiate such a shortfall or to enable the tribunal to work out what amount is said to have been properly payable as compared to the amount paid.

54. Further, as regards the other amounts claimed for unpaid wages and holiday pay in the list of issues, there was no evidence led to prove whether those amounts were properly payable and what, if any, deduction was made. In submissions, I was informed that these amounts are sought based on oral evidence and the witness statements. Whilst the Claimant told me about a number of hours and pay rates to which she says she is owed, some of these referred to amounts that are accepted as having later been paid. I find it an unsatisfactory way to set out a claim for unpaid wages and I am unable to place any real weight on such figures without documentation establishing what was worked as compared to what was paid, particularly having regard to the length of time over which any such amounts are said to have been owed.

55. The Claimant's final pay (which was paid on a fortnightly basis) was paid on 26th May 2021 [**311**].

Law

Constructive unfair dismissal

56. A constructive dismissal arises under section 95(1)(c) Employment Rights Act 1996 ("ERA") where:

> *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.*

57. In order for a Claimant to establish dismissal under this section, there must be:

    57.1. A breach of contract by the Respondent that is sufficiently important to justify the Claimant resigning (i.e. a fundamental breach), or it must be the last in a series of incidents which justify her leaving.
    57.2. The breach must be a reason for the Claimant leaving and terminating her employment (although there may be other reasons: Wright v North Ayrshire Council [2014] IRLR 4).
    57.3. The Claimant must not delay too long in resigning. Otherwise, the Claimant may be deemed to have waived any breach of contract by remaining in employment.

58. In this case, the term relied upon is the implied term of mutual trust and confidence in the employment contract. In Malik and Mahmud v BCCI [1998] AC 20; [1997] IRLR 462, the House of Lords formulated this as an obligation that the employer shall not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. There are three questions for the tribunal:

    58.1. What is the conduct or failure to act on the part of the employer which is said to breach the implied term?
    58.2. Was there reasonable and proper cause for that conduct or failure to act?
    58.3. If not, viewed objectively, was that conduct calculated or likely to destroy or seriously damage trust and confidence?

59. Where the Claimant relies on a 'last straw', following a series of events. The Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978; [2018] IRLR 833 confirmed that the tribunal should ask itself:

    59.1. What was the most recent act or omission on the part of the employer which the employee says caused, or triggered, his or her resignation?
    59.2. Has he or she affirmed the contract since that act?
    59.3. If not, was that act or omission, by itself, a repudiatory breach of contract?
    59.4. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous breach affirmation).
    59.5. Did the employee resign in response (or partly in response) to that breach?

60. The final straw itself must contribute something to the breach of contract. What it adds may be relatively insignificant so long as it is not utterly trivial. The final straw, in isolation, need not be unreasonable or blameworthy conduct but an innocuous act cannot be the final straw (LB of Waltham Forest v Omilaju [2004] EWCA Civ 1493; [2005] IRLR 35).

61. If the Claimant establishes dismissal pursuant to section 95(1)(c), the tribunal must ask itself what the reason or principal reason for the dismissal was and whether it was potentially fair within the meaning of section 98 of the ERA and, if so, consider whether the dismissal was fair or unfair in accordance with section 98(4):

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

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

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

62. In applying the above test, the tribunal must consider whether, in all respects, the Respondent acted within the band of reasonable responses.

Unlawful deductions from wages

63. Section 13 of the ERA provides for the right not to suffer unauthorised deductions from wages. So far as relevant to this case:

    (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.
    (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

64. For the purposes of a claim of unauthorised deductions from wages, so far as relevant, 'wages' are defined in section 27(1)(a) of the ERA as:

> *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.*

Time limits in respect of claims under section 13 of the ERA

65. Subsections 23(2)-(4) of the ERA provide (as to the time limits and the extension of time limits):

> *(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)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*
>
> *(3) Where a complaint is brought under this section in respect of—*
>
> *(a)a series of deductions or payments, or*
>
> *(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,*
>
> *the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.*
>
> *(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.*

66. Section 23(4A) of the ERA provides:

> *An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.*

67. Section 23(4B) provides:

> *Subsection (4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).*

68. Sections 23(4A) applies in relation to claims presented on or after 1st July 2015 and only applies to wages claims, as defined in section 27(1)(a), above.

69. Where a Claimant relies on a series of deductions over a period of time (subject to the two year limit, as above), a gap between deductions of more than three months will break the series such that earlier deductions will not otherwise be considered to have been brought 'in time' (Bear Scotland and Ors v Fulton and Ors [2015] IRLR 15). Langstaff J, sitting in the EAT explained the principle as follows [at paragraph 81]:

> *Since the statute provides that a tribunal loses jurisdiction to consider a complaint that there has been a deduction from wages unless it is brought within three months of the deduction or the last of a series of deductions being made (s.23(2) and (3) ERA 1996 taken together) (unless it was not reasonably practicable for the complaint to be presented within that three month period, in which case there may be an extension for no more than a reasonable time thereafter) I consider that Parliament did not intend that jurisdiction could be regained simply because a later non-payment, occurring more than three months later, could be characterised as having such similar features that it formed part of the same series. The sense of the legislation is that any series punctuated from the next succeeding series by a gap of more than three months is one in respect of which the passage of time has extinguished the jurisdiction to consider a complaint that it was unpaid.*

Conclusions

Constructive unfair dismissal

70. Having regard to my findings, above, I conclude that the Respondent has not committed any of the alleged breaches set out in the list of issues. In respect of pay, insofar as there was any breach by initial non-payment of wages owing under the NMG contract in 2018-19, these were resolved by 17th April 2019. The Claimant was paid and continued working under her employment contract. Even if that did amount to a breach of the implied term as to trust and confidence at the time, it was remedied and any breach was waived by the Claimant at the time. The Claimant continued in post and worked for various other clients. She would not now be able to rely on such historic events on their own to mount a claim of constructive unfair dismissal because of the very long delay between such events and her resignation on 17th May 2021.

71. Beyond any early complaint about her NMG wages between 2018-19, the Claimant's complaints about her pay have, in my judgment, arisen through reluctance (on her part) to accept, after the event, agreed changes to her contract because of the varying business need of the Respondent's clients. Having regard to my findings about the contract variations in this case, I conclude that the Respondent has, as necessary, agreed contractual changes with the Claimant, but the Claimant, after those changes have been implemented, has either been reluctant to accept the effect of those changes on her fortnightly pay or has, in the case of the CJRS, mistakenly expected more.

72. The Respondent has not acted in breach of contract by implementing agreed variations to the Claimant's contract. It has explained the scope of the CJRS to the Claimant and, in particular, explained why such pay ended when a contract variation was signed acknowledging that the work for a particular client (for which furlough had previously been claimed) had ceased.

73. In my judgment, the Claimant has not been willing to accept the effect of those changes, after the changes were agreed. Where such work ended, the

Respondent did not have it available for the Claimant. Whilst the changes may not have been welcome, this is, I am satisfied, that nature of the work at the Site; contractual variations occurring with business need which have continued throughout her employment. Unfortunately, the Claimant's reluctance to accept the effect of those changes (upon receiving her pay notifications) has led to grave accusations being levelled at those supervising her at the Site and the witnesses before this tribunal. I do not accept that there has been any forgery, on the evidence presented to the tribunal in this case, and the Respondent has not, in my judgment, therefore sought to bar the Claimant from receiving furlough pay which, when she was entitled to it, would have been funded by HMRC through the CJRS in any event.

74. The Claimant also claims that there was a failure to follow any grievance procedure in relation to the complaint raised in December 2020. I conclude that Ms Goldsmith gave the Claimant the opportunity to escalate her concerns about the signatures on the contract variations in her email of 10th December 2020. The Claimant knew that the process was proceeding informally. She did not ask for the matter to be escalated to a formal grievance. Having heard the Respondent's evidence and having regard to its size, I find it is more likely than not that a formal procedure would have been willingly adopted by the Respondent if the Claimant had indicated, in her reply on 10th December 2020, that that was her wish. Further, very shortly after this time, the Claimant told the Respondent not to continue with the investigation and had declined the opportunity to meet with the Operations Director. Accordingly, I conclude that the Respondent was not in breach of contract in respect of the investigation of the Claimant's complaint.

75. Finally, the Claimant says that the Respondent targeted her for making her complaint. I have found that this was not the case and, having been on furlough with DVB Bank, the Claimant refused to return to work when she was telephoned by Ms Oliva on 17th May 2021. Whilst the Claimant relies on this as the 'last straw', the facts are such that there is nothing in this event which entitled her to resign in response to the Respondent's conduct. It was not a breach of contract (on the Respondent's part) and, these events were not, in my judgment, part of a course of conduct comprising several acts which, viewed cumulatively, amounted to a repudiatory (or fundamental) breach of the implied term of trust and confidence.

76. It follows that the there was no repudiatory (or fundamental) breach of contract on which the Claimant can pursue her claim based on constructive dismissal. The Claimant was not dismissed by the Respondent.

77. It is therefore unnecessary for me to consider any other legal issues as regards constructive unfair dismissal because the Claimant's resignation does not amount to a dismissal within section 95(1)(c) of the ERA. Her claim therefore fails and is dismissed.

<u>Unlawful deductions from wages</u>

Time Limits and jurisdiction to hear the complaints

78. All of the pay complaints fall clearly within the definition of wages in section 27(1)(a) of the ERA. This definition includes holiday pay. The complaints concern either unpaid wages (whether under furlough or for hours worked) or alleged unpaid holiday pay.

79. The tribunal does not have jurisdiction to hear the first two pay complaints in the list of issues because they concern alleged deductions occurring more than two years prior to the date the claim was presented (13th August 2021). The latest month for any alleged deduction in those two complaints is April 2019. They are therefore time barred by virtue of section 23(4A) of the ERA.

80. As regards the other pay complaints, set out in the list of issues, these occur over different periods between May 2020 up to May 2021, when the Claimant resigned.

81. The Claimant presented her claim on 13th August 2021. Three months back from this date is 14th May 2021. That date is extended backwards to allow for three days in ACAS Early Conciliation (she notified ACAS on 30th July 2021 and the Early Conciliation certificate was issued on 2nd August 2021). Accordingly, any deduction alleged to have been made on or after 11th May 2021 will have been brought in time.

82. The Claimant was paid every two weeks. The latest complaint is brought on the basis that there was an unlawful deduction on 21st May 2021. This was the day after the Claimant's resignation. Given that the Claimant alleges that there was a deduction to her final pay, which was paid on 26th May 2021 [**311**], the last alleged deduction is brought in time (it having been determined that her claims did not arise subject to any amendment to the claim).

83. In relation to her furlough pay (issues at sub-paragraphs 15.5-15.7 above), the Claimant claims continuous deductions from 1st September 2020 until the termination of her employment. These, in my judgment, amount to a series of deductions within the meaning of section 23(3)(a). The tribunal therefore has jurisdiction to consider all of those deductions in the series.

84. As regards sub-paragraphs 15.3 and 15.4, these concern a 12-month period ending with termination of employment. The Claimant claims up to her final pay (26th May 2021) that she was not paid, from 29th May 2020, for 30 minutes per day in respect of the Momenta contract and 2 ½ hours per week in respect of pay for Bannatyne (furlough or otherwise). On the same principles, these are also brought in time as a series of continuous deductions up to the final pay date in May 2021.

85. Accordingly, the tribunal has jurisdiction to hear the pay complaints in sub-paragraphs 15.3 – 15.7, as set out above.

Conclusions on unpaid wages complaints

86. Having regard to my findings that there is insufficient evidence to prove any of the amounts claimed in sub-paragraphs 15.3 – 15.7 above, the Claimant has not established that the Respondent has made any unauthorised deductions to her fortnightly pay. In any event, on the basis of my findings above, the pay complaints fail for the following reasons:

    86.1. At paragraph 25 above, I found no evidence to support a claim for any shortfall in relation to pay under any contract with Momenta (in, around or after May 2019). There is no evidence to support such a claim from 2020 until termination of employment;

    86.2. There is no basis to claim unpaid wages at 2 ½ hours per week for Bannatyne. The Claimant was furloughed during the time period of the

complaint and this ended following the contract variation signed on 21st September 2020;

86.3. As regard the furlough pay complaints, there is no evidence to support a claim as to non-payment or miscalculation of pay. The Claimant's counsel told me that she did not have instructions as to the significance of the bank statements and the payslips in the bundle. It is not at all clear how the Claimant has arrived at the various number of additional hours which are claimed in the list of issues (in each of these complaints) or why they are said to be properly payable over and above the figures recorded in the payslips. Having been directed by the Claimant's counsel to consider the oral evidence and witness statements on these issues, I conclude that there are no unauthorised deductions in respect of the Claimant's furlough pay. Insofar as the Claimant is concerned that she should have continued to receive furlough pay for contracts which I have found have been validly ended by variation, the furlough pay entitlement came to an end at that point.

Outcome

87. It follows that both of the Claimant's claims, for constructive unfair dismissal and unlawful deductions from wages, fail and are dismissed.

Employment Judge Nicklin

Date 30th April 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

03/05/2022

FOR EMPLOYMENT TRIBUNALS