



EMPLOYMENT TRIBUNALS

Claimant: DR KATE BARRY

Respondents: UPPER THAMES MEDICAL GROUP (1)
DR JULIAN TALLON (2)
DR TIMOTHY WAKEFORD (3)
DR JOSCELYN MYLES (4)
DR AMY HOWARTH (5)
DR CAROLINE MAXWELL (6)

Heard at: Exeter (by VHS) **On:** 16 and 17 May 2022

Before: Employment Judge Oldroyd (sitting alone)

Appearances

For the Claimant: Miss Ibbotson (Counsel)

For the Respondent: Mr Munro (Solicitor)

JUDGMENT

1. The Respondents were in breach of contract for failing to pay the Claimant sick pay at a rate equivalent to 100% of her normal pay during the period 29 August 2020 - 26 December 2020 and the Respondents are ordered to pay the Claimant damages in respect of which:
 - a. Unless the parties have agreed damages by 4.00pm 17 July 2022, the Claimant shall notify the Tribunal and request that a remedy hearing be listed with a time estimate of 1 hour by video and before Employment Judge Oldroyd (sitting alone).
 - b. Not less than 6 weeks before the remedy hearing, each party shall send to the other the documents that they wish to refer to at the remedy hearing.

- c. Not less than 4 weeks before the remedy hearing each party shall serve on each other any written statement of the evidence that they wish to rely upon at the remedy hearing.
 - d. Not less than two weeks before the remedy hearing the Claimant and the Respondents (if both are represented) shall prepare a list of issues in respect of the remedy hearing (which list shall be subject to the Tribunal's agreement).
 - e. Not less than one week before the remedy hearing the Claimant (or the Respondents if the Claimant is not represented) shall send an electronic and paginated bundle comprising this Order and the documents referred to at 1a, 1b, 1c and 1d to bristolet@justice.gov.
2. The claim for unauthorised deduction from wages and/or breach of contract in respect of the period 15 February 2021-6 April 2021 is not well founded and is dismissed.
 3. The claim for constructive unfair dismissal is dismissed.

REASONS

Introduction

1. The Claimant in these proceedings is Dr Kate Barry. The first Respondent is a GP practice and the second to sixth Respondents are partners in that practice.
2. The Claimant became ill during the course of her employment with the Respondents for the first material time on 26 February 2019. The Claimant was diagnosed to be suffering from a long term auto immune disorder that was to lead to periods of sickness absence. The illness, upon the Claimant's return to work, necessitated a reduced working pattern.
3. In this claim, the Claimant alleges that the Respondents acted in breach of contract by withholding sick pay to which she was entitled during the period August 2020 to December 2020.
4. The Claimant also says that, as from 17 October 2019, the Respondents engaged in a course of conduct and acted unreasonably by not supporting an appropriate phased return to work. The Claimant relies upon seven events that she says cumulatively led to the Respondents being in breach of their implied obligation to maintain trust and confidence in the relationship between an employer and their employee. The Claimant alleges that the failure to pay her sick pay and the lack of support that she received were the cause of her resigning by letter on 6 April 2021. In this respect, the Claimant claims constructive unfair dismissal.
5. Additionally, the Claimant says that she was not invited to work during the period 14 February 2021 and her resignation. In this respect, the Claimant alleges unlawful deduction from wages and breach of contract.

6. The Respondents deny withholding sick pay unlawfully and maintain that the Claimant's contractual entitlement to sick pay had lapsed at the end of August 2020 and hence she received no further payments after that time.
7. The Respondents also say that they supported the Claimant in respect of her phased return to work and that her resignation was the consequence of her not receiving the sick pay that she wrongly believed that she was entitled to.
8. The Respondents further say that, if the Claimant was entitled to sick pay, then she was not entitled to treat the non-payment of it as a constructive unfair dismissal as she lost that right by reason of affirmation.

Representation

9. Both parties were represented; the Claimant by Ms Ibbetson of Counsel and the Respondents by Mr Munro.

The Evidence

10. An agreed bundle of documents was prepared by the parties and made available to the Tribunal.
11. The Claimant gave evidence on her own behalf. The Claimant produced a written statement dated 11 May 2020 and also gave oral evidence. Reasonable adjustments were made for the Claimant (in the form of breaks) during the course of her oral evidence.
12. On behalf of the Respondents, written evidence was provided by its partners, Dr Tallon, Dr Wakeford, Dr Maxwell, Dr Howarth and Dr Myles and also by their practice manager, Fiona David and former practice manager, Georgina Brown .
13. As far as the Statement of Dr Tallon is concerned, the parties agreed that paragraph 26 of that Statement alluded to 'without prejudice' material and that this paragraph should be deleted from the Statement that had been included in the bundle. This agreement was subject to the Tribunal being made aware that paragraph 26 referred to email exchanges involving the Claimant and Respondents that were sent between the parties in March 2021 in connection with their ongoing dispute over sick pay. The deletion was made before the Tribunal had regard to the Statement.
14. Only Dr Tallon, Dr Wakeford Georgina Brown and Fiona David gave oral evidence on behalf of the Respondents.
15. In terms of the oral evidence, I found each witness to be truthful, giving an honest account of their best recollections and understanding of their position to the best of their recollection.

Fact findings

16. The Claimant is a GP whose continuous employment within the NHS first commenced in April 2006. The Claimant is now aged about 40.

17. The Claimant's employment with the Respondents, a partnership of GPs working within the NHS, commenced on 16 April 2018.
18. The contractual terms of the Claimant's employment were comprehensively documented.
19. As far as sick pay is concerned, the Claimant's entitlement was documented in the Claimant's Terms & Conditions of Employment which in turn referred to a Staff Handbook and Hospital Conditions of Service. The relevant terms were as follows:
 - 19.1 In the case of an employee having more than 5 years of continuous employment, as all parties agreed the Claimant enjoyed, then any sick pay was payable for 6 months at full pay and then a further 6 months at 50% of full pay.
 - 19.2 Upon an employee falling sick, the procedure for sick pay was detailed in the Staff Handbook. Paragraph 48 of the Handbook provided for the payable sum to be in accordance with paragraphs 225-244 of the Hospital Conditions of Service.
 - 19.3 Paragraph 227 of the Hospital Conditions of Service provided that:

“... the period for which [sick pay] is to be paid in respect of any period of absence due to illness, shall be ascertained by deducting from the period of benefit ... appropriate to the practitioner's service on the first day of absence the aggregate for the period of absence due to illness during the twelve months immediately preceding the first day of absence...”
20. It was not disputed that, prior to her first period of sick leave, the Claimant was initially contracted to work 25 hours a week. This was spread over 5 sessions which were in turn spread over two days. Each session was envisaged to be 4 hours 10 minutes (but the Claimant gave evidence to the effect that, in practice, sessions overran and might last 5 or even 6 hours). All of the Claimant's sessions were to take place on site, rather than remotely.
21. In February 2019, the Claimant suffered from a bad episode of laryngitis following which she began to notice the drooping of her eyelids and a sense of profound fatigue. This led the Claimant to start a period of sick leave on 26 February 2019 which continued until 1 July 2019. Pursuant to her contractual terms and conditions, the Claimant's entitlement to sick pay began on 16 March 2019.
22. During this first period of absence, the Claimant was diagnosed with a rare long term auto-immune disorder, Myasthenia Gravis.
23. The Claimant returned to work on 2 July 2019. The Respondents agreed, as documented in their letter to the Claimant of 21 June 2019, that a phased return was appropriate. It was consequently agreed that the Claimant would initially work for 2 days each week on site and, on each day, carry out one session with a duration of 2 hours. It is clear that the Respondents were very supportive of the Claimant at this time.

24. The Claimant attended a consultation with an Occupational Health Adviser on 19 July 2019. The subsequent report concluded that the Claimant was fit to carry out her role with long term adjustments being in place. It was suggested that the Claimant continue her phased return by maintaining her working pattern for a further month with a view to then giving consideration to increasing each session by 30 minutes or one hour. After 6 months, it was suggested that the Claimant might aim to work 3 sessions on this basis, namely 3 sessions of up to 3 hours.
25. This report noted that the Claimant was "*motivated to return to normality*" at this time. I accept that the Claimant envisaged that this would involve a return to her full contractual hours and that this is what she wished to achieve.
26. By letter dated 6 August 2019, the Claimant proposed a 'return to work plan' to the Respondents which was to broadly involve working 2 sessions a week of 3 hours duration on site, and a third 3 hour session from home. The Claimant also proposed to work a fourth full session albeit that it be taken as annual leave. The Claimant's proposal amounted to working to 3.5 of her 5 contracted sessions and so the Claimant further proposed that she be paid sick pay for her remaining 1.5 sessions. The Claimant agreed that sick pay would be payable at 50% of her pay on the footing that, once the arrangement came into effect, the Claimant would already have received 6 months' of sick pay at 100% of her pay.
27. The Respondents made a counter-proposal that was confirmed by letter dated 7 August 2019. It involved the Claimant working 2 weekly 3 hour sessions on site and then at home for one hour and 10 minutes per session to make up 2 full sessions. It was agreed (as the Claimant had proposed) that the Claimant should work a third full session that would be paid as annual leave (whilst leave was available). This left the Claimant being paid in full for 3 full sessions. The other 2 sessions, the Respondents agreed, would be paid as sick pay calculated by reference to 50% of the Claimant's pay.
28. The Claimant accepted this counter-proposal although it did not come into effect until the end of September (and after the Claimant had been provided with home working equipment).
29. Before the new working arrangement came into effect, the Claimant was seen again by an Occupational Health Adviser on 20 September 2019. The subsequent report records that the Claimant was fit to remain at work (and to carry out 2 separate 3 hour sessions on site) and it was suggested that the Claimant, once set up to work from home, would be able to carry out an additional 2 hours and 20 minutes of work remotely so that she would then be working 2 full sessions (in keeping with the Respondents' counter proposal of 7 August 2019). It was suggested that matters be reviewed further in 6 months' time, in March 2020. The report noted that the Claimant "*remains motivated to sustain herself at work and her ultimate aim is to carry out her normal role*". I am satisfied that this was the Claimant's intention at this time. This report was provided to the Respondents.

Conduct event 1

30. On 17 October 2019, the Respondents wrote to the Claimant following a meeting that had taken place that day (between the Claimant, Dr Tallon and Georgina Brown (the Respondents' then Practice Manager).
31. The Claimant said in evidence that, at the meeting, she was actively encouraged to increase her working hours and hence ensuing letter states:

*"... as a result you told us that you did not think you were ready to work more
... you did though feel ready to shorten the duration of half of your phone call appointments form 7.5 minutes to 5 minutes"*.
32. The Claimant complains that this encouragement was out of keeping with the most recent Occupational Health Report that had suggested that a review of her working pattern should only be carried out in 6 months' time or in March 2020. This is said by the Claimant to be the first of 7 events which cumulatively led to the Respondents to be in breach of their obligation to maintain trust and confidence in their relationship. Hence I refer to it as "Conduct event 1".
33. The Respondents (and in particular Dr Tallon and Mrs Brown who were present at the meeting) were clear that the aim of the meeting was to enquire as to the Claimant's welfare.
34. In this respect of this issue, I accept Dr Tallon's and Mrs Brown's evidence that their aim and that of the Respondents was to support the Claimant and to generally follow up matters that had been raised in the most recent Occupational Report Health and the meeting was informal. It was not the Respondents' primary aim to encourage a return to work.
35. Viewed objectively, I do not consider that it was unreasonable, in the context of what was in effect a welfare and adjustments discussion, to address the issue of the Claimant's longer term plans and to look beyond the next 6 months that were subject of the most recent Occupation Health Adviser's report. As Mrs Brown put it in her oral evidence "*.. it was just trying to work out the longer term plan*". In this context, it is important to note that the Respondents' GP practice was a relatively small one and that the Claimant's reduced hours of working had a not insignificant impact upon it (as further explained below).

Conduct event 2

36. At the end of November 2019, the Claimant was away from work for a further 3 days as a result of laryngitis, having also left early from work on 12 November after feeling unwell. This was to lead to the second event that the Claimant says amounted to a breach of the Respondents obligation to maintain trust and confidence, namely the fact that, on 9 December 2019, the Claimant was invited to a medical capability meeting.
37. The capability meeting was first mooted by letter dated 5 December 2019 in which it was said:

“... your health appears to be deteriorating and you are now not even able to fulfill your reduced schedule ...the Practice was prepared to accommodate you for a few months but your recent performance suggests that you might not be able to return to a full capacity for a very long time”

38. This was followed up by a letter dated 9 December 2019 which was written in formal terms and which specifically identified that the likelihood of the Claimant returning to fulltime duties was to be the specific subject of discussion and also, that if there was little likelihood of a return to work in a reasonable timescale without reasonable adjustments, then the outcome of the discussion might be the termination of the Claimant's employment.
39. On 19 December 2019, the Claimant attended the capability meeting with her union representative.
40. In respect of this capability meeting and the immediate events that preceded it, I accept the Claimant's evidence that she was shocked and upset to receive correspondence which made it clear to her that her long term employment status was under review. This was very understandable. In this regard, the Respondents up until this point had not previously suggested that her long term position was under review and, from the Claimant's subjective perspective, this was something of a volte-face.
41. However, I do not consider that the Respondents' conduct was objectively unreasonable (even though I do accept that Dr Tallon at least assumed that there was a connection between her recent laryngitis and her ongoing condition which there may not have been). To this end:
 - 41.1 By this stage, the Claimant had been away from her work or working reduced hours for 7 months and the most recent Occupation Health Report was not suggestive of a full return to work within the next 6 months or even thereafter. The Claimant was working considerably less than her full contractual hours. Also, as the notes of the capability meeting reveal, even working reduced hours the Claimant had been absent 10% of time.
 - 41.2 I accept Dr Tallon's evidence that the Claimant's reduced working pattern was having a significant impact on the Respondents' relatively small practice and, by extension, on other staff and patients This impact is set out in Dr Tallon's Statement (see paragraph 20 for example which refers to increased locum costs). It was reasonable, in this context, for the Respondents to have wanted to investigate the Claimant's longer term plans.
42. In light of this, it was reasonable for a capability meeting to have been carried out and I note that the Respondents had obtained legal advice in this regard.
43. Although it may have come as a shock to the Claimant that her employment position was under review, this was a transparent reflection of a fact; but such a review was a reasonable step to undertake.
44. The capability meeting resulted in agreement that a report from the Claimant's treating consultant should be obtained and that report was provided on 4 February

2022. The report was somewhat vague in terms of the Claimant's likelihood of returning to full time work. Although hope was expressed that the Claimant's condition would stabilise, it was acknowledged that there could be further periods of absence before that was the case.

45. In March 2020, shortly before the first national lockdown, the Claimant was allowed to work from home for shielding reasons and along with other members of the Respondents' practice.
46. During this period and on 27 May 2020, a third Occupational Health Report was prepared. This report also confirmed that the Claimant was fit to continue working as she was (carrying out 40% of her sessions in effect) and the Claimant's professed appetite to gradually increase her working pattern was supported. Again, I find that that, at this time, the Claimant's intention was to return to her pre-illness working pattern as soon as she was able.

Conduct event 3

47. In this vein and on 29 June 2020, the Claimant requested that the Respondents increase her working pattern to 3, 3 hour sessions albeit that 1 session, she proposed, should be conducted remotely from home. The Respondents rejected this request. The Claimant says that this further caused her to lose trust and confidence in her employer who she now perceived to be "*blocking*" her return to work (up until her resignation). This is the third complaint about the Respondents' course of conduct that the Claimant relies upon for establishing a breach of their obligation to maintain trust and confidence.
48. Dr Tallon's evidence was that the proposal was rejected (following an informal meeting on 2 July 2022 by Teams a transcript for which does not exist) as the Respondents believed that the Claimant was *permanently* seeking to reduce her contractual obligation from 5 sessions to 3 and also that she was *permanently* seeking to agree one full remote session.
49. Whilst I accept that the permanency of the proposal is not an objectively justifiable construction of the Claimant's written proposal as the Claimant contends, I accept the evidence of Dr Tallon and Dr Wakefield that, at the undocumented meeting on 2 July 2020 at which the proposal was discussed, the Claimant was seeking a permanent contractual change and expressed that to the Respondents.
50. This being so, it was not unreasonable for the Respondents to decline the Claimant's proposal of permanent amendments to her contractual hours, involving as they did, an odd number of sessions and homeworking. The rejection of the proposal was done after internal consideration and after taking into account the effect upon the Respondents' small practice and impact upon other staff and patients.

Conduct event 4

51. The Claimant was invited to a second capability meeting on 10 August 2020 which is the fourth conduct event that the Claimant says gave rise to a breach of the duty on the Respondents to maintain trust and confidence.
52. In the invitation letter, the Claimant was again advised that her long term position was under review and the outcome of any review might be the termination of her employment. I accept again that the Claimant was upset to receive this letter (especially as she had previously explained to the Respondents that she had found the first capability meeting and the invitation to it to be distressing).
53. Again, though, I do not consider that the Respondents' conduct was objectively speaking unreasonable. By this stage, the Claimant had been away from work or working reduced hours for about 18 months and, having regard to the views of her treating consultant's report, the ability of the Claimant to return to full contractual hours was uncertain as ever.
54. At the capability meeting itself, the Respondents indicated that they were content for the Claimant to work 2 'on site' sessions each week (an offer formalised by letter dated 9 November 2020), which the Claimant agreed to reflect upon. The suggestion was fairly made in response to the Claimant's own proposal that had been discussed on 2 July 2020.
55. Immediately after the meeting though, the Claimant suffered a relapse of her condition and she started a period of sick leave on 24 August 2020 during which time she was in hospital for a period of time. The Claimant was to remain on sick leave or else unable to work at all until 26 December 2020.

Conduct event 5

56. On 28 August 2020, the Respondents ceased paying such sick pay as they had been paying and announced that no further sick pay would be paid. To this end, the Claimant had received sick pay between 16 March 2019 and 28 August 2020, so over a period of around 17 months. The Respondents say that they paid the Claimant sick pay for a period that was longer than 12 months because she had, for much of that period, only been working 40% of her time.
57. The failure to pay sick pay for the period 28 August 2020 to 26 December 2020 is alleged by the Claimant to be a freestanding repudiatory breach of her contract but it also the fifth complaint that the Claimant makes about the Respondents' conduct and which, it is said, cumulatively amounts a breach of the Respondents' duty to maintain trust and confidence.
58. The sick pay issue soon led to a dispute between the Claimant and Respondent over her entitlement to sick pay. The dispute effectively began on 11 September 2020 when the Claimant's union representative e-mailed the Respondents to raise the issue of sick pay. The issue was raised more forcefully by way of letter dated 26 November 2020.

59. It is clear that the parties engaged in further correspondence relating to the issue of sick pay and these culminated in an e-mail being sent by Dr Tallon to the Claimant on 26 March 2020 that confirmed a final decision had been made to the effect that no sick pay would be paid. However, as that letter, I am told, was sent on without prejudice basis, I have not seen it.
60. Indeed, I have not seen other correspondence that I am told was generated relating to the sick pay dispute in that period and so it is not clear to me what each parties' position was at that time. Two things are clear to me, though:
- 60.1 The Respondents accepted that the Claimant's entitlement to sick pay was complicated and not clear; see Dr Tallon's letter of 9 November 2020.
- 60.2 At one stage and on 16 February 2021, the Respondents advised the Claimant that its payroll advisers had calculated her entitlement to sick pay to be £9,136.03 but this sum was never paid. The Respondents case is that this gave the Claimant a false expectation of her entitlement to sick pay.

Conduct event 6

61. Returning to events, the Claimant was able, she says, to resume her previous work pattern of 2 sessions per week as from 26 December 2020 but at the Respondents' suggestion she took annual leave for up until 14 February 2021. The Claimant did so in spite of knowing that the Respondents were disputing her entitlement to sick pay.
62. Thereafter, the Claimant says that she was not invited to carry out any sessions even though she was fit and willing to work. This is the sixth course of conduct that the Claimant says gave rise to a breach of the duty on the Respondents to maintain trust and confidence.
63. In respect of this issue, I do accept that the Claimant was fit to work as from 26 December 2020 as she gave evidence in that regard (and I note that she was carrying out other limited work at that time). However, I do not accept that the Respondents were blocking her return to work. The Respondents' were attempting to facilitate a return to work. In this respect:
- 63.1 On 9 November 2020 the Respondents had suggested (but not on a "take it or leave it" basis) that the Claimant work 2 sessions per week. An offer was made to meet with the Claimant to discuss matters but it was declined by her. I do note that, by this stage, the Respondents were suggesting a contractual change to two sessions (down from 5) but given how long it had been since the Claimant had worked 5 sessions and that she had never worked longer than 2 sessions in reality, I do not find that to have been unreasonable.
- 63.2 That offer to work 2 sessions was repeated on 22 December 2020.
- 63.3 I note that even after the Claimant resigned, Dr Tallon wrote to the Claimant on 8 April 2021 and invited her to return to work. I accept Dr

Tallon's evidence that this was not a disingenuous proposal but a genuine one.

64. In my judgment, the reason why the Claimant did not return to work after 14 December 2020 was because she was dissatisfied with the fact that she had not been paid sick pay (as to which see further below).

Conduct event 7 – the last straw

65. Thereafter, on 26 March 2021 and as I have noted, I am told that the Claimant was advised again by the Respondents that she was not to be paid sick pay. This, the Claimant says, was the last straw and caused to write a letter of resignation on 8 April 2021. The resignation letter states:

“The wrongful withholding of my rightful sick pay and other entitlements and my treatment by UTMG means there has been an irreparable breakdown in employer employee relationship and both a fundamental and serious breach of contract. As a consequence of this, I now consider my position at work to be untenable with a complete loss of confidence and trust in my employer. This leaves me with no option but to resign as of today’s date, effective immediately. I consider myself to have been constructively dismissed”

66. It is clear to me from this letter and the Claimant's evidence that the failure to pay sick pay was the sole event that led to the Claimant resigning (as opposed to the other conduct events that she now identifies but which she did not identify in her resignation letter).

The Issues

67. The issues, agreed by the parties, are set out below.

Breach of contract

68. The Claimant received no sick pay between 29 August-26 December 2020. Was this a breach of contract because the terms of the Claimant's contract concerning sick pay entitlement required the Respondent to pay her full pay for the period 29 August 2020-26 December 2020?

Unlawful deduction from wages / breach of contract

69. The Claimant received no pay for the period 15 February 2021-6 April 2021. Was this an unlawful deduction from wages or a breach of contract because the Claimant was 'ready and willing to work' during that period?

Constructive unfair dismissal

70. The Claimant claims that the Respondents fundamentally breached the terms of her contract of employment causing her to resign. Did the terms of the Claimant's contract concerning sick pay require the Respondent to pay her sick pay for the

period 29 August 2020-26 December 2020 and was the failure to do so a fundamental breach of contract?

71. The Claimant claims that the Respondents acted in fundamental breach of contract in respect of the implied obligation upon an employer to maintain trust and confidence in relationships with employees. Did the following course of conduct, which the Claimant relies upon when taken cumulatively, amount to a breach of the implied term of mutual trust and confidence under the 'last straw' doctrine:

71.1. On 17 October 2019, the Respondents asked the Claimant whether she was ready to work more than 3 of her 5 contractual sessions per week for the remainder of the year in circumstances where an Occupation Health Report dated 20 September 2019 recommended that she continue to work 3 hours per sessions on 2 non-consecutive days for the next 6 months.

71.2. On 17 December 2019, having missed 3 sessions due to a virus, the Claimant was invited to attend a formal medical capability meeting, the outcome of which she was told could be termination of employment on the grounds of ill health.

71.3. On 10 August 2020, the Claimant was again invited to attend a formal capability meeting, the outcome of which she was told could be termination of employment on the grounds of ill health, in circumstances where she had been working according to an agreed work plan and had suggested increasing her working hours in light of the most recent Occupational Health Report.

71.4. From 2 June 2020 to 6 April 2021, the Respondents rejected the Claimant's proposal to increase the number of sessions she worked from 2 to 3 by including 1 remote session.

71.5. The Claimant was not paid her contractual entitlement to full sick pay for the period 29 August 2020-26 December 2020.

71.6. The Claimant was not paid at all for the period 15 February 2021-6 April 2021 despite, she says, being ready and willing to return to work.

71.7. On 26 March 2021, the Respondents sent the Claimant a letter in which it was stated the Claimant would not be paid the sick pay she had complained she was owed.

72. Did the Claimant resign because of the breach of the express or implied term (or the course of conduct above)?

73. Did the Claimant affirm the contract before resigning?

74. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98(4) of the Employment Rights Act 1996?

The Relevant Law

Unlawful deduction from wages

75. The right not to suffer an unauthorised deduction is contained in section 13(1) of the Employment Rights Act 1996:

“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.”

76. Section 23 of the Act gives a worker the right to complain to an Employment Tribunal in respect of an unauthorised deduction from wages.
77. Even if no work is actually performed, the employer has an obligation to pay wages so long as the employee is ‘ready and willing to work’ (North West Anglia NHS Foundation Trust v Gregg [2019] IRLC 570, § 55).

Constructive Unfair Dismissal

78. Constructive unfair dismissal arises under section 95(1)(c) of the Employment Rights Act 1996 which deems a dismissal to have arisen in circumstances 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”.

79. In *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, CA, the common law concept of a repudiatory breach of contract was imported into what is now section 95(1)(c). Lord Denning MR put it as follows:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”

80. The component parts of a constructive dismissal which need to be considered are therefore as follows:

- 80.1. A repudiatory or fundamental breach of the contract of employment by the employer. Something more than unreasonable conduct is required.
- 80.2. A termination of the contract by the employee because of that breach.

81. In terms of the alleged breach of contract, it may be breach an express term or an implied term.

82. The express term in dispute here is obviously the contractual right to sick pay. It was accepted by Mr Munro in closing that a failure to pay sick pay (at least in the sum claimed) would be a fundamental breach. I agree.
83. As far as implied terms are concerned, the Claimant relies upon *Malik and Mahmud v BCCI [1997] ICR 606* in which was held that and employed is under a duty maintain the relationship of trust and confidence that should exist between employer and employee and that the employer shall not:
- “Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”*
84. A breach of such an implied term is repudiatory in nature *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, 672A*.
85. In this case, the Claimant relies upon the 7 conduct events that I have set out as collectively amounting, objectively viewed, to a breach of the implied obligation.
86. In this regard, it is accepted that a breach of trust and confidence might arise not because of any single event but because of a series of events. In such a case a claimant can rely on a “last straw” which does not itself have to be a repudiation of the contract see *Waltham Forest v Omilaju [2005] IRLR 35*, and *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*. In *Kaur* it was also confirmed that an employee can rely upon earlier conduct by the employer even if they affirmed the contract after those earlier matters, as long as the last straw adds something new and effectively revives those earlier concerns.
87. Whether breach of an express or implied term, the fundamental breach of contract by the employer need only be a single reason for the resignation of the claimant. It does not matter if there are other reasons: *Wright v North Ayrshire Council [2014] IRLR 4*.
88. Even if there is a fundamental breach, the contract may be affirmed if, after the breach, an employee behaves in a way which shows that they intend the contract to continue notably by reason of delay, but delay of itself is not sufficient. It all depends on the circumstances. It must be accepted accept that the paradigm case of the worker downing tools and walking out immediately rarely happens in modern life, particularly in professional or managerial occupations. It may take some time for an employee to consider whether to accept the breach and resign or not.
89. In *Lewis -v- Motorworld Garages Limited, the Court of Appeal [1986] ICR 157*, the Court of Appeal considered the effect of the breach of an express term (such as the failure to pay sick pay) that was affirmed but that was then followed by the subsequent breach of the implied obligation of trust and confidence and concluded as follows:
- “If the employer is in breach of an express term of a contract of employment, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, but the employee does not leave and accepts the altered*

terms of employment; if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence; is the employee then entitled to treat the original action by the employer which was a breach of the express terms of the contract as a part – the start – of the series of actions which, taken together with the employer's other actions, might cumulatively amount to a breach of the implied terms? In my judgment the answer to this question is clearly “yes” .”

90. If it is established that there has been a dismissal, the next stage is for the Tribunal to consider the reason for the dismissal and if appropriate the question of fairness. There are essentially two questions to be answered:
- 90.1. What was the reason or principal reason for the dismissal?
- 90.2. Having regard to that reason, was the dismissal fair or unfair?
91. Where the employee has been employed for two years and no automatically unfair reason is asserted, the burden lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason.

Conclusions

Breach of contract - Sick Pay 29 August 2020 – 26 December 2020

92. The first issue to consider is whether the Respondents acted in breach of contract by not paying sick pay to the Claimant between 29 August-26 December 2020.
93. The Respondents' position is that the Claimant was contractually entitled to 6 months' full pay and 6 months' pay at 50% and no more. Mr Munro confirmed in closing that the Respondents' position was that, having received the equivalent of 12 months of sick pay, the Claimant was not entitled to any further payments at any point in the course of her remaining employment with the Respondents. The Respondents thus say that as the Claimant received payments between 16 March 2019 and 28 August 2020 (the 12 month period was elongated to 17 months owing the Claimant having worked reduced hours in that period) the Claimant's entitlement to sick pay was expunged for all time.
94. The Respondents' construction of the Claimant's contractual terms gives rise to a very strange outcome. If right, it would mean that if a hypothetical employee were to be absent sick for 12 months in the first year of their employment and then absent sick again, say, in the fifth year of their employment, then no sick pay would be due in respect of the second period of absence.
95. It is true that the Claimant's Terms & Conditions of Service do provide for the payment of sick pay during a 12 month period. However, the Terms also expressly incorporate paragraph 227 of the Hospital Terms & Conditions that bear repeating:

“The ... period for which it is to be paid in respect of any period of absence due to illness, shall be ascertained by deducting from the period of benefit (under paragraph 225) appropriate to the practitioner's service on the first day of

absence the aggregate for the period of absence due to illness during the twelve months immediately preceding the first day of absence.”

96. I accept the Claimant's submission that paragraph 227 provides for a rolling entitlement to sick pay as opposed to an entitlement that is simply capped for all time after 12 months. This involves having regard to the sickness absence the Claimant had taken in the 12 months immediately preceding a period of absence in respect of which sick pay is claimed.
97. In this case:
- 97.1. The Claimant was first absent on 24 August 2020 (having returned to work prior to then after her first period of absence).
- 97.2. Paragraph 227 requires consideration to be given to the absence of the Claimant in the preceding 12 months. During that time the Claimant was absent for 1 month on full pay (24 August 2019 -27 September 2019) and 11 months on half pay (28 September 2019 – 28 August 2019).
- 97.3. As the Claimant had only used up one month of full sick pay, she still had an entitlement to five months of sick pay to be paid on a 100% basis. This entitlement should have been made available to her during her roughly four month period of absence between the period 24 August 2020 until her return on 26 December 2020.
98. In these circumstances, I find that that the Respondents acted in breach of contract by failing to pay the Claimant sick pay at 100% of her salary between the period 29 August-26 December 2020.
- Breach of Contract / unlawful deduction from wages in the period 15 February 2021-6 April 2021
99. The Claimant received no pay for the period 15 February 2021-6 April 2021. The Claimant argues that this was an unlawful deduction from wages and / or a breach of contract on the basis that she was ready and willing to work and yet the Respondents did not offer her sessions.
100. I have found that the Claimant was fit to work at this time. However, I have also found that the Respondents had made reasonable offers to the Claimant which she did not take up (owing to the ongoing sick pay dispute). I reject the suggestion therefore that the Claimant was ready and willing to work. I have found instead that the Claimant was not prepared to do so until the issue over sick pay had been resolved.
101. This aspect of the claim therefore fails.

Constructive unfair dismissal

102. There are two strands to the constructive unfair dismissal claim. The first involves breach of an express term and the second involves breach of the implied obligation of trust and confidence. I deal with each breach separately.

a. Express term – constructive unfair dismissal

103. The Claimant claims that the Respondents fundamentally breached the express terms of her contract of employment concerning sick pay entitlement by failing to pay her full sick pay for the period 29 August 2020-26 December 2020.

104. The first question is whether there was a fundamental breach of contract. I have already found that this failure was a breach of contract and I am satisfied that this was a fundamental breach of contract given its significant financial impact that led to non-payment of 4 months' of sick pay. (As noted, Mr Munro conceded for the Respondents in closing that if I found against the Respondents on the breach of contract claim that a finding of fundamental breach would follow).

105. The second question is whether the Claimant resigned because of the breach of the express term. I have already found that the Claimant's resignation was prompted by the Respondents' decision that she would not be receiving sick pay in respect of her absence that post- dated 24 August 2020. The fundamental breach thus had causative effect in this respect.

106. The third question is whether the Claimant had affirmed the contract before her resignation and so treated the it as ongoing when viewed objectively such that she lost the 'right' to resign. The Respondents maintains that the Claimant affirmed the contract by delaying her resignation. To this end, and as I have noted, the Claimant was first advised that she would not be receiving sick pay on 11 September 2011 and certainly by 26 November 2011 she was in dispute with the Respondents (through the offices of her union representative). And yet, the Claimant did not resign until 8 April 2021.

107. The Claimant points to these factors to suggest that there was not affirmation:

107.1. The Claimant received no pay (other than holiday pay) after 24 August 2020.

107.2. The Claimant did not perform any work after she was told that her sick pay was withheld.

107.3. The Claimant was in dispute over her sick pay and engaged in discussion with her representatives with the Respondents (much of it being without prejudice) such that the Claimant's should be taken as reserving her position with regard to sick pay. (In this regard, I would highlight again that I was not shown the without prejudice communications between the parties leading up to the Claimant's resignation).

108. I addition, I take note of the fact that:

- 108.1. The Claimant was ill until 26 December 2020 and on holiday for a period of time thereafter.
- 108.2. As of 16 February 2021, the Respondents did (temporarily it would seem) indicate that the Claimant was owed at least some sick pay.
109. In spite of the points raised by the Claimant and the additional points that I have considered, in my judgment, I find that the Claimant affirmed her contract in so far as her claim for unfair constructive dismissal arising out of the failure to pay sick pay is concerned. In reaching this conclusion, I have particular regard to:
- 109.1. The long delay in resigning between September 2020 when the Claimant first knew that she was not being paid more sick pay and April 2021. During this time, the Claimant was assisted by her union representative.
- 109.2. The Claimant's own evidence at paragraph 47 of her Statement in which she states that she was "*ready and wanted to return to work*" as from 26 December 2020. I infer that she made this position known the Respondents as this would be consistent with her claim that the Respondents were "*blocking*" her return to work.

Taken together, this conduct amounts to behaviour that suggests clearly to me that the Claimant was not treating her contract with the Respondents as being at an end owing to the non-payment of sick pay.

110. In my judgment therefore, the claim for constructive dismissal arising out breach of an express term must fail.
111. For completeness I should say that, but for the affirmation, I would have held that constructive dismissal on these ground was not otherwise fair within the meaning of s. 98(4) of the Employment Rights Act 1996 which I do not understand the Respondents to have disputed.

b. Implied term – constructive unfair dismissal

112. Further and in the alternative, the Claimant says that the Respondents acted in fundamental breach of contract in respect of the implied obligation of mutual trust and confidence.
113. As to whether there was a breach of the implied obligation, the Claimant relied upon the 7 conduct events that I have identified. In respect of these conduct events, 2 relate to the non-payment of sick pay and the other 5 broadly relate to a lack of support that the Claimant says the Respondents provided to her in respect of her phased return to work.
114. I have considered each conduct event already but I summarise my findings on them below.

- 114.1. Conduct event 1: On 17 October 2019, the Respondents asked the Claimant whether she was ready to work more than 3 of her 5 contractual sessions per week for the remainder of the year in circumstances where an Occupation Health Report had recently recommended that she continue to work 3 hours per sessions on 2 non-consecutive days for the next 6 months.

I have found that the Respondents reasonably raised this issue in the context of a meeting which primarily related to the welfare of the Claimant.

- 114.2. Conduct event 2: On 17 December 2019, having missed 3 sessions due to illness, the Claimant was required to attend a formal capability meeting the outcome of which, she was told, could be termination of employment on the grounds of ill health.

I have found that, in light of the Claimant's absences to date, her diagnosis and uncertain prognosis that the Respondent acted reasonably in inviting the Claimant to this meeting.

- 114.3. Conduct event 3: From 2 June 2020 to 6 April 2021, the Respondents rejected the Claimant's proposal to increase the number of sessions she worked from 2 to 3 by including 1 remote session.

I have found that the Claimant put forward a permanent contractual amendment involving reduced hours and remote working and the Respondents reasonably declined it in light of the impact on them, other staff and patients.

- 114.4. Conduct event 4: On 10 August 2020, the Claimant was invited to attend a formal capability meeting the outcome of which she was told could be termination of employment on the grounds of ill health, in circumstances where she had been working according to an agreed work plan and had suggested increasing her working hours.

I have found that in light of ongoing uncertainty around the Claimant's ability to resume her former contractual hours, the Respondents acted reasonably in calling this meeting.

- 114.5. Conduct event 5: The Claimant was not paid her contractual entitlement to full sick pay for the period 29 August 2020-26 December 2020.

I have found that the Claimant acted in breach of contract in this regard.

- 114.6. Conduct event 6: The Claimant was not paid at all for the period 15 February 2021-6 April 2021 despite being ready and willing to return to work.

I have found that the Respondents were willing to accommodate the Claimant during this time and she did not take up the opportunity to work. It follows that the Respondents' conduct was reasonable.

- 114.7. Conduct event 7: On 26 March 2021, the Respondents sent the Claimant a letter in which he stated that the Practice would not pay her the sick pay she had complained she was owed.

This is relied upon as the 'last straw' by the Claimant and it is thus relied upon by the Claimant as the last of the series of acts that led to her resigning on the basis of a breach of the implied obligation. I have found that this letter confirmed what the Claimant already knew and had known since 11 September 2020, namely that the Respondents were not paying her sick pay (contrary to advice that the Claimant was receiving from her union representative at that time). I have found that the Claimant had decided to resign owing to the failure to pay her sick pay (not because of the Respondents' failure to support her return to work).

115. In respect of Conduct events 1-4 and 6 which relate to the Respondents' failure to support the Claimant's return to work, I do not accept that these events individually or even cumulatively amounted to a breach of the implied obligation of trust and confidence. I have found that the Respondents' conduct in respect of these other events was objectively reasonable and was not designed or calculated to damage their relationship with the Claimant or indeed likely to do so when viewed objectively. These events did not therefore contribute to a breach of the the implied obligation.
116. That leaves Conduct events 5 and 7 relating to the Respondents failure to pay sick pay that I have already found to be breach of an express term.
117. Breach of an express term may coextensively amount to a breach of the implied obligation. In this case, breach of an express term had the effect of depriving the Claimant of sick pay for a substantial period and so was significant. This being so (and even though the breach may have been inadvertent on the part of the Respondents), I accept that its effect was to also give rise to a breach of the implied term on the basis that it was always likely to damage (and did so damage) the Claimant's confidence in her employer.
118. In terms of causation, I have found that the effective cause of the Claimant's resignation was the Respondents' failure to pay sick pay (being Conduct events 5 & 7) which amounted to breach of an express term but also of the implied obligation. This being so causation is established by the Claimant.
119. However, the breach of the implied obligation solely arises as a result of breach of the express obligation to pay sick pay that I have found was affirmed by the Claimant. This being so, to the extent that breach of the express term also amounts to breach of the implied term, it is a breach that has also been affirmed for the reasons I have already set out. Accordingly, there has not been a breach of the obligation of trust and confidence that the Claimant is entitled to rely upon for the purposes of her claim for constructive unfair dismissal and this aspect of the claim fails for this reason.

Employment Judge Oldroyd

Date: 7 June 2022

Judgment & Reasons sent to the Parties: 16 June 2022

FOR THE TRIBUNAL OFFICE