EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102122/2022

Held in Glasgow on 28, 29 and 30 November with members' meeting on 15 December 2022

Employment Judge M Robison
Tribunal Member J Anderson
Tribunal Member J Gallagher

Ms L McBryde	**Claimant** **In Person**
Scottish Ambulance Service	**Respondent** **Represented by:** **Mr G Fletcher - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claims under the Employment Rights Act 1996 and the Equality Act 2010 are not well-founded and are therefore dismissed.

REASONS

Introduction

1. The claimant lodged a claim in the Employment Tribunal on 28 April 2022 claiming unfair constructive dismissal, disability discrimination, unlawful deduction from wages and unpaid holiday pay. The respondent resists the claims, although concedes that the claimant was disabled at the relevant time in terms of section 6 of the Equality Act 2010 in respect of post-traumatic stress disorder (PTSD).

2. This claim relates to the claimant, who was employed as an ambulance technician (AT) (band 5), working in the role of ambulance care assistant (ACA)

(band 3) for a period of time following a road traffic accident in which she was injured while undertaking her duties. The claimant ultimately resigned.

3. At the outset of the hearing consideration was given to the outstanding issues for determination by the Tribunal. These had been listed in an annex to a note following a preliminary hearing which took place on 1 July 2022.

4. These broadly were:
   - whether the claimant was unfairly constructively dismissed following a breach of the implied term of trust and confidence;
   - whether the claimant was subjected to unfavourable treatment (by being paid at band 3 rather than band 5) for a reason arising from disability;
   - whether the respondent failed to make reasonable adjustments by placing the claimant on band 3 rather than on band 5;
   - whether the payment of wages at band 3 rather than band 5 was an unlawful deductions from wages; and
   - whether the respondent was due to pay to the claimant any outstanding holiday pay.

5. Mr Fletcher advised that the respondent accepts that four hours of holiday pay is due to the claimant, and the claimant agreed that was the amount outstanding. It was agreed that payment would be made to the claimant. The Tribunal did not therefore deal with the claim for holiday pay under the Working Time Regulations at this hearing.

6. At the hearing, the Tribunal heard evidence from the claimant. For the respondent, the Tribunal heard from Wendy Quinn, deputy director, who heard the claimant's stage 1 grievance and from Ron Lilly, area service manager, who met with the claimant to discuss the role of ambulance care assistant.

7. The Tribunal was referred to a joint bundle of documents lodged for the hearing. The claimant was given the opportunity, following the first day of evidence, to lodge additional e-mails which she had referenced in her

evidence. She lodged two additional documents on the second day of the hearing. Documents relied on are referred to in this judgment by page number.

Findings in Fact

8. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.

9. The claimant commenced employment with the respondent in December 2006 in patient transport services (PTS), being promoted to ambulance technician (AT) in October 2009 (35).

10. On 17 June 2017, the claimant was attending a road traffic accident with her then permanent partner, Steven Thompson, who was driving, when they were involved in a collision.

11. The claimant suffered whiplash, but returned to work after only a day absent on sick leave. Several months later, she was again attending a road traffic accident when she injured her shoulder. She was subsequently absent on sick leave (49).

12. On 12 November 2017, the claimant intimated to the then area services manager, Alan Crookston, that she had felt anxious about returning to work partnering Mr Thomson and had a panic attack the day before she was due to return to work on 9 November. She said she appreciated the offer to work on the urgent tier trial vehicle instead. She continued, “I need to make it clear that I am not doubting Steven’s skills as a Paramedic or his character but his driving although normal for him is not for me. I have said to Steven on numerous occasions to slow down and this is ignored and as a result we ended up in a head on collision with a van. This has led me to have flashbacks and at times uncontrollable crying…I am not saying that I do not want to go back on shift but I don’t think I can feel secure and comfortable with Steven driving to jobs…..Knowing the [urgent tier] trial is coming to an end has left me distraught and it is now affecting my home life” (41).

13. The claimant was subsequently absent on sick leave from 7 December 2017 to 11 January 2018. The reason is recorded as “anxiety/stress/depression” (49).

14. The claimant attended mediation with a view to resuming work partnering Mr Thomson. The result was that she changed shifts and worked with Andrew Sloan during 2018. In early 2019, the claimant again became anxious at the possibility of partnering Mr Thomson.

15. In January 2019, the claimant approached Mr Crookson regarding alternative duties. She asked to be seconded as an ambulance care assistant (ACA) relief in PTS for a 12 week period.

16. A notification of change form was completed confirming secondment from 4 February 2019 to 5 May 2019, to be reviewed at the end of the secondment (46).

17. However, on 3 February 2019 the claimant asked to stop her secondment and stay on accident and emergency duties (A&E) (43). Mr Crookston expressed disappointment because of the effort that had gone into arranging the secondment and given that this was as advised by the OHS “due to your alleged anxieties around A&E working”. He said he was very reluctant to overturn the decision on a text or an e-mail and suggested a meeting (43).

18. By e-mail dated 14 February 2019, Mr Crookston confirmed that he had received the information needed to allow the claimant to return to her normal A&E duties and that he had requested the necessary form to show the change. He confirmed that she would be available to return to A&E duties from w/c 25 February 2019. A notification of change form was completed confirming current PTS secondment terminated effective 25 February 2019 (48).

19. In or around February 2019, the claimant was referred by occupational health to the primary mental health team for assessment and treatment (81).

20. In July 2019, when Mr Sloan left his post as a paramedic to work full time in the office, the claimant again became anxious about who she would be partnered with.

21. The claimant was absent on sick leave from 14 July 2019 until 18 December 2019. This absence is recorded as “anxiety/stress/depression” (49).

22. The claimant was referred to occupational health on 22 July 2019 (50). She consulted Karen Pearce, occupational health nurse. An OH report completed 29 August 2019 states as follows.

23. In answer to the question, “are there any work related issues that are impacting on Louise’s ability to attend work?”, it is recorded that “Louise would be fit to consider adjusted duties at present if there was no risk of exposure to violence or aggression”.

24. In response to the question, “Is it possible to assess when the employee will be fit for work”, it is stated that, “Louise is currently receiving a course of treatment and this is likely to be complete by the end of October”.

25. In response to the question, “What impact will Louise’s medical condition have on her ability to render regular service in the future?”, it is reported that “Long term fitness for work will be dependent on outcome of current treatment”.

26. Around this time the claimant continued to undertake assessments with the mental health team (Shirley Courtney) and attended counselling at the Keil Centre and EMDR counselling (81).

27. On 23 September 2019, the claimant attended an attendance management meeting chaired by Phil McAleer, head of service. A report was completed in which it was stated that “Louise considers remaining as an AT as her first option” (58).

28. A further attendance management meeting took place on 31 October 2019 again chaired by Mr McAleer. The report states that the claimant’s absence is

due to “stress” and that the claimant advised that she did not wish to consider redeployment at this stage (62).

29. The claimant was again referred to occupational health on 1 November 2019. In the report, signed 19 December 2019, Ms Peace states that the claimant advised that she had now been diagnosed with PTSD; and that she would be unable to cope returning to her operational role currently although did not wish to consider redeployment at this time (65).

30. In response to the questions posed (65 and 74), Ms Peace stated as follows:

Q1 Can you please assess Louise for her current role as an AT?

A Louise is still receiving interventions from the MH team every 2/52 and unable to assess fully until she has completed treatment.

Q2 Will Louise be expected to return to her role as an ambulance technician?

A Until Louise has completed treatment unable to fully assess.

Q3 If Louise could return will she be able to provide regular, sustainable service in the future?

A Alternative duties where there was no risk of exposure to trauma could be considered.

Q4 Could Louise be considered for an alternative duties at this time; if so what form could these take and how long could she be expected to undertake these?

A Alternative duties where there was no risk of exposure to trauma could be considered.

Q5 Are there any restrictions to Louise working shifts?

A Louise would be able to work shifts.

Q6 Should Louise be considered for redeployment at this time?

A Louise is happy to discuss redeployment.

Q7 Can you advise what current support we can offer Louise at this time?

A Louise is fit to return to work on adjusted duties with immediate effect.

Q8 Does Louise's recent diagnosis of PTSD or any of her other current conditions affect her ability to drive an emergency ambulance vehicle?

Q9 Are any of Louise's conditions DVLA reportable for private car use, C1 class or D1 class driving?

A There are no driving restrictions in place.

31. No answer is given to the following questions posed:

Q10 When would Louise be expected to return to work?

Q11 Are there any modifications required that would aid Louise's return to work or once she returns?

32. In December 2019 the claimant completed the Learning in Practice course which was a refresher course to ensure that skills were up to date.

33. Another attendance management meeting with Mr McAleer took place on 23 December 2019 when alternative duties and redeployment were discussed (75). The report states that the claimant considered PTS as a suitable alternative and that on return she would be paid for four weeks initially at technician rate and that an extension could be considered. It reports that the claimant said that she was reluctant to join the redeployment register but she was advised that those on that register get opportunities for vacancies prior to externals. She said that she would consider this option (79).

34. The fit notes issued during this time from 22 July 2019 (71) to 23 October 2019 (68) record that the claimant was absent for stress. The fit note issued on 22 November 2019 and 9 December 2019 record that the reason for absence was "post-traumatic stress disorder". These confirmed that the claimant was unfit for work until 6 January 2020.

35. By e-mail dated 8 January 2020, Shirley Courtney, mental health nurse, wrote to Karen Peace, occupational health nurse. She confirmed that the claimant had since 21 August 2019 attended 14 out of 15 offered appointments, and stated that as follows [the copy being obscured on the right]:

> "Formal diagnosis was not part of our treatment plan…psychological formulation guided our treatment with a cognitive behavioural model, which include…reduce her symptoms indicative of Post Traumatic Stress Disorder; intrusive thoughts; flashbacks; …when driving as a passenger; and to help to lift her mood. Ms McBryde seems to have engaged and responded well to treatment. Therapy included Eye Movement Desensitisation and Reprocessing (EMDR) and Ms McBryde…intrusive images, feels competent when driving and more relaxed as a passenger. We are currently… with how she may manage potentially distressing situations in the future and have to further appointments arranged".

36. With regard to prognosis, she stated: "I am cautiously optimistic that Ms McBryde will attain a level of functioning which may continue to imp… the passage of time and continued use of techniques learned throughout therapy. However your…information regarding whether further exposure to trauma would exacerbate her condition is difficult to determine and therefore I am unable to give an opinion".

37. Following a referral to occupational health on 19 December 2019, Ms Peace forwarded a report to Mr McAteer on 13 January 2020. She advised that the claimant was still receiving interventions, had almost completed treatment but there was no conclusion as to whether exposure to trauma could exacerbate her condition. She suggested that alternative duties could be considered to facilitate a return to work where there was a low risk of exposure to trauma, which if successful could allow the claimant to progress to her current role on completion of treatment. She said that the claimant was happy to discuss redeployment and that she was fit to return to work with adjusted duties. She also stated that "I am unable to comment on Louise's future regular sustainable service as the report is unable to confirm the success of the treatment on

exposure to future trauma…Louise's diagnosis was not confirmed in the report" (86).

38. On 13 January 2020 Mr McAleer wrote to Ms Peace for further clarification about the report, advising that he could not commit to the claimant returning to adjusted duties until he had some indication of timescales for return to substantive role. While the claimant had returned on annual leave, he suggested that she may require to take further sick leave when she was due to return on 26 January unless there was an anticipated return to her substantive duties within four weeks of that date. He noted that there was no foreseen date of return because the claimant was still receiving treatment.

39. In that e-mail he stated, "With regard to the diagnosis, Louise has advised me in September 2019 she has been 'diagnosed' as having PTSD – can you enquire from EMDR if this is the case? With regard to no exposure to 'trauma' on her potential adjusted duties, it would be good to understand what this actually means, eg would dealing with palliative care patient's end of life care journey be classed as 'trauma' or does it purely relate the acute trauma faced on A&E duties? This would then allow us to consider which roles are an acceptable form of adjusted duty (and redeployment if required). For your information, Louise has been referred to the Deputy Regional Director for a Management of Health Review. I discussed Redeployment in November and December with Louise but she did not wish to apply for it at that time (Pending report from EDMR to yourself). Does she now wish to apply for reconsideration for redeployment?" (89).

40. Ms Peace responded by e-mail dated 15 January 2020 to advise that there was no diagnosis provided and no indication if exposure to further trauma would exacerbate her condition. However, she said that she "would be happy for her to progress from annual leave to a phased return and normal duties after 4 weeks. This would then be monitored and if her health started to deteriorate again the work situation would be reviewed. This is a decision Louise has to make as there is no evidence returning to her substantive post would make her unwell again. Louise did ask about support immediately after

being exposed to any traumatic situations and this maybe something you could consider. The specifics of the traumatic situations would be something you could agree between Louise and yourself at a return to work interview as you have the knowledge of the situations she could be exposed to as part of her role. She will be in the best position to advise you of potential situations where she may experience symptoms. If you are unable to support the adjustments needed for Louise to return to work then redeployment may have to be considered. I would also be happy to support Louise if she requests redeployment and decides not to return to her current post" (87).

41. An attendance management meeting took place on 29 January 2020 with Judith Pettigrew (97) when a phased return to work was agreed. This was to commence after the claimant's return from annual leave on 3 February when she would take a role in PTS for two weeks; returning to "third person duties" week commencing 24 February; and then full A&E duties week commencing 2 March 2020 (99).

42. On 24 February 2020, Jim Goodwin, then area services manager, advised Mr McAleer that he had met the claimant who was due to go back to A&E duties that week, stating "our discussion was around what she wanted and felt happy to do. She has e-mailed me today to ask if she can be considered for a permanent move to PTS. I have not answered her yet. Can you tell me your thoughts? (104).

43. On 26 February 2020 Mr Goodwin wrote to the claimant to advise "as discussed I write to confirm your temporary re-banding….you will be moved from your current A&E position to ACA relief at the top of band 3, working 5 days over 7 and this will be effective from Monday 2 March 2020" (105).

44. The notification of change document which he had enclosed, along with redeployment questionnaire, was signed and dated 10 March 2020 and stated as reason for change "temporary re-banding from AT to ACA" and effective 2 March 2020 (106).

45. On 10 March 2020 a meeting took place between the claimant and Matt Cooper, deputy regional director for the west region, when Mr Cooper was accompanied by assistant HR manager and the claimant was accompanied by her trade union representative. This was a meeting which was held under the respondent's attendance management policy and was described as a "management of health meeting". The invite letter confirmed that "the outcome of the meeting could result in the termination of your employment on the grounds of incapability due to ill health".

46. By letter dated 24 March 2020, Mr Cooper confirmed the outcome of the meeting. He noted that during the meeting the claimant was happy with the content of the management of health report that she had been sent prior to the meeting. He referenced events in her personal life as well as the road traffic collision at work which she had found stressful and had led to her attending counselling and a subsequent diagnosis of PTSD. He noted that this stress and anxiety had prevented her from undertaking her substantive role as an AT from July 2019 to January 2020. He noted that she had not been able to return to her substantive post but had been undertaking alternative duties as an ACA paid at band 3 because she had been undertaking those duties for more than four weeks. The letter continued:

"You told me that you have come to terms with the fact that it is unlikely you will be able to return to the Ambulance Technician role at this time and that you wish to continue working as an Ambulance Care Assistant. Occupational Health has also confirmed that you will be unable to return in this role. We discussed the opportunities and agreed that we would place you on the redeployment register and Hazel made arrangements for this to happen. We agreed that you could continue to work in your alternative duties as an Ambulance Care Assistant for the next six to eight weeks and we would then review your position again at that point. I made you aware that there would be Ambulance Care Assistant posts coming up in Ayrshire in the near future and you were keen to explore this as an option through redeployment.

I am pleased that you have now been able to return to work, even if it is in an alternative role at this time, and I hope you are able to find a suitable role through the redeployment process. If you require any further support with the redeployment process please contact your line manager. I will not look to arrange to meet with you again at the moment but if you have not been successful in securing a post through redeployment in the next eight weeks we will meet again and there is a possibility that the outcome of that meeting could result in the termination of your employment on the grounds of incapability due to ill health" (105).

47. The claimant was advised of her right to appeal (page 108).

48. Vacancies for ACA posts in the region were subsequently advertised, and Ron Lilly was appointed to undertake the recruitment process. He noted that the claimant was identified as a candidate for interview during the planned recruitment process, that is she was treated as an external candidate. However, he also noted that she was on the redeployment register, and following discussion with HR it was agreed that she would be extracted from the list of external applicants and that he would arrange a separate meeting with her.

49. Consequently, Mr Lilly arranged a meeting with the claimant which took place on 24 June 2020. That meeting was intended to serve two purposes, one being to discuss the claimant's application to undertake secondary employment but the main purpose being to interview the claimant as a redeployment applicant for the post of ACA.

50. Mr Lilly sensed at the outset of the meeting that the claimant was agitated. However, he believed that he had reassured her that the purpose of the meeting was not to take away the role of ACA that she had been undertaking since her return from long term absence. Rather the purpose was simply to complete the formal process and to report on her suitability for a PTS post "as per her application for re-deployment" in a cross matching exercise.

51. At the end of the meeting, he confirmed that he would be recommending appointment to the role, that being the expected outcome given she had previously undertaken the role of AT. Mr Lilly said that he discussed the completion of notification of change documentation, which the claimant assured him had been completed because she was already in the post. This was a misunderstanding.

52. On the matter of secondary employment, this was approved and Mr Lilly wrote to the claimant by letter dated 15 July 2020, as he was required to do, to confirm the approval (111).

53. That letter made no mention of the appointment to the post of ACA. On that matter, Mr Lilly said that he sent an e-mail to HR advising that he confirmed redeployment was appropriate and passed over to HR to take this matter forward, as was the usual practice. Mr Lilly stated that the e-mail also included a request to remove the claimant from the active redeployment register [but the e-mail was not lodged].

54. The claimant did not receive any written confirmation regarding her re-deployment application. The claimant did not receive any correspondence at all from HR following the meeting. That was a mistake.

55. On 23 July 2020, the claimant met with Alison Taylor to discuss an action plan. In the report headed up “Scottish Ambulance Service – Action Plan” (112-113) it was stated that the claimant disclosed that she had been diagnosed with PTSD. While that report stated that the Equality Act 2010 may apply, no adjustments or other recommendations were made. The claimant was undertaking the role of ACA at that time.

56. The claimant subsequently lodged a grievance asserting among other things that she should not have been re-deployed but should have remained a Technician or been afforded pay protection if another role was deemed more suitable.

57. A meeting to consider this stage 1 grievance was held on 16 November 2020 in line with the NHS Scotland Grievance Policy, chaired by Wendy Quinn, who was supported by an HR representative. The claimant was accompanied by her trade union representative. The claimant was entitled to call witnesses but she did not. The chair heard from Phil McAleer, Alan Crookston, Jim Goodwin and Andrew Sloan.

58. At the hearing, the claimant outlined her grievance which in summary was stated as follows: there had been a failure to recognise that she had PTSD, which she thought was a result of the accident in 2017; she was treated differently from other colleagues who she believed were protected on band 5 although their circumstances were the same; she complained of a gang mentality within the management team; she was not given access to alternative posts because she was female; she believed no action had been taken against the individual who she complained had been allowed to target female staff members; being forced to participate in mediation; that Andrew Sloan was coerced to lie during an investigatory process in relation to secondary employment; not being given the opportunity to return to her substantive post as technician; lack of support for those suffering mental health illnesses; being discriminated against when a retired employee was offered a post on urgent tier ahead of her when she had been covering the post; and that no reasonable adjustments were made.

59. The claimant was advised of the outcome by letter dated 2 December 2020 (120). Ms Quinn concluded that no diagnosis of PTSD was given to OHS. With regard to comparisons, her investigations indicated that there was no evidence that her circumstances were exactly the same and there was no preferential treatment; no evidence of a gang mentality; that she consented to participate in voluntary mediation; there was no evidence of coercion and this was an assumption she made. She also concluded that there was no evidence that staff with mental illness were treated differently from those with physical illnesses and that the recruitment to urgent tier was fair.

60. On the matter of redeployment in particular, she stated that: "I found evidence that you had written to your manager asking to be redeployed into an ACA post. Mr Matt Cooper, DRD confirmed in his letter that you were keen to explore the upcoming ACA vacancy. I found no evidence that you were able to return to your technician role which was why the ACA option was explored as redeployment and in fact what I reviewed supported that you did not want to return to your technician role. You were given the right to appeal this outcome which you chose not to".

61. On the matter of reasonable adjustments, she concluded, "You confirmed that a number of reasonable adjustments were made for you. They included being moved to another board so that Mr Sloan could work with you and support you; you were given a period on urgent tier to help you return to the workplace and thereafter you were provided with an ACA post as a temporary redeployment which you then requested permanently and were offered. Please be advised that all of these measures are considered as reasonable adjustments"

62. The claimant was advised that she could submit a stage 2 grievance which she did. A hearing to consider that was held on 7 January 2021, chaired by Garry Fraser, regional director, who was accompanied by HR advisor. The claimant was accompanied by her trade union rep.

63. The claimant appealed three aspects of the stage 1 grievance which were considered at the hearing, namely in regard to the diagnosis of PTSD; that a male paramedic also diagnosed with PTSD following a work related incident had retained his paramedic salary; and this resulted in a failure to make reasonable adjustments to enable her to return as a technician.

64. The claimant was advised of the outcome by letter dated 25 January 2021 (94). Mr Fraser noted that the PTSD diagnosis did not come to light until February 2020 and suggested that better communication could have helped understand her specific needs. However he noted that she had undertaken several different roles over the last few years and that this was to try to support her needs and requests. He noted that she had stated that she would like to be

considered to become a technician again and that being the case she should approach her manager to be referred to OHS to ensure that she was fit for the role and if she required any specific support to undertake the role again; then she would need to apply for a vacancy once OHS had assessed her. Her grievance was not upheld because there was evidence that support was provided by giving alternatives to the technician roles, and that the support provided in relation to reasonable alternatives would not have been any different if the diagnosis had been found. The diagnosis obtained was after the bulk of the meetings where support was provided had taken place. Finally he noted that, "you applied for and accepted your current role of ACA therefore this was your decision to take on a new role and you appear to have been content in this role".

65. The claimant raised concerns about these conclusions in a letter dated 25 January 2021. Mr Fraser gathered further evidence and clarification which was communicated to the claimant by letter dated 12 March 2021. In this letter, Mr Fraser confirmed that "you were provided with an ACA post as a temporary redeployment that you later requested permanently and were offered" (126).

66. On 5 March 2021 the claimant e-mailed John Burnham then head of service for West region raising a number of issues, in particular that she had raised with Mr Goodwin the fact that she was ready to return to her substantive role (129).

67. On 9 March 2021 in reply Mr Burnham encouraged the claimant to meet with Mr Goodwin as planned to allow her to fully discuss the matters regarding her desire to undertake A&E duties and potentially return to a technician role, which he understood to have been the outcome of the grievance hearing with Mr Fraser (125).

68. The claimant was then referred to occupational health to consider whether she was fit to return to the role of AT.

69. The questions for consideration by OH were as follows: has Louise been diagnosed with PTSD; If so, what treatment is she receiving; is ACA role

suitable to support her mental health; would she be suitable now or in the future for a role as AT and is there any support she would require to undertaken that role; is there a risk of triggering Louise mental health problem if she is subject to traumatic incidents?

70. In the subsequent report dated 30 April 2021, it was stated that, "Louise was diagnosed with PTSD in 2019. She is currently well and is not attending any specialists at present… She has coped well with the ACA role but also feels fit to resume her substantive post…Louise feels well enough to work as an AT. She is keen to return to this role. As Louise has not been carrying out this role I would certainly advise that all necessary training was up to date…. unable to answer triggering question as it would be difficult to determine whether further exposure to traumatic event would exacerbate a condition" (134).

71. Thereafter the claimant made a request to undertake Driver 2 roles to prepare her for returning to the role of AT. In response, a request was made (see email 23 June page 142 headed up "driving assessment") as follows: "Louise McBryde, previous technician who is currently on PTS at Kilmarnock, wants to do D2 shifts when required. I have checked back on GRS and her last A&E shift was on the 20th December so that means she will require a driving assessment before she restarts emergency driving as it was over 6 months ago. Can this driving assessment please be arranged as soon as is convenient so she can help out with D2 shifts?"

72. An assessment was therefore arranged for the end of end June but the claimant cancelled (140-142). The claimant believed she was being singled out as she has done D2 within the last 6 months and queried why she should have to do a further driving assessment (e-mail 15 July page 144).

73. Towards the end of June, the claimant asked for a meeting with Mr Cooper and at his request provided the following further information about why she wanted to meet with him in an email dated 25 June 2021: "I requested the positive action of taking on temporary alternative duties with PTS to allow recovery time after my diagnosis of PTSD. Which you agreed, with a view to being reviewed

in 8 weeks. I signed a temporary amendment form. I was never approached by my line manager to discuss my return as he went off sick. I have been ready to return to my substantive post since last year. I am still contracted to A/E. Occ health have deemed me fit to do so. I have since had to attend an Interview (no HR present) I was unsuccessful at the interview. Does this mean I have been constructively dismissed from my substantive post?" (137).

74. On 30 June 2021, the claimant asked HR for feedback as to why she was unsuccessful at interview and asked "have I been dismissed from my role and under what grounds". She continued, "once again I am a qualified Technician who has been ready to return to her role from last year. I have had no support from the service. I am being treated differently from my colleagues. It is not procedure to be interviewed when wishing to return to a substantive role from alternative duties. I am contracted to A/E. I am moving to Dunoon in September. I am looking to transfer as an Ambulance Technician" (143).

75. The claimant then applied for and was successful in obtaining a post as Ambulance Technician at Dunoon following an interview. On 28 July 2021, she asked HR if she would receive written confirmation about the post. She was told that she would have to pass the fitness test and occupational health assessment first before she would be offered the post (147).

76. In response, she advised that she had attended occupational health on 5 April 2021 and had been deemed fit to return.

77. On 6 August 2021, the claimant asked for buddying and D2 (driving) shifts at Kilmarnock (149) to prepare her for the AT role. She was told by Mr Goodwin that buddying would take place when she arrived at Dunoon. She said D2 did not allow her to practice her Technician skills (149).

78. On 7 August 2021, in regard to the AT job at Dunoon, a notification of change form was completed which stated the reason for the change was "transfer and end of temporary re-banding" effective 6 September 2021. The reference to "temporary re-banding" was an error.

79. The claimant was advised to complete a self-assessment form which was intended to identify whether she had additional training needs in order to undertake the role of AT.

80. On 10 August 2021, the claimant was advised by Mark Benton, ASM for West region that she would be buddying for the first two weeks at Dunoon; and that she should contact her team leader, Piers Millier, who would provide her with induction (page 155).

81. On 7 September 2021, the claimant commenced employment at Dunoon as a AT but was asked to desist by Mr Millier who had been instructed to do so by Mr Benton. This related to the fact that she had not performed the substantive role of AT since 2019. There was therefore a requirement for her to undertake an assessment to ascertain whether she required further training.

82. On 29 September 2021, the claimant was advised by Mr Benton that EPDD (the education department) had decided (based on her returned self-assessment) that she did not require to attend a full technician's course. She would however be invited to attend Hamilton training centre to carry out some OSCEs (scenario based exercises) on a date to be confirmed. He advised that following successful completion of the OSCEs, her technician qualification would be re-instated. She was advised that, in the meantime, she must only work in the role of D2 or ACA (238).

83. By e-mail dated 27 October 2021, the claimant was advised by Darren O'Hare following a telephone call that she was to attend Hamilton training centre as "part of the support we are providing as you return to the role of AT after an extended period away from practice. As discussed this is standard practice for anyone who has been away from their frontline role, whether that be ACA, Technician or Paramedic. The training team will assess you and any further support that is required for you to return to your role as an ambulance technician will be implemented. As discussed, this isn't punitive action. This is in place to offer a safe and supported route back to the role" (156).

84. The claimant understood that she had been told on the telephone by Mr O'Hare that this would refresher training.

85. On 29 October 2021 the claimant attended Hamilton training centre for a pre-arranged clinical assessment. This was standard procedure to assess the claimant as a previous qualified member of staff, who had been away from front line technician duties, to determine the level of support that she potentially required to return to the role of AT. She was told that, following the assessment, a recommendation would be made about two potential avenues, namely a place on the upcoming vocational qualification technician course or to support her with the offer of return to work process.

86. When the claimant queried this, because she had understood she was only there for refresher training, the CTOs appointed contacted HR who confirmed this was standard procedure to identify any potential training requirements.

87. The claimant however decided not to participate and said that she wanted to speak to management and her union because she thought she was being treated unfairly.

88. The claimant was subsequently advised (160) that, because she had failed to take the clinical assessments, a place had been reserved for her on the next technician course.

89. On 4 November 2021, in response to an enquiry from the claimant about these developments, she was advised as follows:

"As we discussed at your interview the terms of the offer of the Technician post was subject to determination of the clinical training you were required to undertake given the length of time that you last practiced as a Technician to ensure you were clinically competent to undertake this role. Given it was unclear of the skills gap requiring to be addressed a space was reserved for you at the time for the November course if the outcome of the training department assessment was that you were required to undertake a full training course this was to ensure that no new recruits were allocated this space should

it be required for you. In order to identify the training you require to undertake the full duties the training department advised there was a requirement to assess your clinical skills in order to determined what level of training was required.

I understand you were invited to the training department last week to undertake this assessment however you failed to engage in this process. As an organisation we require to ensure that all staff are appropriately trained to deliver effective care to the patients therefore it is essential that you are afforded the appropriate level of training to allow you to do this. The training department has confirmed today they can facilitate this assessment for you tomorrow therefore please advise if you are in a position to undertake this assessment. Alternatively the space on the November course which commences on Monday remains an option for you should this be required. I really hope that you engage in this process to ensure that the terms of your offer of employment are met" (159).

90. The claimant then lodged a complaint under the early resolution procedures which was considered by Islay Russell at a meeting which took place on 9 December 2021. The claimant was accompanied by her trade union representative.

91. The terms of the grievance were stated to be that: her efforts to return to A&E following an arranged period of time on PTS were not followed up and allowed to continue past agreed dates; she was not informed of the need for an assessment prior to commencing at Dunoon; she was treated differently as others returning to A&E have done so without the need for refresher training or assessment; starting at Dunoon on 7 September and being advised on 9 September to stop practicing and attend Hamilton Training Centre.

92. She was advised of the outcome by letter dated 11 January 2022. Ms Russell concluded with regard to the claimant's wish to return to the role of AT while at Kilmarnock, that "there was sufficient engagement with yourself, unions and OHS and the decision was joint for you to accept a substantive role as

Ambulance Care Assistant. You were advised by Gary Fraser in writing that should you wish to return to technician role you would require to apply in the normal process. This is the process that has been followed. This was not a transfer into a position as….it would have been an application into a new role…you would have been required to complete the technician course should your assessment deem it necessary and the placement of your name to hold a place for you was with the aim of support and progression into the role you had applied for. Your OHS report also advised further training to ensure you were adequately supported in your return to Technician role".

93. The claimant was also advised that the intention was that when she started at Dunoon she would be in a buddying third person role until her assessment was completed allowing her to progress to the technician role immediately at Dunoon or attend the technician training course if required. She apologised if the claimant was not made aware of that as she was unable to confirm that she had been advised. Because she had not completed the requested assessments, she was required to complete the technician course.

94. The claimant was signed off by her GP from 18 January 2022 until 15 February and then for a further 31 days with "exacerbation of PTSD" (166-167).

95. On 22 February 2022, the claimant attended an absence management meeting with Mark Benton, when the question of whether the claimant had been diagnosed with PTSD was raised. Mr Benton replied by e-mail advising that having checked all of her files he could not find a PTSD diagnosis. He advised that the screenshots she had sent did not constitute this and that the certificate from her doctor was two years ago, although he accepted that her most recent certificate stated "exacerbation of PTSD".

96. He continued, "The reason this is important is because you have stated that you are off work for work related PTSD. However from what I can tell your PTSD stems from incidents prior to your RTC, and then the RTC itself. Your OHS reports state that you had recovered from this and were no longer on any treatment. That is why you are recorded as absent with anxiety

/stress/depression. To be fair, you would not have been treated any differently anyway as it is service policy to support all, and any forms of mental health. The term redeployment does not necessarily refer to the redeployment process. Just that you were redeployed in an alternative role. On that basis, there is no redeployment paperwork because, to my knowledge, you have never been placed on the redeployment register".

97. The claimant resigned on 17 February 2022, advising in an e-mail of that date that "Due to the organisation's intransigence, actions and omissions my position has become untenable. I am notifying you of my resignation with immediate effect" (page 221).

Relevant law

Constructive dismissal

98. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 94(1) states than an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) states that an employee is dismissed if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly known as "constructive dismissal".

99. In *Western Excavating Ltd v Sharp* 1978 IRLR 27, the Court of Appeal set out the general principles in relation to constructive dismissal. Lord Denning stated that "An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without

leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

100. The question whether the employer has committed a fundamental breach "going to the root of the contract" is to be judged according to an objective test and not by the range of reasonable responses test (*Tullett Prebon plc v BGC Brokers* 2011 EWCA Civ 131; *Bournemouth Higher Education Corporation v Buckland* 2010 ICR 908 CA). The EAT has since confirmed in *Leeds Dental Team v Rose* 2014 IRLR 8 that it is not necessary to show a subjective intention on the part of the employer to destroy or damage the relationship to establish a breach.

101. The duty of mutual trust and confidence is a term which is implied into every contract of employment. This means that an employer must not, without proper and reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee (*Mahmud v Bank of Credit and Commerce International SA* 1997 IRLR 462 HL, *Baldwin v Brighton and Hove City Council* 2007 IRLR 232 EAT).

102. When considering whether there has been a breach of the implied term, "the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it" (*Wood v WM Car Services Ltd* 1982 ICR 666 EAT, per Mr Justice Browne Wilkinson).

103. There may be a series of individual actions on the part of the employer which do not in themselves amount to a fundamental breach, but which may have the cumulative effect of undermining the mutual trust and confidence term implied into every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal. This is commonly referred to as "the last straw" (*Lewis v Motorworld Garages Ltd* 1985 IRLR 465 CA). The last straw

must contribute something to the breach (even if relatively insignificant) (*Waltham Forest v Omilaju* 2004 EWCA Civ 1493).

104. Where there is a breach of the implied term of trust and confidence, that breach is "inevitably" fundamental (*Morrow v Safeway Stores plc* 2002 IRLR 9 EAT).

The law relating to unlawful deductions of wages

105. Section 13 ERA states that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised by virtue of a statutory provision or relevant provision of the worker's contract; or the worker has previously agreed in writing that the deduction could be made.

106. Section 23(1) ERA states that a worker may present a complaint to an employment tribunal that the employer has made a deduction from his wages in contravention of section 13.

107. Section 23(2) ERA states that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the date of payment of wages from which the deduction was made, or from the date of the last deduction where there was a series of deductions (section 23(3)).

Disability

108. Section 15 of the Equality Act 2010 states that a person discriminates against a disabled person if they treat the disabled person unfavourably because of something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim. A disabled person will not be treated unfavourably simply because they could have been treated more favourably (*Williams v Swansea University* 2019 IRLR 306).

109. Section 20 of the Equality Act 2010 sets out the employer's positive duty to make reasonable adjustments to address disadvantages suffered by disabled

people. The relevant requirement is set out at section 20(3) which states that "the first requirement is a requirement, where a PCP [of the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage". A failure to comply with the duty amounts to discrimination under section 21(2).

110. The duty arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. What is reasonable in any given case will depend on the individual circumstances of the disabled person. The test of reasonableness is an objective one (*Smith v Churchill Stairlifts plc* 2006 ICR 524 CA).

111. Section 123 of the Equality Act 2010 states that a complaint under that Act must be brought within three months of the date of the act of discrimination or such other period as the Tribunal thinks just and equitable.

Tribunal's observations on the witnesses and the evidence

112. We accepted that the claimant recounted events to the best of her ability, but we did not consider her evidence to be wholly reliable. It was apparent that her evidence was recounted from her own perspective and that there was a good deal that she had forgotten or misconstrued either at the time or subsequently. Her oral evidence is clearly not consistent with the documentary evidence which was lodged.

113. Considering the respondent's witnesses, both Mr Lilly and Ms Quinn gave their evidence in an entirely straightforward manner. On the key question of dispute about what was said at the meeting between Mr Lilly and the claimant in June 2020, we preferred the evidence of Mr Lilly. Although the claimant suggested in evidence that there had been no discussion about redeployment at that meeting in June, resulting in her giving no evidence about what happened, she was apparently reminded when she heard Mr Lilly's evidence. In any event, she did not put to him in cross examination that there had been no discussion about redeployment. We accepted that she had forgotten about that; and

indeed there was no paperwork relating to the meeting or even issued after it which could have reminded her about the discussion.

114. As Mr Fletcher recognised, the respondent's case was not assisted by a lack of paperwork. We would have expected to see a written contract changing the claimant's terms and conditions or at least an amendment or notification of change following the meeting with Mr Lilly.

115. We did also note that there was a general lack of paperwork lodged by the respondent. We might have expected to see e-mails which were said to have been sent, but Mr Fletcher said that archive e-mails had been lost in the transition from .net to .scot. Further, the respondent did not lodge what we considered were relevant policies such as the attendance management policy, the grievance policy and the redeployment policy. Nor was the "Management of Health" report lodged. While we appreciated that events took place during the time of covid, we did not consider that excused the respondent from these lapses. Our decision-making and fact-finding role was severely hampered by this lack of documentation.

116. We also accepted that there were a good many communication failures, even allowing for the claimant's misunderstandings, and that, as Mr Fraser found, better communication would certainly have assisted the claimant's understanding of why things were done. Examples include the failure to be clear about her position on transfer to Dunoon and taking her off shift when it was realised that an assessment was required. Further, we noted that some managers had passed on the wrong information, for example the claimant was told that she would not have to undertake the technician course before returning to Dunoon, but a place was reserved for her on the course; and the claimant was advised (in February 2022) that no diagnosis of PTSD had been recorded and that she had never been placed on the redeployment register both of which are clearly incorrect. Such errors would not have helped the claimant to fully understand the correct position.

Finding in relation to the ACA position

117. Notwithstanding, this case appears to turn largely on a single disputed fact, as Mr Fletcher suggested. That relates to the question whether the claimant took up the role of ACA at Kilmarnock Station on a permanent basis or whether it was temporary.

118. The claimant's position is that it was temporary or at least she has become convinced of that. We noted that it was the claimant's firm position in evidence that she had taken the role of ACA on a temporary basis only. She did not accept at this hearing that she had been offered and accepted the position on a permanent basis. She says that she considered that as an option, but that is not what happened. She stressed her understanding that there would be a further meeting with Mr Cooper regarding the temporary role but that never took place. She appears to suggest that since that meeting never took place, there was no subsequent change from the temporary role. She asserts that she was never on redeployment and that the meeting with Mr Lilly was only about the issue of secondary employment.

119. This was her oral evidence but she relied on certain documents and absence of documents. In particular, in a letter to her dated 26 February 2020, Mr Goodwin confirmed that it was a temporary re-banding. That it was temporary is also made clear in the notification of change dated 10 March 2020.

120. She disputes what was discussed at the meeting on 24 June 2020 with Mr Lilly. While she initially stated that she had no memory of any discussion about redeployment, she appears to have recalled having heard his evidence that she was indeed agitated during the meeting, as Mr Lilly had said. We noted that there was no paperwork issued prior to the meeting to advise that it was to be an interview for cross matching purposes. We noted that the only paperwork issued after the meeting referenced secondary employment and made no reference at all to redeployment. There was no letter of appointment, no notification of change, no new contract of employment. There was no paperwork at all relating to redeployment or showing that she was on the

redeployment register. Had these documents been issued, there could have been no dispute about the position.

121. The claimant's position is further fortified by the fact that the notification of change when she accepts the job as AT at Dunoon states that the reason for change is "transfer and end of temporary re-banding" (dated 7 August 2021). Mr Fletcher recognised that this presented a difficulty for the respondent, but explained that it should be accepted as a clerical error in light of all of the other evidence.

122. Indeed, we did come to the conclusion based on the evidence which we heard that the claimant had requested permanent redeployment and that she had been successful in securing the position of ACA following the interview with Mr Lilly.

123. We thus accepted the respondent's submission that the claimant was put on a permanent ACA contract in June 2020. This conclusion is based on the following facts which we found:

- Mr Goodwin refers to an e-mail when the claimant asks him if she could be considered for a permanent post (104). In cross examination, the claimant accepted that she had asked for a permanent move to PTS.
- The occupational health reports obtained in August and December 2019 and January 2020 indicate that the claimant should not be exposed to trauma, which the respondent points out would mean that she could not safety undertake the AT role. It was not until April 2021 that the claimant was deemed fit to undertake the role of AT.
- The letter from Mr Cooper following the meeting in March 2020 notes that the claimant had told him that she had "come to terms with the fact that it [was] unlikely [she] will be able to return to the Ambulance Technician role at this time and that [she wishes] to continue working as an Ambulance Care Assistant. Occupational Health has also confirmed that [she] will be unable to return in this role. [They] discussed the opportunities and agreed that [they] would place [the claimant] on the

redeployment register and Hazel made arrangements for this to happen".

- There was no promise by Mr Cooper to meet her within six to eight weeks, as the claimant insists. This is what she understood from the sentence in the letter dated 24 March 2020 "we agreed that you could continue to work in your alternative duties as an ambulance care assistant for the next six to eight weeks and we would then review your position again at that point". However, he goes on to say "I will not look to arrange to meet with you again at the moment but if you have not been successful in securing a post through redeployment in the next eight weeks we will meet again".
- The claimant was given a right to appeal this outcome but did not.
- The claimant was in fact placed on the redeployment register, as mentioned in that letter. This was also confirmed by Mr Lilly who saw that her name was on the register. Her name was thus on the redeployment register from March to June 2020.
- In June 2020, the claimant was interviewed for a permanent vacancy for ACA at Kilmarnock by Mr Lilly which was a cross-matching exercise. This was confirmed in a report prepared by Mr Lilly shortly after in August and September 2020.
- The follow up meeting suggested by Mr Cooper was not therefore required because the claimant was successful in securing a permanent post through redeployment.
- Ms Quinn confirmed in the outcome of the stage 1 grievance that "You were provided with an ACA post as a temporary redeployment which you then requested permanently and were offered" (120).
- Although the claimant appealed a number of Ms Quinn's conclusions, she did not raise this as a concern when she appealed to Mr Fraser.
- Mr Fraser's letter is written on the premise that the post was permanent. In particular he concluded the letter stating that she had applied for and accepted a permanent position of ACA. He also stated that if she wanted

to be considered for an AT role she would need to apply for a vacancy (126).

- Although the claimant took further issue with these conclusions in a follow up letter dated 25 January 2021, in his reply dated 12 March Mr Fraser again confirms that the ACA position was permanent.
- The claimant does not reference or suggest that this was not accurate at the time.
- The claimant was being advised by trade union representatives, who represented her at these meetings.
- The claimant worked in the role of ACA on a band 3 pay from March 2020 to September 2021.
- The claimant indicates in an e-mail to Mr Goodwin that she is ready to return to the AT role, but she does not apparently suggest that her banding at 3 was temporary and that she should therefore revert as of right to the AT role.
- If she believed that there should have been another meeting with Mr Cooper which she continually stressed during evidence - frequently asserting on this matter “this is why I am here” - then she apparently made no effort to follow that up and to request another meeting until June 2021.
- It is clear that whatever the claimant’s understanding, and even if she had at one point considered becoming permanent ACA but did not intend that to be followed through, the respondent operates on the basis that she has taken the ACA role on a permanent basis.
- The claimant does not complain when it is stated in both Ms Quinn’s outcome letter and Mr Fraser’s outcome letter that she had taken a permanent position. She does not raise this point in the appeal, although she does raise a number of other matters.

124. This finding that she was offered and accepted a permanent position as an ACA is significant for all of her claims, to which we now turn.

Tribunal's conclusions

Unfair dismissal

125. The claimant claims unfair constructive dismissal. She relies on the implied term of mutual trust and confidence which she argues was breached, justifying her resignation and permitting her to claim unfair dismissal.

126. As noted above, the duty of mutual trust and confidence is a term which is implied into every contract of employment, and means that an employer must not, without proper and reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence. Where there is a breach of the implied term of trust and confidence, that breach is "inevitably" fundamental. Thus if the claimant can show that the term has been breached, then she will succeed at least in showing that there is a breach which is "fundamental" going to the root of the contract, which is a prerequisite for claiming unfair dismissal following a resignation. Here, the claimant relies on their being a series of actions by the employer which taken together with "the last straw" has undermined the mutual relationship of trust and confidence.

127. In his submissions, Mr Fletcher relied on the decision of the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* 2018 IRLR 833, where the Court of Appeal set out five questions which a Tribunal should ask itself in an unfair constructive dismissal claim, as follows: 1) What was the most recent act (or omission on the part of the employer which the employee says caused, or triggered, their resignation; 2. Have they affirmed the contract since that act? 3. If not, was that act (or omission) by itself a repudiatory breach of contract? 4. If not, was it nevertheless 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 affirmation) and 5. Did the employee resign in response (or party in response) to that breach?

128. Mr Fletcher argued that even if the Tribunal discounts the evidence of Mr Lilly regarding the appointment to the ACA role, the claimant affirmed the contract by continuing to work in the role after the grievance and appeal hearings. She worked in the role of ACA until the AT role was accepted in August 2021.

129. He argued that the events which the claimant relies on do not amount to a course of conduct or "last straw" type of case. Referencing *Malik* and the *Waltham Forrest* cases, he submitted that if the claimant relies on a course of conduct there must be a last straw, which has to contribute something to the breach, although it may be minor. He argued that in this case, the claimant refused to undertake the OSCEs but it was in her gift to return; whereas her response was to go off sick when she had regular attendance meetings and support from occupational health. He submitted that, the test being objective, nothing had changed by February 2022 when she tendered her resignation. The claimant, he argued, has not identified anything that goes to the root of the contract or any meaningful last straw.

130. The claimant in this case relies on a course of conduct, that is that the respondent's conduct has the cumulative effect of undermining trust and confidence. The claimant, in her written summary of her submissions, set out the course of conduct as: being forced to work as an ACA; being removed from a band 5 and reduced to band 3 after it was confirmed that her diagnosis of PTSD was due to a work related incident; being forced to stop practicing as an ambulance technician (when she commenced at Dunoon); and being force to retrain as an ambulance technician.

131. The claimant initially described the last straw as "not accepting my diagnosis of PTSD and the willingness to reach a resolution". She confirmed in oral submissions however that she meant that the last straw was Mr Benton's failure (as she saw it) to deal with her concerns raised at the attendance meeting which took place on 22 February 2022.

132. If the claimant had established these as facts, then it is highly likely that we would have found that there was a breach of the implied term. However it is

clear from our finding in facts that we do not accept the claimant's version of events.

133. In particular, as above, we do not accept that the claimant was "forced to work as an ACA". We have found that the claimant requested to return after long term sick leave at the beginning of January 2020 to the role of ACA. While this was originally temporary, we have found that the claimant took the view that she could not, at that time, revert to the role of AT. This was the view of occupational health, at least that she could not return to a role where there was any risk of exposure to trauma. We have found that the claimant attended an interview for a permanent post as ACA to which she was appointed.

134. We do not therefore accept that the claimant was "removed from a band 5 to band 3 after my diagnosis of PTSD confirmed it was due to the work related incident in 2017". The claimant asked to return after long term sick to the role of ACA and this was put into effect on a temporary basis. Then the claimant asked for a permanent placement in the role of ACA because she do not wish, at the time, to revert to the role of AT. Indeed the view of occupational health was that she should not be in a role where there was at risk of exposure to trauma. It cannot be said therefore that she was "removed" except to the extent that the respondent acceded to her requests. The respondent's practice was to allow a temporary deployment at the pay band of the substantive role but only for four weeks. It was possible to get an extension but this would not as a matter of course continue indefinitely. The claimant made no request for such an extension. Although she now believes that Mr Cooper was to get in touch with her after six to eight weeks after the meeting on 10 March (at which time the position was temporary), that is not how his letter reads. In fact what she did was ask to move to the ACA role on a permanent basis.

135. Nor do we accept that the claimant was "forced to stop practicing as an AT", or at least we accepted that there was a valid reason for this request. While the claimant was asked to desist from undertaking the AT role when she moved to Dunoon, this was because she required to undertake assessments to ascertain whether and to what extent she required further training, having not done the

role since 2019. Unfortunately, it appears that there was a failure on the part of the respondent to properly communicate the requirements at the time but that does not mean that the request to desist and only undertake driving/ACA roles until the training assessment had been undertaken was not a valid requirement.

136. We do not therefore accept that she was "forced to retrain" or at least we accept that it was reasonable and proper for the respondent to request that she undertake retraining before re-commencing the AT role, when she had not been undertaking that role for more than six months. The claimant appears to have come to the view that the fact that she had previously undertaken the role of AT, and the fact that she had done driving and buddying while in the role of ACA, meant that she would not have to undertake further training. While in evidence she suggested that she was doing AT shifts while at Kilmarnock in the role of ACA, including driving, she admitted in cross examination that she was not the lead clinician on these shifts/journeys but a "third person"; and in an e-mail said that driving did not give her the opportunity to practice her technician skills. She seems to believe she was being singled out but we found no evidence of that. We accepted that, objectively, it was obviously appropriate at the very least for her to undergo assessments to determine whether or not further training was needed. As Mr Fletcher submitted, the claimant should have realised that given the e-mails she received, including the one from Mr Benton which confirmed that she would not be required to undertake the full technician course, but she appears not to have construed them in that way for whatever reason. We were at something of a loss to understand why the claimant would not undertake the training assessments because her perception that she did not require to retrain was not consistent with common sense or even her own evidence, when she recognised the need for on-going training.

137. We considered whether the effect of the employer's conduct overall was conduct which an employee could not be expected to put up with, and we concluded, on the facts that we have found, that could not be said of the

employer's conduct in this case. While we have found that the respondent's paperwork was woefully inadequate, either missing or inaccurate, and managers had been given incorrect information, standing back looking at the employer's conduct overall, we noted that the employer had gone to some lengths to accommodate the claimant and to seek to retain her. Indeed, we accepted Mr Fletcher's submission that had the claimant undertaken the assessments at HTC then she could still be in the role of AT working at Dunoon.

138. Thus we do not accept that this as a course of conduct which could, objectively, be said to be calculated or even likely to destroy the relationship of trust and confidence. There being no breach of contract and the claimant having resigned, this claim must therefore be dismissed.

Discrimination arising from disability

139. The claimant in this case argued that she had been unfavourably treated for a reason relating to her disability contrary to section 15 EqA. The question in this case was whether the claimant was subjected to unfavourable treatment by being paid at band 3 rather than band 5 for a reason arising from disability.

140. Mr Fletcher argued that, as at 18 February 2020, the claimant asked to stay in the band 3 role so suffered no disadvantage by being paid at band 3 when she was not doing a band 5 role, whether the respondent recognised PTSD or not. He did not understand the claimant to be arguing that the failure to recognise PTSD amounted to discrimination arising from disability.

141. The claimant argued in her submissions that "I have been discriminated against as Technician with a mental health disability as I was not offered the same pay/conditions as a paramedic with PTSD (mental health disability)".

142. The claimant appears to argue here that she has been less favourably treated than a colleague because of disability. However, the claimant made no claim of direct discrimination, but in any event on these facts such a claim could not succeed. The claimant thought that she was being treated differently from a

colleague, who also had PTSD. It could not therefore be said that she was treated less favourably because of the condition of PTSD. We also heard some evidence that Ms Quinn was aware of this comparator and she explained that his circumstances were very different. Further as Mr Fletcher pointed out, those presenting with disabilities are treated as individuals, and the solution for one may not be appropriate for another member of staff even with the same condition.

143. While in this case it might be argued that the "unfavourable treatment" (paid at band 3) was the result of "something" (the experience of trauma) which "arose in consequence of her disability" (PTSD), here we have found that the claimant had requested first a temporary and then a permanent move. It cannot be said that this is unfavourable treatment meted out by the respondent, since this change was at her request. The change to ACA did not arise because of the trauma which was a symptom of PTSD, but because the respondent acceded to the claimant's request.

144. Had we found that the claimant had been "forced" to work as an ACA, because of the trauma that she experienced as a result of her condition, then we may well have concluded that this was unfavourable treatment satisfying the test. However and in any event, given the occupational health reports which state, in particular, that the claimant should not undertake a role which has a risk of exposure to trauma, it may be that the respondent would have been able to show that such a move was "a proportionate means of achieving a legitimate aim". In particular, given the fact that it would be impossible for the claimant to remain in an AT role and not potentially be exposed to trauma, and given the nature of the respondent's business and the need to protect not just the claimant but also patients, that may mean that a requirement to work as an ACA instead of an AT (and to be paid at the relevant rate) was justifiable to achieve a legitimate aim. Further, it could be argued that it was proportionate, not least because the claimant was said not to be fit for the AT role for over a year until April 2021. However, we did not need to consider this question, because we find that there was no unfavourable treatment.

145. We therefore conclude that the claimant has not satisfied us that she was unfavourably treated for reasons related to her disability and therefore she had failed to to fulfil the relevant provisions. That claim must also be dismissed.

Failure to make reasonable adjustments

146. The claimant argues there has been a failure to make reasonable adjustments contrary to section 21 EqA. In this case, the claimant apparently relies on the first requirement under section 20(3), that is where "a requirement, where a provision, criterion or practice (PCP)" of the employer "puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled" then the employer must "take such steps as is reasonable to have to take to avoid the disadvantage".

147. Mr Fletcher submitted that he understood that the PCP relied on was the respondent's practice of only allowing four weeks in the lower banded job to be paid at the higher rate. However, he relied on the fact that the claimant asked for more time in the lower banded post and that was extended to March 2020, which is two years and one month before she raises this claim. He also relied on the fact that the claimant signed the notification of change and agreed to the contractual change. He submitted that while it may have been a temporary adjustment for six to eight weeks, that temporary adjustment ended in June when she got the permanent ACA position. While Mr Fletcher accepted that the respondent had no documents to support the position, he asked the Tribunal to accept the evidence that the claimant continued to work in that role.

148. We also understood the PCP to be the respondent's policy of retaining the substantive pay band for only four weeks, before reducing pay to the level matching the post being undertaken (even on a temporary basis).

149. It may well be that such a policy would place a disabled person at a substantial disadvantage (receiving less pay), in comparison with those not disabled (not suffering PTSD), in which case the respondent should take such steps as are reasonable to avoid the disadvantage.

150. Here, the claimant complains that the respondent had failed to make reasonable adjustments by placing her on band 3 rather than on band 5 for the period from March 2020 through to September 2021. Again, as above, we have concluded that the claimant requested, and the respondent agreed, to move to the band 3 role first on a temporary basis then a permanent basis, and there was no question of her being "forced" to continue in the band 3 role because this was done at her request. This is notwithstanding the conclusions of occupational health at the time.

151. While such a PCP might well place disabled employees at a substantial disadvantage, triggering the duty, it could not be said that to pay the claimant at a band 5 level when she was undertaking the band 3 role on a permanent basis is an adjustment which would be a reasonable one. This is particularly where the change was requested by the claimant.

152. There being no failure to make reasonable adjustments in these circumstances, that claim cannot succeed.

Unlawful deductions from wages

153. The claimant also argues that the payment of wages at band 3 rather than band 5 for the period from March 2020 until September 2021 was an unlawful deduction from wages.

154. We heard that the respondent's practice is to continue to pay at the substantive pay grade for four weeks, which we understand took place in this case. While it is clear that this was initially a temporary arrangement, we have found that the situation became permanent. That was at the request of the claimant.

155. While no new contract of employment was issued as might have been expected, and no notification of change documentation was completed or at least lodged, we have found as a matter of fact that there was an amendment to the claimant's contract of employment. Her substantive role changed from AT to ACA and that was formalised following the interview with Mr Lilly in June 2020. The claimant remained in this role until she applied for and was

successful in interview for the position of AT at Dunoon commencing September 2021.

156. Thus the claimant's contractual terms were amended and wages at the pay rate applicable to band 3 were "properly payable" since the contractual position was that the claimant, after March 2020, was band 3. It could not be said that the claimant suffered any unlawful deduction from wages, because she was paid a salary in accordance with her contracted role.

157. The claim for unlawful deductions from wages cannot therefore succeed and is also dismissed.

Time bar

158. We have found that the facts do not support that claimant's claims that she was unfairly dismissed, discriminated against or suffered an unlawful deduction from wages. The respondent argues that the claim is in any event time barred and for completeness we went on to consider that question.

159. We understood this submission to be in relation to the claims under the Equality Act and claim for unlawful deductions from wages only. With regard to the unfair dismissal claim, the claimant resigned on 26 February 2022 and contacted ACAS on 28 February 2022, with the certificate issued on 22 March 2022, and the claim lodged on 28 April 2022, so that claim is lodged in time.

160. We then considered the position with regard to the unlawful deductions from wages claim. Mr Fletcher submitted that the position had fundamentally changed by September 2021 when the claimant got the position of AT. Then she returned to band 5; and given a time limit of three months from the date of the last deduction; that would be December 2021.

161. The relevant provision is section 23 of the Employment Rights Act 1996, set out above. This would be an instance of a series of deductions, which would mean that time would run from the last of those deductions. We accepted that the claimant was receiving band 5 wages by 6 September 2021, and therefore should have lodged the claim within three months of the last deduction, which

would mean that, at the latest, the claim should have been lodged by 5 December 2021. The claim was not lodged until 28 April 2022.

162. The claim having therefore been lodged out of time, the Tribunal has discretion to extend the time limit where it was not reasonably practicable for the claimant to have lodged the claim in time. There was no clear reason given by the claimant for the delay, beyond that she did not understand the legal position. The claimant was however liaising with the respondent about other matters and getting advice from her trade union reps during the whole of the period of the deductions. The deductions were being made from around March 2020. Claims could have been pursued this claim from then onwards had the claimant at the time believed she should have been paid at band 5 notwithstanding her role as ACA. We could not therefore accept that it was not reasonably practicable for her to have lodged the claim in time, particularly since she had the support of her trade union throughout.

163. Thus even if we had found that the claimant had suffered an unlawful deduction from wages, we would in any event have found that claim to have been lodged out of time.

164. We then considered the position with regard to the discrimination claim, where the relevant provisions are set out in section 123 of the Equality Act 2010.

165. Mr Fletcher argued that the claimant's complaint relates to issues which were resolved by September 2021 when she accepted the post in Dunoon. There are no allegations of discriminatory conduct in 2022. She lodged her claim on 28 April 2022 raising issues which should be reasonably known at the time. He argued that, with the extension of 29 days for ACAS conciliation, the date of the last act of discrimination had to be 30 December 2021 to fall within the relevant time limits. With regard to the failure to make reasonable adjustments, he submitted that that claim should have been lodged within three months of 2 December 2020 because the claimant applied for a permanent position as an ACA and the claimant must know that it is not a reasonable adjustment to pay at band 5.

166. On the question of a just and equitable extension, referencing *Robertson v Bexley Community Centre* 2003 IRLR 434, Mr Fletcher submitted there is no continuing act here because the claimant obtained the technician role in September 2021. Even if the issues around the HTC are discriminatory, he argued, these happened two months before the primary time limit.

167. We note, in regard to the reasonable adjustments claim, that the claimant was challenging the respondent's practice to pay only four weeks at the substantive band before moving to the band for the role actually being carried out (even if temporary). Arguably then, the claimant should have raised this matter formally at that time which was around March 2020. As Mr Fletcher pointed out this is more than two years before she lodged the claim.

168. We noted in any event that the claimant secured the role of Ambulance Technician in August 2021 and was paid at band 5 following commencement at Dunoon in 6 September 2021. We accept that there could be no continuing course of conduct following that date, the focus of the claimant's claim being the failure to pay her at band 5. We accept that any claim should have been lodged within three months of that date. The claimant notified ACAS on 28 February 2022 but that was already out of time, because three months from 6 September 2021 is 5 December 2021. This would mean that the claimant would not in any event get the benefit of the extension of 29 days.

169. Even if the claimant had argued that the requirement for her to attend the Training at HTC was discriminatory (although we did not understand her to make that argument), this took place on 27 October 2021 so that the time limit would be 26 January 2022, so again not in time.

170. Likewise, with the unfavourable treatment claim, any unfavourable treatment must be said to have ended on 6 September 2021, when the claimant was paid at band 5 in the role of AT.

171. In such circumstances, for claims under the Equality Act, the claimant can seek an extension on the grounds that it is just and equitable. This test is different from the test to determine whether it was not reasonably practicable to lodge

a claim. While the claimant could have, with union advice, lodged a claim following her commencement in the role of AT in September 2021, we appreciate that she was then absent on sick leave from the end of October with "exacerbation of PTSD". We noted however that the claimant commenced new employment 28 March 2022 so she must have recovered from the condition by then. She did not lodge the claim until one month later, that is on 28 April 2022.

172. Had we seen medical reports about the claimant's condition we would have taken these into account when considering whether an extension was just and equitable in this case. However, we have in any event found that the claimant's claims under the Equality Act are not well-founded so that no final view on that question required to be reached.

Conclusion

173. We find that the claimant resigned so was not constructively dismissed, therefore her claim for unfair dismissal must fail. Further we find that there was no unlawful deduction from wages and no breach of the Equality Act 2010 so these claims must also be dismissed.

Employment Judge: Muriel Robison
Date of Judgment: 16 December 2022
Entered in register: 20 December 2022
and copied to parties