THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **Employment Judge K Andrews**
MEMBERS: **Ms J Forecast**
Mr C Rogers

BETWEEN:

Mrs A O'Mahony

Claimant

and

Priory Healthcare Limited

Respondent

ON: **4 November 2022 and**
14 &15 December 2022
in chambers

Appearances:
For the Claimant: **Mr J Castle, Counsel**
For the Respondent: **Dr M Ahmed, Counsel**

REMEDY JUDGMENT

The Judgment of the Tribunal is that:-

The respondent is ordered to pay forthwith compensation of **£40,332.63** to the claimant That sum is calculated as follows:

Unfair Dismissal

Basic Award:		£3,255.84
Compensatory Award:		
Loss of earnings		
8 September – 7 December 2020	£5,115.60	
Plus 25% uplift (ACAS)	£1,278.90	
		£6,394.50
		£9,650.34

Unlawful detriment	
Injury to feelings	£22,000.00
Money claims	
Unpaid wages (gross)	£ 9,167.75
Less overpaid wages	£ (485.46)
Total	**£40,332.63**

This sum does not fall to be grossed up as the amounts paid net of tax (compensatory award and injury to feelings) do not exceed £30,000.

The Recoupment Regulations do not apply to this award.

REASONS

1. In this matter the claimant complained that she was unfairly constructively dismissed and that that dismissal was automatically unfair because she had made protected disclosures and raised a relevant health and safety matter. For the same reasons she said she was subjected to detriments and further that there were unlawful deductions from her wages and she was owed holiday pay.

2. In summary the Tribunal's liability judgment was that:

    a. The claimant made protected disclosures and, until 14 August 2020, had a reasonable belief in serious and imminent circumstances of danger (referred to hereafter simply as her 'reasonable belief') and refused to return to work as a result.

    b. The claimant was subjected to detriments because of that reasonable belief (but not because of her disclosures) both:
        i. when her salary was withheld between 24 March and 14 August; and
        ii. when she was threatened with disciplinary action in relation to her absence up to 14 August.

    c. The respondent breached the implied term of mutual trust and confidence when:
        i. it withheld the claimant's salary between 24 March and 14 August;
        ii. it withheld payments for her monthly clinical supervisions;
        iii. it failed to conduct a proper grievance process; and
        iv. it brought disciplinary proceedings against her for unauthorised absence before 14 August.

d. The claimant resigned in response to that breach and therefore was constructively dismissed.

e. The reason for that constructive dismissal was conduct and insofar as that conduct was the claimant's absence until 14 August, it was an automatically unfair constructive dismissal because of her reasonable belief and in any event was unfair on ordinary principles.

3. In that Judgment we noted that the pleadings and submissions from both Counsel (and to some extent the evidence) did not address the issue of unpaid wages, including holiday pay. Accordingly we did not sufficiently understand the claim and the response in this respect in order to be able to make a decision and would invite further submissions (and if necessary, evidence) at the remedy hearing on these matters.

4. It was clarified during Mr Castle's submissions at this hearing that the claimant is no longer pursuing a claim that any unpaid wages or holiday pay was a detriment. They remain as money claims only.

Evidence

5. We heard oral evidence from the claimant and were provided with a schedule and counter schedule of loss.

6. We had an agreed bundle of documents relevant to remedy as well as the original liability bundle and witness statements. We also had written submissions from both Counsel, supplemented orally.

Relevant Law

7. <u>Unfair dismissal</u>

8. If a re-employment order is not made (and none is sought by the claimant), the remedy for unfair dismissal is limited to compensation by way of basic and compensatory awards calculated in accordance with sections 118-124 of the Employment Rights Act 1996 (the 1996 Act).

9. The basic award is calculated by reference to a statutory formula. The parties agree that for the claimant the relevant award amounts to £3,255.84 (subject to any finding of contributory fault on the part of the claimant – discussed below).

10. As far as the compensatory award is concerned, the starting point is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the claimant subject to his/her duty to act reasonably in order to mitigate that loss. The burden of proof is on the respondent to show that the claimant has failed to mitigate (Bessenden Properties Ltd v Corness [1974] IRLR 338) but it is a question of fact for the Tribunal to resolve by assessing when the claimant, if he/she was acting reasonably in his/her job search, will find or would have found suitable alternative employment and

at what level of income.

11. The Tribunal is entitled to take the view on the evidence before it that there is no real prospect of the employee ever obtaining an equivalent job, and in such a case the Tribunal must assess loss on the basis that it will continue for the claimant's working life, however difficult or speculative (Wardle v Crédit Agricole Corporate and Investment Bank [2011] ICR 1290).

12. The relevant calculation of compensation is then subject to various possible adjustments.

13. First, where the Tribunal concludes that the dismissal was unfair on procedural grounds but that the claimant would have been dismissed even if a fair procedure had been followed (Polkey v AE Dayton Services Limited [1988] ICR 142). Further, if the Tribunal concludes that, but for the dismissal, the claimant would have been fairly dismissed thereafter, it is just and equitable for compensation to be awarded on that basis (O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615).

14. Second, compensation may be increased or decreased by up to 25% according to whether a party complied with the principles of the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). This provides not only the structure and format of a fair grievance process but also emphasises the need for fairness and transparency in the application of that process and specifically that employers should carry out any necessary investigations, to establish the facts of the case.

15. The focus when deciding upon whether to award an uplift needs to be upon the failures to comply with the Code as opposed to unfairness or conduct generally (Lawless v Print Plus (Debarred) UKEAT/0333/09). The circumstances which will be relevant will vary from case to case but will include:
    a. whether the procedures were ignored altogether or applied to some extent;
    b. whether the failure to comply with the procedures was deliberate or inadvertent; and
    c. whether there are circumstances which may mitigate the blameworthiness of the failure.

16. If the Tribunal does find an unreasonable breach of the Code, it must follow the four-stage approach set out in Slade v Biggs and Stewart ([2022] IRLR 216):
    a. Is the case such as to make it just and equitable to award any ACAS uplift?
    b. If so, what does the Tribunal consider a just and equitable percentage, not exceeding although possibly equalling, 25%?
    c. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the Tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?
    d. Applying a final sense-check, is the sum of money represented by

the application of the percentage uplift arrived at by the Tribunal disproportionate in absolute terms and, if so, what further adjustment needs to be made?

17. Third, if it is just and equitable, a reduction having regard to any blameworthy conduct of the claimant that contributed to the dismissal to any extent (sections 122(2) & 123(6)). A reduction to the basic award is not mandatory even if there is culpable conduct (Optkinetics Ltd v Whooley [1999] ICR 984) but it is very likely (though not inevitable) that any reduction to the compensatory award will applied in the same or similar way to the basic (Steen v ASP Packaging Ltd [2014] ICR 56).

18. In order to justify a specific reduction, the Tribunal has to find:
    a. culpable or blameworthy conduct of the claimant in connection with the unfair dismissal;
    b. that that conduct caused or contributed to the unfair dismissal to some extent;
    c. that it is just and equitable to make the reduction (Nelson v BBC (No 2) [1979] IRLR 346).

19. Langstaff P in Steen advised Tribunals to approach this issue by identifying:
    a. the conduct in question;
    b. whether it was blameworthy;
    c. whether it caused or contributed to the dismissal (in relation to the compensatory award); and
    d. to what extent the award should be reduced.

20. In making this assessment the Tribunal forms its own view as to what happened rather than the reasonableness or otherwise of the respondent's view.

21. Establishing the causal link between the blameworthy conduct and the dismissal can be problematic in cases where the dismissal was constructive. There would have to be a connection between the employee's conduct and the fundamental breach by the employer. Such a finding will be unusual particularly in a case concerning a breach of the implied term of trust and confidence as there must have been no reasonable or proper cause for the employer's conduct for there to be a breach of the implied term (Firth Accountants Ltd v Law [2014] IRLR 510).

22. The statutory cap applied to the calculation of the compensatory award by sections 117(1)&(2) and 123 does not apply where the dismissal was automatically unfair, as is the case here.

23. No award in respect of loss of statutory rights should be made where there is a finding that the claimant would have been fairly dismissed in any event (Puglia v C James and Sons [1996] IRLR 70).

24. Unlawful Detriment

25. The relevant remedy for a health and safety detriment is found at section 49(1) and (3) of the 1996 Act which provides for a declaration and compensation such as the Tribunal considers just and equitable in all the circumstances having regard to both the relevant infringement and any loss attributable to that infringement. It is established that it is open to the Tribunal to include an award for injury to feelings as part of that compensation according to the facts of the case (South Yorkshire Fire and Rescue Service v Mansell UKEAT/0151/17).

26. The onus remains on the claimant to establish the nature and extent of such injury and Tribunals have a broad discretion as to the amount of any such award. In Prison Service and ors v Johnson ([1997] ICR 275) the EAT summarised the general principles that underlie awards for injury to feelings:

    a. awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party;
    b. an award should not be inflated by feelings of indignation at the guilty party's conduct;
    c. awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches;
    d. awards should be broadly similar to the range of awards in personal injury cases; and
    e. Tribunals should bear in mind the value in everyday life of the sum they are contemplating, and the need for public respect for the level of the awards made.

27. In Vento v Chief Constable of West Yorkshire Police (No.2) ([2003] ICR 318), the Court of Appeal set down three bands of injury to feelings award, indicating the range of award that is appropriate depending on the seriousness of the discrimination in question. The Court also described some of the elements that can be compensated under the head of injury to feelings (and noted that medical evidence is not required to support such a claim). According to Lord Justice Mummery, injury to feelings encompasses 'subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression'. They also emphasised that after making an award for injury to feelings the Tribunal must stand back and have regard to the overall compensation figure to ensure that it is proportionate and not subject to double counting.

28. The three broad bands of compensation for injury to feelings (recognising that there is considerable flexibility within each band allowing Tribunals to fix what is fair, reasonable and just in the particular circumstances of the case) are:
    a. a top band to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of

compensation for injury to feelings exceed the stated maximum figure;

b. a middle band for serious cases that do not merit an award in the highest band; and
c. a lower band appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than the minimum should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

29. The amounts in each band are updated each year by Guidance from the Presidents of the Employment Tribunals to take into account both inflation and the 10% uplift resulting from Simmons v Castle ([2012] EWCA Civ 1288). The relevant figures for this claim presented on 6 May 2020 are:

    a. top band: £27,000 to £45,000;
    b. middle band: £9,000 to £27,000; and
    c. lower band: £900 to £9,000.

30. Holiday pay

31. Workers are entitled by statute to a minimum of 5.6 weeks paid holiday per year (capped at 28 days - regulations 13 and 13A of the Working Time Regulations 1998). They may also be entitled to additional contractual paid holiday. On termination of the contract they are entitled to be paid in lieu of any unused holiday.

32. There have been significant developments in recent years concerning the correct calculation of holiday pay both where the normal amount of pay is variable and where the individual works varying hours and/or varying hours at certain times of the year (Harpur Trust v Brazel (2019) EWCA Civ 1402). In this case the claimant worked a fixed number of weekly hours consistently throughout the year.

33. Unpaid wages

34. If a worker suffers an unauthorised deduction from his or her wages he or she may make a complaint to the Tribunal (section 23 of the 1996 Act). Where the total amount of wages paid is less than the total amount properly payable, the amount of that deficiency is a deduction (section 13).

35. The meaning of wages for this purpose is broad: 'any sums payable to the worker in connection with his employment' (section 27).

Discussion & Conclusions

36. Having assessed all the evidence, both oral and written, and the submissions made by the parties we find the following.

Unfair Dismissal

37. Period of loss: at the time of the claimant's resignation she had received the invite from Ms Davies dated 7 September 2020 inviting her to a disciplinary meeting on the 11th. For the reasons stated in the liability judgment, it was inappropriate for the respondent to instigate disciplinary proceedings in respect of the claimant's alleged unauthorised absence. It was reasonable and appropriate, however, for them to instigate disciplinary proceedings in respect of the claimant's refusal to follow a reasonable management instruction to attend a work-related meeting.

38. That instruction was given following the exchange of correspondence between the parties after the meeting on 14 August and the detailed follow up email sent by Ms Lovegrove to the claimant on 25 August. It was in that email that the claimant was invited to a meeting on 4 September to discuss the respondent's plans for her to return to work. Further in that email Ms Lovegrove had warned the claimant that failure to attend the meeting could result in a disciplinary process (Mrs Telford having already given a similar warning on 7 August).

39. In the claimant's reply on 28 August she expressly stated that she saw little purpose in having

> 'these meetings when I do not intend on returning to work on site until Covid 19 has been eradicated/vaccination becomes available'

and that her position remained that she should be working remotely.

40. Ms Lovegrove replied restating that this was a reasonable management instruction and that refusal to follow it may mean the claimant was the subject of disciplinary action.

41. The claimant's evidence at the remedy hearing was that she had intended to reply fully and would have said that she continued to hope the respondent would change its stance and permit her to work remotely but that she had had a discussion with her (now late) husband over the weekend of 5 & 6 September regarding various options going forward one of which would have been to have a career break until she was vaccinated. There was no other evidence to support the claimant's statement in this regard and it was not referred to by the claimant in her resignation letter or exit interview. We also note that this evidence was not given at liability stage. We do not find it more likely than not that if the claimant had been given a further opportunity to make representations to the respondent that she would have raised this possible career break as an alternative way forward. Such an approach was out of line with her previous hard-line stance with regard to her position. There had been no hint of this as being in her thinking in any other correspondence or discussion.

42. The claimant did not attend the disciplinary meeting on 11 September but resigned on 8 September.

43. We find that if the claimant had not resigned from her employment the respondent would have pursued disciplinary proceedings against her in respect of the failure to follow a reasonable management instruction to attend the work-related meeting on 4 September.
44. As for how long that process would have taken (noting that there is no guidance in the respondent's documents as to their typical disciplinary process timescales and we therefore assume they would have been compliant with the ACAS Code), we find that a fair process would have been concluded within three months. This is on the basis of the process involving a period of investigation, the claimant being given an opportunity to comment on the results of that investigation, the claimant attending a meeting (probably remotely), the dismissing manager taking some time to make and write up the decision, the claimant lodging an appeal, the appeal manager carrying out some form of investigation, meeting the claimant and then writing up and delivering the outcome of that appeal. We have also allowed slightly longer than perhaps would normally be expected for that process to conclude given the general circumstances facing the respondent at the time as a result of the pandemic and the very understandable other pressures on both HR and management functions.

45. As to the outcome of that process being a finding of gross misconduct and summary dismissal, we have expressly considered the previous position adopted by the claimant and her style of communication with the respondent between March and September 2020 which we have commented on in the liability judgment. In particular, although she accuses the respondent of adopting a hard-line stance, she clearly did likewise. She had extremely strong views about the correctness of her position and strongly disagreed with the position adopted by both the respondent and the Government in response to the pandemic. She exhibited no willingness to be flexible in this regard. We conclude that this approach and attitude on the part of the claimant would have contributed to the respondent concluding that she was guilty of gross misconduct and that summary dismissal was the appropriate penalty. Such an approach would have been within the band of reasonable responses and the claimant would therefore have been fairly dismissed in any event.

46. We have also considered whether the changing position with regard to the availability of vaccines would have impacted upon the disciplinary process and its likely outcome. We note that the very first vaccines were administered in the UK towards the end of the first week of December 2020. There were indications in November 2020 that this was likely although there was no certainty until very shortly before. It is likely, therefore, that towards the end of the disciplinary process and certainly only within the appeal part of it, it might have become apparent that a vaccine would be available for the claimant in the relatively near future. It is quite clear that the claimant would have taken the vaccine once available. For the reasons already stated about the claimant's approach to the respondent's policy and management of her, notwithstanding the possibility of her being able to access a vaccine in the relatively near future, we find it more likely than not that the outcome of the disciplinary process would have fairly remained

dismissal. Although we do not doubt the claimant's genuine desire to return to work and to do the best for her patients, she was equally emphatic in her views about not returning to work until she agreed with both the respondent's and Government policy on working arrangements and indeed she had previously said she would not return to work until Covid had been eliminated.

47. Consequently the maximum period ongoing loss for which the claimant falls to be compensated after her dismissal is 12 weeks.

48. Amount of loss: for that period, the claimant is entitled to receive her net weekly pay (£365.23) together with her monthly pension contributions (£41.07) and the cost of clinical supervision costs that she incurred (invoices for the same having been in the liability bundle) and would have been reimbursed for in September to December inclusive (4 x £60). This totals £5,115.60.

49. Mitigation of loss: the claimant gave persuasive evidence that, given the specific and demanding nature of her role as a therapy practitioner, it was reasonable for her to not seek alternative work for a period of time following termination of her employment. This was so that she could both recuperate from the undoubted stress of the events leading up to her dismissal and to emotionally detach from and gain closure from the therapeutic relationships that she had established during her employment. She and her husband had agreed that she would start to look for equivalent work in January 2021 which they believed would give her sufficient time to complete that process. We accept that that was a reasonable approach. We also accept that, given the claimant's professional knowledge, it was not necessary for her to provide medical evidence to support it. She had sufficient self-awareness and understanding to effectively self diagnose her state of mind following the dismissal and the appropriate professional response to that.

50. The respondent's evidence of alternative work available to the claimant during this period was very light. They produced details of two family therapist roles available at the relevant time within the respondent's organisation. One of those vacancies was in fact the job the claimant had reassigned from and the other was based in Edgbaston. The respondent invited the Tribunal to conclude that it was likely that there were other similar roles in other private providers and the NHS but produced no data upon which we could make such a finding.

51. In any event, given that we have concluded it was reasonable for the claimant not to actively seek equivalent alternative work until January 2021, we find that she did not fail to mitigate her loss during the three-month period for which it is appropriate to compensate her.

52. ACAS adjustment: we conclude that it is appropriate to uplift the compensatory award due to the failure of the respondent to comply with the ACAS Code in respect of the conduct of grievance procedures.

53. Whilst we recognise that the respondent did not totally fail to provide a fair process there were significant flaws with it as identified in the liability judgment. Some of those flaws may well have been inadvertent but we are particularly troubled by:
    a. the respondent inviting the claimant to a meeting on 7 April with four senior managers when her grievance was live. This appears to have been an inappropriate attempt to circumnavigate the grievance process;
    b. Ms Crimmings' comment on 20 April which betrayed an unwillingness to allow the claimant to properly present her case; and
    c. Ms Crimmings not putting the claimant's case to Ms Lovegrove and Mrs Telford;

    and conclude that these specifically undermined the carrying out of all necessary investigations and substantively undermined the fairness and transparency of the process.

54. As already acknowledged in the liability judgment the general deficiencies in the first stage of the grievance process were remedied to some extent by Mr Bloor at appeal stage which does mitigate to some extent their effects. However, he was unable to remedy these deficiencies fully and indeed never knew about the attempt by senior management to meet with the claimant on 7 April. Further he displayed a lack of independence in the terminology he used.

55. We find therefore that there was an unreasonable breach of the Code and it is just and equitable to award an uplift. Taking all the circumstances into account and particularly the nature of the breaches we consider the appropriate percentage to be 25%. We are conscious that we are also separately awarding a not insignificant sum of money for injury to the claimant's feelings in relation to the detriments she suffered. Those detriments however were not directly related to the grievance process and do not overlap with this adjustment. Finally, looking at the total compensatory award with the benefit of this uplift, we consider it to be proportionate to all the circumstances of the case. The compensatory award of £5,115.60 is therefore increased to £6,394.50.

56. The respondent has counter-submitted that there should be a reduction by 10% due to the claimant breaching the Code by failing to engage with the respondent. We reject that argument. It cannot be said that she failed to engage with the respondent. She did engage albeit sometimes in an overly legalistic and combative way as described in the liability Judgment. Primary responsibility for the conduct of the grievance process, and its deficiencies, lies with the respondent and it is not appropriate to reduce the award as suggested.

57. Contributory fault: the respondent has sought a reduction in the compensation payable by up to 50% to reflect blameworthy conduct on the part of the claimant that contributed to the unfair dismissal.

58. As stated above, there is an inherent tension in arguing contributory fault on a constructive dismissal. Notwithstanding that, we do acknowledge that we made several criticisms of the claimant's behaviour in particular in the way she engaged with the respondent. However, in all the circumstances, particularly the fact that the claimant had a reasonable belief prior to 14 August that there were serious and imminent circumstances of danger and refused to return to work as a result, and the equally intransigent and dogmatic approach taken by management, any inappropriate behaviour by the claimant prior to 14 August was not such as to amount to blameworthy conduct such as to justify a reduction in compensation.

59. Further, although the claimant lost the protection of having the reasonable belief after 14 August and she maintained her position (for example in her email of 28 August) of not returning to work until Covid had been eradicated or a vaccine was available, by then the respondent had breached her contract of employment and she was already entitled to resign in response to those breaches. Her blameworthy conduct after 14 August, therefore, cannot have contributed to the dismissal and responsibility for that lies with the respondent.

60. Accordingly, no, deduction in respect of contributory fault will be made. In coming to this conclusion, we are mindful that we have taken the claimant's own inflexibility into account in our decision that she would have been fairly dismissed within three months.

61. Loss of statutory rights: although this figure had been agreed by parties to be £500, given our finding that the claimant would have been fairly dismissed in any event, it is not recoverable.

Detriment

62. We remind ourselves that the remaining detriment that falls to be compensated in respect of injury to feelings is the claimant being threatened with disciplinary action further to her refusal to attend a work related meeting. That threat existed from 7 August until 11 September when HR confirmed the action would not be pursued. Although she lost the protection of having a reasonable belief on 14 August, she was still threatened with disciplinary action in relation to the period before 14 August through until her dismissal. Further, the impact of that threat having been made continued for a significant period thereafter. It was an extremely unsatisfactory way for her professional engagement to come to an end and she plainly felt it very keenly. Her evidence in this regard was compelling. It is also relevant to take into account the build up to this situation and the respondent's failure to engage properly with the claimant to understand her position (and her reasonable belief) and their own intransigence.

63. We do not agree, however, with the claimant that her injury to feelings should be compensated within the upper Vento band. We assess, having looked at the impact on the claimant in the round and in all the circumstances of the case, that the middle band is the appropriate one and

that compensation should be awarded slightly above the midpoint of that middle band. Accordingly we assess injury to feelings at £22,000.

Money claims

64. We stated in the liability judgment that the respective positions of the parties with regard to the money claims were unclear and required further explanation and if necessary evidence. Despite this both parties attended the remedy hearing with incomplete and inconsistent positions on both unpaid wages and holiday pay. The claimant's witness statement did not address them at all (and it was not addressed with her in either supplementary questions or cross-examination) and both Counsel on occasion either had to correct their earlier statements or seek further instructions during the hearing.

65. Consequently the Tribunal can simply do our best with the less than optimum material before us.

66. Unpaid wages:

67. The parties agree that the claimant is due to be awarded her unpaid wages for the period 24 March – 14 August 2020, some 20 weeks and 3 days. Her gross weekly pay was £434.11 and therefore this totals £8,867.75 gross. She was also due to be reimbursed for her clinical monthly supervision payments for the period April to August 2020 (5 x £60) making the total award for unpaid wages prior to 14 August to be £9,167.75.

68. The claimant also says that she is due wages for the period between 14 August and 7 September as she was available and willing to work from home. We do not agree. Although she was so willing, she had the lost the benefit of her reasonable belief and therefore, although the respondent had by then breached the implied term of mutual trust and confidence, she had not yet resigned and therefore should have attended for work. As she did not, the respondent was entitled not to pay her.

69. As for the period after her resignation (her notice expiring on 8 October), she should have been paid in full for this period. It seems that the respondent made deductions totalling £1078.20 for her non-attendance. Given that the claimant has been compensated for this loss in her compensatory award for unfair dismissal (3 months of loss from 8 September) to award her unpaid wages as well would be double recovery and is inappropriate.

70. Both parties accept the claimant was overpaid in Oct by £485.46 and that therefore falls to be deducted from her overall award.

71. Holiday pay:

72. During submissions it was established that the claimant's schedule of loss was incorrect and the correct calculation of the claimed holiday pay is as set

out in Mr Castle's submission with a total due of £1,121.35 less what she received in October – see below. This calculation is based on the application of the principles of the Harpur Trust case. We find that Harpur Trust is not applicable to the claimant as she worked a fixed number of hours each week over the whole year. Her holiday pay is therefore calculated on normal principles.

73. The claimant in her October payslip received payments in respect of holiday pay of £211.64 and £618.11. The respondent has submitted a letter dated 1 November 2022 which sets out their calculation of these amounts. Having rejected the claimant's objection on the basis of Harpur Trust, and there being no alternative calculation submitted by the claimant, we accept the respondent's calculations and find that there is no holiday payment due to the claimant.

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Employment Judge K Andrews
Date: 20 December 2022