



EMPLOYMENT TRIBUNALS

Claimant: Miss. L Mubika

Respondent: South West London & St Georges Mental Health NHS Trust

Heard at: London South Employment Tribunal by Video (CVP)

On: 27 February 2023 and 28 February 2023

Before: Employment Judge Macey – sitting alone

Representation

Claimant: Ms. Maher (sister)

Respondent: Miss. Ibbotson, counsel

RESERVED JUDGMENT on LIABILITY

1. The complaint of unfair dismissal is well-founded. This means the respondent unfairly dismissed the claimant.
2. The respondent was in breach of contract by dismissing the claimant with immediate effect during her notice period.
3. The respondent made an unauthorised deduction from wages by failing to pay the claimant the full amount of wages due on 30 March 2022 and 31 March 2022.

REASONS

CLAIMS AND ISSUES

1. The issues to be determined by the tribunal were agreed to be as follows:

Constructive unfair dismissal

1.1. Did the respondent commit a fundamental breach of the claimant's contract of employment amounting to a repudiation of the implied term of trust and confidence?

The claimant relies on the following as constituting alleged breaches:

- 1.1.1. Recalled to Hume Ward before she had started physiotherapy appointments;
- 1.1.2. The respondent made it difficult for the claimant to attend physiotherapy appointments; and
- 1.1.3. The claimant was told by the respondent that if she could not do physical restraint that she must look for an alternative job.

1.2. If the respondent did commit a fundamental breach of the claimant's contract of employment amounting to a repudiation of that contract, did the claimant resign in response to such a breach?

1.3. If so, did the claimant resign in sufficient time to avoid affirming such fundamental breach?

1.4. If the claimant was constructively dismissed what was the reason or principal reason for her dismissal and was it a potentially fair reason within section 98(2)(b) of the Employment Rights Act 1996 ("ERA")?

1.5. Was any such dismissal fair within the meaning of section 98(4) of the ERA?

(Ordinary) unfair dismissal

1.6. The respondent concedes that it actually dismissed the claimant on 25 March 2022 during her notice period.

Unlawful deductions from wages

1.7. Did the respondent make a deduction from the claimant's wages that:

- 1.7.1. Was not required or permitted under the terms of the claimant's contract of employment or under statute; or
- 1.7.2. The claimant had not given her written consent regarding?

1.8. In particular, is the claimant owed £493.00 which was deducted by way of an overpayment?

Wrongful dismissal

1.9. The respondent concedes that it terminated the claimant's employment on 25 March 2022 during her notice period and that it owes the claimant notice pay from 26 March 2022 to 4 May 2022.

Remedy

1.10. If the claimant's claim(s) is/ are successful, what remedy is it appropriate to award the claimant in the circumstances?

PROCEDURE, DOCUMENTS AND EVIDENCE HEARD

2. The form of this hearing was a remote video hearing by CVP.
3. There was a Bundle of Documents of 705 pages. I read those documents that were referenced in the witness statements and that were referred to during the hearing. During the hearing the claimant also disclosed an email dated 12 January 2023 from the claimant to Mr. Dalton at the respondent. During the hearing the respondent disclosed a table of bank shifts that the claimant had undertaken for the respondent during 2022 and 2023. Neither the claimant nor the respondent objected to these documents being added to the Bundle to be considered by the tribunal.
4. There were separate written witness statements. The claimant gave evidence for herself. Mr. Kazeem Adeniya, bank staff member at the respondent and former Ward Manager of Hume Ward at the respondent, and Mr. Jean Pierre Foo Kune, Clinical Lead Nurse for Forensic and Complex Care Specialist Services, gave evidence for the respondent. The claimant also had a schedule of loss.

FACTS

5. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.
6. The claimant commenced employment with the respondent as a Band 5 Mental Health Nurse on Hume Ward as a bank staff member on 15 February 2016. Bank staff members are on a zero hours' contract with the respondent. They are offered shifts by the respondent and can decide whether they want to work the shifts that they have been offered. On 8 July 2020 the claimant was employed in a permanent role with the respondent as a Band 6 Deputy Team Leader/ Clinical Charge Nurse on Hume Ward [157-158] and she also continued working shifts as a bank staff member at the respondent.
7. The respondent is a Mental Health NHS Trust. Hume Ward is a 16-bed low secure forensic unit, specialising in the treatment of bipolar disorder, schizophrenia and personality disorder. Many of the patients in Hume Ward had been referred from the Ministry of Justice. They are individuals who have committed a crime but cannot serve a sentence in prison because of a mental health issue. It is sometimes necessary to physically restrain the patients in Hume Ward, this is known as Proactive Physical Intervention ("PPI").
8. The respondent has a Managing Sickness and Attendance at Work Policy [60-131] "Sickness Policy" and a Grievance Policy and Procedure [132-147] "Grievance Policy".
9. The Sickness Policy states the following about triggering Stage 1:

"Stage 1 meeting: *This will be reached when the Trigger points (see section 5) have been reached, or patterns of attendance have raised cause for concern. The Stage 1 meeting will be between the line manager and the employee...*

... Stage 1 will also be triggered in sicknesses which last over 4 weeks. The only exception to this is where there is a long term illness of over 4 weeks where there is no clear indicator of how long the duration of the absence from work will be then it will start at stage 2 rather than stage 1."

10. The Sickness Policy states the following about Stage 2:

*"**Formal Stage 2 meeting:** Will be triggered when there is a long term absence which occurs of over 4 weeks and there is no clear indicator of when the member of staff will be able to return to work, or short term absence continues and targets set at Stage 1 have not been met. Absences more than 4 weeks may require a stage 1 or 2 meeting depending on the circumstances. The format will include the attendance of HR and an employee representative/ workplace colleague, and will normally also include advice from both Occupational Health and other medical input as required..."*

11. Section 5 of the Sickness Policy states the following about trigger points:

*"5.3 The **triggers for short term absence** are: four occasions of absence in any rolling 12 month period, or Aggregated 10 day's absence in any rolling 12 month period..."*

*5.4 The **trigger for long term absence** is: a continuous period of 4 weeks absence."*

12. Stage 3 of the Sickness Policy is a final review meeting when the manager and employee will reach a decision about either returning to a previous stage of the Sickness Policy or, redeployment, or termination.

13. Appendix 4 of the Sickness Policy contains a Return to Work Discussion Record and Appendix 5 has a Phased Return to Work Plan form.

14. Appendix 10 of the Sickness Policy has useful contact points for providing support and early intervention for staff that have health concerns. In respect of physiotherapy it states:

"From the 7 February 2017, as part of Trust commitment to staff well-being, the Trust will be providing fast access to onsite physiotherapy for staff with musculoskeletal issues. The service will be delivered in collaboration with Kingston Hospital Trust Physio and OH departments and will initially be provided from Kingston Hospital site..."

... To access Fast Track Physio Services staff will need a referral by their line manager."

15. In respect of the Reporting of Injuries Diseases and Dangerous Occurrences Regulations 2013 ("RIDDOR") reporting the Sickness Policy at clause 2.1.4 [76] states that any work-related injury that incapacitates an employee for 7 days or more, must be RIDDOR reported in line with Health, Safety and Welfare Policy.

16. The respondent says that Stage 1 and Stage 2 of the Sickness Policy are about providing support to their employees. It does also state at clause

4.2.12 of the Sickness Policy, *"It should be made clear to the employee that has repeated unexplained or unjustified absences that this may be treated as a conduct issue and lead to disciplinary action and ultimately dismissal."* [67]

17. On 3 February 2021 when leaving Mr. Adeniya's office the claimant slipped and fell outside Mr. Adeniya's office. Another employee screamed on witnessing the claimant's fall. Mr. Adeniya came out of his office to check what was happening and went back into his office without saying anything to the claimant. Two other employees supported the claimant, assisting her to get up. The claimant was in a lot of pain. She applied an ice pack and took ibuprofen. She stayed at work to complete some audits that Mr. Adeniya had said needed to be completed before the end of the day.
18. On 3 February 2021 Mr. Adeniya left at 5 pm. He did not check with the claimant how she was before he left. The claimant worked until 9 pm. The Incident form had not been completed for her fall so, the claimant completed it and submitted it herself [159-161].
19. The claimant could not drive home as her knee and ankle were swollen and she was in a lot of pain. The claimant's sister collected her from work.
20. The claimant did not work from 4 February 2021 to 10 February 2021 inclusive. I have not been provided with any information from either the claimant or the respondent on which days during this time period she was scheduled to attend work on the rota on Hume Ward, but in cross-examination the claimant confirmed she was off work for 7 days. The respondent did not RIDDOR report the claimant's accident at work.
21. The claimant saw her GP on 10 February 2021 and was prescribed painkillers. The claimant returned to work on 11 February 2021. The claimant then received a shielding letter from the NHS dated 18 February 2021 [163-173], she did not see this letter until 19 February 2021. This shielding letter states, *"We currently advise you to follow shielding measures, including working from home, from the date of this letter until 31 March 2021"*. The claimant did not attend work from 20 February 2021 to 31 March 2021 inclusive because she was shielding.
22. The claimant returned to work on 2 April 2021. The claimant was still experiencing physical problems with her ankle, knees, hips and wrists. The claimant asked Mr. Adeniya if she could be excused from holding the response radio because she could not safely take part in PPI as her hips and wrists were painful. Mr. Adeniya told the claimant that if she could not take part in restraining (i.e., PPI) that she could not work on the ward (Hume Ward) and he suggested that she should be moved to reception. The claimant was not moved to reception.
23. Sometime between 2 April 2021 and 7 July 2021 Mr. Adeniya referred the claimant to Occupational Health. The claimant attended Occupational Health on 7 July 2021 and Occupational Health prepared a report dated 7 July 2021 [178-180] "OH Report July 2021". The OH Report July 2021 states, *"Based on information obtained during this consultation, I am of the opinion that Ms Mubika is currently fit to remain at work with adjustments...I recommend that you exclude Ms Mubika from restraint training and activities and any other*

tasks that involve pushing, pulling and lifting while she seeks support from the physiotherapist and on completion of her sessions I advise that you gradually reintroduce her to her contractual duties.”

24. The OH Report July 2021 also stated that the Occupational Health Nurse Advisor had advised the claimant to contact the Occupational Health administration team to arrange an appointment with the Occupational Health Physiotherapist for further assessment and support.
25. The Occupational Health Nurse Advisor also advised the claimant to undertake the self-assessment of her workstations and then inform Mr. Adeniya of the outcome. The claimant did this self-assessment and discussed the outcome with Mr. Adeniya, to which he replied that some of the adjustments were not practical. The claimant said it would be helpful if she could at least have a footstool and an ergonomic mouse.
26. Mr. Adeniya sent the OH Report July 2021 to Mr. Maskell, the respondent's Health and Safety Adviser on 4 August 2021 [181]. Mr. Maskell replied on 9 August 2021 advising Mr. Adeniya to follow the Occupational Health recommendations and to set up a review date to see if further actions were required [181].
27. The claimant was not fast-tracked for physiotherapy as per the Sickness Policy but Mr. Adeniya gave evidence in cross-examination that the Covid pandemic had changed a lot of the services and it might not have been available.
28. In August 2021 during a supervision meeting with Mr. Adeniya the claimant asked whether Mr. Adeniya had requested the footstool and the ergonomic mouse, Mr. Adeniya replied he would like to help, but his hands are tied. The claimant purchased her own ergonomic mouse.
29. The claimant's GP signed her off as not fit for work for 21 days from 10 August 2021 [183]. The claimant returned to work on 6 September 2021. When the claimant returned from sick leave she informed Mr. Adeniya that she was still waiting for a physiotherapist appointment from either Occupational Health or her GP. Mr. Adeniya asked the claimant if she could now restrain, and the claimant replied that she could not. Mr. Adeniya said he was going to move the claimant to reception and that he was going to speak to Mr Martin McIntyre (the Forensic Matron and Service Manager).
30. The claimant also had a meeting with Mr. McIntyre on 6 September 2021. It is clear from their emails [188] that Mr. McIntyre arranged to come to Hume Ward after 5 pm on 6 September 2021. During this meeting the claimant asked Mr. McIntyre why she was still on Hume Ward since she was a risk to herself and others, as she could not restrain (PPI). Mr. McIntyre told the claimant they were still looking for somewhere else to send the claimant. The claimant suggested Burntwood Villas "BWV".
31. BWV is a rehabilitation unit and place of living for patients and the likelihood of PPI at BWV is very low.

32. Mr. McIntyre informed Mr. Adeniya of the meeting between the claimant and Mr. McIntyre. Mr. Adeniya then said to the claimant that she would need to stay on Hume Ward for at least two more weeks due to staff shortages.
33. The claimant was initially temporarily redeployed to BWV from 29 September 2021 to 26 December 2021 inclusive and the claimant was aware it was a temporary redeployment. This was on the understanding that the claimant would receive physiotherapy treatment during this time so that she could return to Hume Ward at the end of the redeployment. Unfortunately, the claimant did not have any face-to-face physiotherapist appointments during this time, only remote physiotherapy.
34. The claimant's initial redeployment to BWV was extended to 2 January 2022 on 30 November 2021 [189].
35. Also, on 30 November 2021 Mr. Adeniya emailed the claimant [191] asking for her availability so that they could meet regarding her return to Hume Ward and "*to confirm if you are now fully fit to undertake Proactive Physical Intervention*". The claimant replied on 2 December 2021 [191] providing her availability and that she was still having problems with her hip and right hand and would not be able to take part in PPI.
36. The claimant and Mr. Adeniya had a meeting via Microsoft Teams on 3 December 2021. Mr. Adeniya's record of the meeting is in his email to the claimant on 3 December 2021 [197] and the claimant's response pointing out differences and omissions is in her email to Mr. Adeniya on 3 December 2021 [196]. From the claimant's evidence and the email exchange I find that Mr. Adeniya did ask the claimant whether she was wearing heeled wellington boots on the day of her fall (3 February 2021). I also find from the claimant's evidence and the email exchange that Mr. Adeniya told the claimant that as she could not take part in PPI she could not work on Hume Ward and so she had better start looking for a job elsewhere. The claimant was clear in cross-examination that Mr. Adeniya had said to her that if she cannot restrain, she had better start looking for a job elsewhere. I also note the claimant's email [196] to Mr. Adeniya states, "*You said that we had previously discussed that I should be looking elsewhere for a job...*"
37. During the meeting on 3 December 2021 the claimant asked Mr. Adeniya about the support or plan for the claimant's return to Hume Ward and he replied he would share the minutes of the meeting with Mr. McIntyre and the Employee Relations Advisor and that he would seek their advice about the claimant's return to Hume Ward.
38. The claimant emailed Mr. McIntyre on 10 December 2021 to complain about Mr. Adeniya and the meeting on 3 December 2021. This email states, "*I just want to say that I am not going to be bullied, intimidated or harassed into quitting my job. The fall has had huge impact on my health... and instead of being supported towards recovery, I am being intimidated and victimised instead.*" Mr. McIntyre replied on 10 December 2021 [195] to arrange a meeting with the claimant to discuss her concerns. This email [195] also confirmed the intention was always to bring the claimant back to Hume Ward after the three-month secondment, that the claimant will need to be referred

back to Occupational Health and to review the recommendations for returning to Hume Ward because of the need to be able to undertake PPI.

39. When the claimant met Mr. McIntyre he repeated what he had said in his email to the claimant [195]. The claimant asked Mr. McIntyre why was she being asked to look for another job when she was injured at work? Mr. McIntyre replied that Mr. Adeniya should not have said that. Mr McIntyre further informed the claimant that they would refer her to Occupational Health while she was at BWV so that a right plan would be in place for her return to Hume Ward.
40. Mr. Adeniya then emailed the claimant on 29 December 2021 informing her that he had been advised that the role she was covering at BWV ended on 27 December 2021 and that Mr. Adeniya would be telephoning her later that afternoon to discuss her shift for January 2021 and going forward.
41. Mr. Adeniya and the claimant spoke on 30 December 2021. Mr. Adeniya informed the claimant that she had been put onto the Hume Ward rota. The claimant asked what plan had been put into place for the claimant's return to Hume Ward. Mr. Adeniya replied that the claimant would be okay as there were the same patients as when the claimant was there before. Mr. Adeniya said the claimant knew all the patients and the ward was settled. The claimant informed Mr. Adeniya of her first physiotherapy appointment on 14 January 2022 at 11.00 am. The claimant also asked Mr. Adeniya whether a referral had been made to Occupational Health and he replied he had made a referral.
42. The claimant took sick leave from 3 January 2022 because she was stressed and having panic attacks because she felt there was no plan in place to help her return to Hume Ward. The claimant was scared and worried because she was going to work on Hume Ward. The claimant telephoned Occupational Health and was told there was no referral from the manager. I find that the respondent had not made a referral to Occupational Health prior to 3 January 2022. The claimant self-referred herself to Occupational Health and she was given an appointment on 14 January 2022 at 2 pm. The claimant says she telephoned Mr. Adeniya to inform him of this appointment. The respondent says Mr. Adeniya did not know the claimant had an appointment with Occupational Health on this date. There are no documents supporting the claimant's case on this point. I find that prior to 10 January 2022 Mr. Adeniya was not aware of the claimant's Occupational Health appointment on 14 January 2022.
43. In response to the claimant's absence on 3 January 2022 Mr. Adeniya reviewed the Sickness Policy and noted that the claimant had passed the trigger point for Stage 1 because she had taken 17 aggregated working days absence between 9 August 2021 and 31 August 2021. In a letter dated 7 January 2022 [203-204] Mr. Adeniya invited the claimant to a Stage 1 meeting on 14 January 2022 at 11.00 am. This letter informed the claimant that Mr. Adeniya and Mr. McIntyre would be present at the meeting. The letter stated details of the claimant's absences over the last rolling 12 months as follows:
- “

<i>Reason</i>	<i>Period</i>	<i>Period</i>	<i>Working Hours</i>	<i>Working Day</i>	<i>Duration</i>
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<i>Injury, fracture</i>	05/02/2021	10/02/2021	61.5hrs	7 days	6
<i>Other musculoskeletal problem</i>	09/08/2021	31/08/2021	127.5 hrs	17 days	23
<i>Anxiety/Stress/Depression</i>	03/01/2022	09/01/2022	42.5 hrs	4 days	7

44. The claimant emailed Mr. Adeniya on 10 January 2022 asking him to change the date for the Stage 1 meeting to another day as she had both a physiotherapy appointment at 11 am and an Occupational Health appointment at 2 pm on 14 January 2022.

45. On 11 January 2022 Mr. Adeniya emailed the Occupational Health Medical Secretary [206] requesting that they cancel the referral for the claimant scheduled on 14 January 2022 and reschedule it for a future date. Occupational Health replied to Mr. Adeniya informing him that as the appointment on 14 January 2022 was on the basis of self-referral it could only be cancelled on the employee’s request.

46. Mr Adeniya then emailed the claimant on 11 January 2022 forwarding her the email from Occupational Health [205]. This email states:

“Please respond to this e-mail and provide a nearer date, preferably the coming week starting 17th January 2021 to have your OH appointment. Kindly let me know when this is completed.”

47. In cross-examination Mr. Adeniya stated he had requested that this Occupational Health appointment be cancelled because he had also referred the claimant to Occupation Health and there were therefore two referrals. There is no reference to this reason in Mr. Adeniya’s emails to either Occupational Health or the claimant. I find that this was not the reason why Mr. Adeniya requested that Occupational Health and the claimant cancel the appointment on 14 January 2022.

48. The claimant did not ask for her Occupational Health appointment on 14 January 2022 to be cancelled and she attended an Occupational Health appointment by telephone in January 2022 as confirmed by her email to Mr. Adeniya on 24 January 2022 [213].

49. The Stage 1 meeting did not take place on 14 January 2022 because the claimant was still absent from work on sick leave on that date. Mr. Adeniya emailed the claimant on 14 January 2022 thanking the claimant for letting him know that she could not attend the Stage 1 meeting and that he would send a new invitation in due course.

50. The claimant says that the Management Referral Form for Occupational Health that Mr. Adeniya completed is in the Bundle at 207-212. The respondent says that the document at 207-212 is the Occupational Health Report. I find that it is a Management Referral Form at pages 207-210 because that is the name of the document on the first page [207]. Pages 211-212 of the Bundle is the Occupational Health Report dated 18 January 2022 (“OH Report January 2022”).

51. The OH Report January 2022 states:

“Given the ongoing MSK symptoms and which is attributed to work. I recommend she is offered reasonable adjustments in the work place until her symptoms improved and I recommend the following:

That she refrains from control until her symptoms improve

That you undertake a risk assessment of all her duties in order to identify those that may exacerbate her symptoms and to put measures in place and also assess her suitable to perform basic life support in view of the symptoms of pain in her wrists.

For Ms. Mubika to be offered adjustments in the work environment until her symptoms improve or you may consider offering her temporary redeployment to a suitable area.”

52. The claimant was absent from the respondent on sick leave from 3 January 2022 to 24 February 2022 inclusive. The claimant saw her GP on 24 January 2022. Her GP confirmed she was not fit for work from 10 January 2022 to 24 January 2022 [214]. Further the GP also stated that the claimant may be fit for work from 10 January 2022 to 24 February 2022 taking into account the following advice: a phased return to work; amended duties; altered hours; workplace adaptations; and to follow the recommendations of Occupational Health.
53. The claimant and Mr. Adeniya emailed each other between 24 January 2022 and 27 January 2022 [215 -217]. The claimant informed Mr. Adeniya that she had started physiotherapy for her hips and that she will start separate sessions for her hands on 18 February 2022 [217]. Mr Adeniya replied on 27 January 2022 [216] informing the claimant he had telephoned her that day to discuss the OH Report January 2022 and to support her return. Mr. Adeniya also asked when the physiotherapy sessions would end and informed the claimant that a meeting was needed to discuss what support the claimant may require under Stage 2 of the Sickness Policy.
54. On 28 January 2022 the claimant emailed Mr. Adeniya and informed him that the physiotherapy sessions were for three months and then it will be reviewed, and she did not know the end date for the hand physiotherapy [218].
55. On 21 February 2022 the claimant emailed Mr. Adeniya reminding him that she was due to return to work on 25 February 2022 and she had not received an update about the Stage 2 meeting. Mr. Adeniya replied on 22 February 2022 [223] explaining that HR had advised him to undertake a return-to-work interview with the claimant and the Stage 2 meeting will take place in due course.
56. The claimant says when she returned to work on 25 February 2022, she was rostered to work a long day (from 7 am to 9 am) and that she informed the nurse in charge that she could not do long days for some time. One of the charge nurses agreed to stay to cover the afternoon shift (3 pm to 9 pm) for the claimant. The respondent says the E-roster [518] shows that the claimant was rostered to work the early shift (7 am to 3 pm) and that “Other Leave” was noted for 3pm to 9 pm. In cross-examination Mr. Adeniya explained that

it was noted in this way on the E-roster so that the claimant would not be short of hours. I accept the respondent's explanation on this point.

57. On 26 February 2022 the claimant and Mr. Adeniya had a return-to-work meeting. There is no Return-to-Work Discussion Record for this meeting nor a Phased Return to Work Plan for the claimant's return to Hume Ward in the Bundle. During this meeting the claimant gave Mr. Adeniya all the appointment dates and times for her physiotherapy. The claimant asked Mr. Adeniya whether she could swap her shifts if she had a morning physiotherapy appointment, and she was on rota to work an early shift and vice-versa. The claimant says that in this meeting Mr. Adeniya agreed to this. The claimant also explained to Mr. Adeniya that she could not do long days for some time. The claimant says Mr. Adeniya did not change the rota. The respondent relies on the E-roster [518] which shows "Other Leave" on long shift days in the afternoon on 25 February 2022, 26 February 2022 and 28 February 2022. I find that the E-roster demonstrates that although rostered to work a long shift on those days the claimant was assigned "Other Leave" from 3 pm to 9 pm.
58. Between 25 February 2022 and 4 March 2022 inclusive the claimant was rostered [518] as follows:
- 58.1. 25 February 2022 – early shift (7 am to 3 pm) and Other Leave for 3 pm to 9 pm.
 - 58.2. 26 February 2022 – early shift and Other Leave for 3 pm to 9 pm.
 - 58.3. 27 February 2022 – day off.
 - 58.4. 28 February 2022 – early shift and Other Leave for 3 pm to 9 pm.
 - 58.5. 1 March 2022 – day off.
 - 58.6. 2 March 2022 – day off.
 - 58.7. 3 March 2022 – Other Leave.
 - 58.8. 4 March 2022 – day off.
59. The claimant does not know when she had physiotherapy appointments scheduled between 25 February 2022 and 4 March 2022 inclusive because she lost the appointments from the calendar in her mobile telephone and they could not be retrieved. In cross-examination she stated she may have had 3 physiotherapy appointments during this time period. The claimant also accepted that she did not miss a physiotherapy appointment between 25 February 2022 and 4 March 2022. There is no evidence of the dates or times of these physiotherapy appointments between 25 February 2022 and 4 March 2022 inclusive and therefore I find that the respondent did not prevent the claimant from attending any of her physiotherapy appointments for the time period from 25 February 2022 to 4 March 2022 inclusive.
60. On 2 March 2022 the respondent emailed the claimant a joining link for a Microsoft Teams meeting on 3 March 2022 for the Stage 2 meeting [532]. The Sickness Policy envisages that an employee should be given 5 working days' notice to prepare for the meeting [78]. The claimant's original choice of companion could not attend but one of her colleagues from the trade union could attend instead.
61. The respondent held the Stage 2 meeting with the claimant on 3 March 2022. Eyong Besong (Human Resources Adviser) and Mr. Adeniya were present for

the respondent. The claimant was accompanied by Ms. Sue Smith (a Trade Union representative). The respondent says the letter at pages 227-230 of the Bundle confirms what was discussed in the meeting, that the date of the letter (2 March 2022) is a typo and that Mr. Adeniya sent the letter to the claimant on 3 March 2022. The claimant says she did not receive this letter [227-230] before she resigned and that the first time she saw the letter was when the Bundle for the tribunal was prepared. Outcome letters of Stage 1 and Stage 2 meetings should be sent to the employee within 5 working days of the meeting according to the Sickness Policy at clause 6.3.13 [70].

62. I find that the letter [227-230] in conjunction with the claimant's witness statement at paragraphs 49 – 51 provide the content of the Stage 2 meeting. It appears the letter was sent by ordinary post to the correct address of the claimant, but it was not sent by Special Delivery (which would have meant it could have been tracked). I find that the claimant did not receive this letter on 3 March 2022 and that she first saw the letter [227-230] when the Bundle was being prepared.
63. By the time of the Stage 2 meeting Mr. Adeniya had not completed the risk assessments recommended by the OH Report January 2022. During the Stage 2 meeting he informed the claimant that he had asked HR for a risk assessment, and they had just sent him a policy. Mr. Adeniya informed the claimant that he would use the link in the OH Report January 2022 to complete the risk assessment.
64. At the start of the Stage 2 meeting Ms. Smith queried why the respondent had moved straight to Stage 2, and no Stage 1 meeting had taken place. Mr. Adeniya explained that the claimant's absences had now triggered Stage 2 and that the Stage 1 meeting did not take place because the claimant had been absent on sick leave.
65. The claimant accepted in this Stage 2 meeting that she could not work on Hume Ward without the ability to restrain (PPI). Most of the Stage 2 meeting focused on where the claimant could be redeployed while she was undertaking physiotherapy.
66. Redeployment was, therefore, discussed. Mr. Adeniya informed the claimant that it was not possible for her to remain redeployed to BWV and this had been a temporary redeployment. Mr. Adeniya also explained in terms of redeployment there was nothing he could do at the present time. Eyong Besong asked the claimant whether she had any thoughts on where she could be temporarily redeployed. Ms. Smith queried why Mr. Adeniya was pushing all the responsibility onto the claimant when the respondent is a Trust that is large, and surely it had somewhere to redeploy the claimant. In respect of redeployment the claimant stated she knew that there was another Band 6 on BWV who was willing to swap roles with the claimant.
67. In respect of working on reception the letter [227-230] states, "*You reported you can work on the reception.*" The claimant says that at that time there was still no permanent cover on the reception.
68. In respect of an administrative role the letter states, "*She [Eyong] asked if you would be prepared to do an administrative role. You stated you can consider*

an administrative role. You mentioned that there was an ACC vacancy. Thereafter, I asked if the vacancy is still live. You reported you are having difficulties accessing Trust email and opening websites.”

69. Mr. Adeniya confirmed in the meeting that in terms of redeployment he would speak to Mr. McIntyre to see if there was anything that could be done differently to the claimant's existing role, that he would speak to the Nursing Development Team to see if there were any vacancies, that he would email his colleagues to find out whether there were any services not requiring restraint and that he would check with the Forensic Outreach Team (FOS) whether they needed anyone, because their shifts are 7.5 hours long.
70. The claimant informed Mr. Adeniya in the Stage 2 meeting that she was on annual leave from 7 March 2022 and would return on 28 March 2022.
71. Following the Stage 2 Meeting on 3 March 2022 Mr. Adeniya emailed Catherine Sellars and Lucy Cooper [529] asking if there were any opportunities for temporary redeployment for the claimant. Catherine Sellars replied to Mr. Adeniya later that evening informing him that FOS did have a vacancy from 21 March 2022 [528-529].
72. Mr. Adeniya emailed the claimant on 4 March 2022 at 11.46 am [528] forwarding the claimant the email from Catherine Sellars [528-529]. Mr. Adeniya asked the claimant to liaise with Catherine Sellars to have a chat about FOS.
73. The claimant emailed Mr. Adeniya on 4 March 2022 at 12.21 pm resigning from her substantive position as Deputy Ward Manager [231-232]. This email states:
- “It is with regret that I tender my resignation from my substantive position as Deputy Ward Manager, as of today 04/03/2022. Contractually I'm obliged to serve 2 months' notice which would make my last day 04/05/2022 (subject to leave entitlement).*
- As you are aware since my fall at work on 03/02/2021 I have been experiencing some difficulties therefore I have decided to focus on my treatment and recovery.*
- I wish the team the very best in the future.”*
74. The claimant says that she resigned to safeguard her health, safety, and mental well-being. That it was important for her to fully engage with physiotherapy without fail, as the claimant had been told at her first appointment that if she missed two sessions she would be discharged and would need to be referred again. Further considering the length of time the claimant had to wait from referral to her first physiotherapy appointment, missing appointments was not an option for her.
75. The claimant says that she did not see the email from Mr. Adeniya about the opportunity in FOS [528-529] prior to her sending her email to Mr. Adeniya resigning from her substantive position as Deputy Ward Manager [231-232]. I find that it is highly implausible that the claimant would not have seen the

email from Mr. Adeniya [528-529] when she opened her email to write her resignation email to Mr. Adeniya [231-232]. I find that the claimant did see the email from Mr. Adeniya [528-529] before she sent her resignation email [231-232] to Mr. Adeniya.

76. The claimant says that working in FOS would have required a lot of driving to patients in different locations, that she would be carrying their medication and that at times she could not open a bottle of medication and had asked a colleague to do it for her. She did, however, know that Catherine Sellars was very nice and understanding and that she was someone the claimant could work with. The claimant says she did telephone Catherine Sellars on several occasions, but that she could not reach her. The claimant spoke to Catherine Sellars once, but Catherine Sellars was on a visit and told the claimant she would call her back, but she never did.
77. The claimant emailed Mr. Adeniya on 25 March 2022 [241] reminding him that she had resigned and she had not received an acknowledgement and that she had requested unpaid leave for the remainder of the notice period.
78. Mr. Adeniya replied on 25 March 2022 [241] stating the claimant would have received a Notification of Leave on the date she tendered her resignation and he also attached a copy of the Notification of Leave to the email. He also said the respondent was happy to support the claimant's request for unpaid leave and to kindly send the date that she would like to be her last date.
79. The Notification of Leave form was submitted by Mr. Adeniya to E-roster on 25 March 2022 and this had the effect of ending the claimant's assignment to the substantive role of Deputy Ward Manager on 25 March 2022.
80. The claimant had a physiotherapy appointment on 28 March 2022 and emailed Mr. Adeniya on 25 March 2022 [242] to inform him that she could not work in the morning on that day. The claimant says that after her email [242] Mr. Adeniya called her and told her that he was going to give the claimant unpaid leave on 28 March 2022 and 1 April 2022, the claimant then queried why she could not swap shifts and Mr. Adeniya said he was going to give the claimant unpaid leave because he did not want her to owe hours.
81. Mr. Adeniya emailed the claimant on 25 March 2022 [242] and informed the claimant that he would amend her rota to support her appointment on Monday (28 March 2022). Mr. Adeniya indicated he did not want the claimant to owe hours and, therefore, he did not know how the claimant wanted it recorded. The claimant did not answer this email.
82. The claimant was due to work as a bank staff member at BWV on 29 March 2022 and 30 March 2022 [554]. She saw that there was PPI training for 3 days from 30 March 2022 and asked Mr. Fumey (the manager at BVW) to cancel her bank shift on 30 March 2022 so that she could attend the training. The claimant attended the training on 30 March 2022 and 31 March 2022. At the end of the day on 31 March 2022 she tried to download her certificate and she discovered that she was locked out of the respondent's system.
83. An email dated 1 April 2022 from the E-roster Administrator to Payroll, Temporary Staffing, IT Service Desk and copied to the claimant states:

“Louisa Mubika has been processed as a leaver; last day as a substantive staff member on 25/03/2022.

As of 02/04/2022 has been rehired as a Bank only staff member.”

84. The claimant continued to work for the respondent as a bank staff member, mostly at BWV and Bluebell (Old Church). In 2022 she worked once on Jupiter Ward and three times on Phoenix Ward. The claimant initially stated in cross-examination that following her termination she had worked as a bank staff member on BWV and as an agency worker on a general hospital ward. On being shown the table of her shifts from March 2022 to March 2023 she accepted that she had worked on other wards at the respondent following her termination. I do not find that this undermines her credibility in general, particularly given the very few times she actually worked on Phoenix Ward and Jupiter Ward and the fact that the claimant accepted the table of shifts as being correct when it was shown to her.
85. Bluebell (Old Church) is deaf services. Jupiter Ward is acute mental health and Phoenix Ward is a rehabilitation ward for mental health. Mr. Foo Kune was previously the manager on Bluebell (Old Church) and he stated that PPI was sometimes needed on Bluebell (Old Church). Mr. Foo Kune also confirmed that PPI was required on Phoenix Ward. As Jupiter Ward is an acute mental health ward the risk of assault to staff and the need to conduct PPI is higher in Jupiter Ward than in Hume Ward.
86. The claimant completed her physiotherapy sessions in April 2022 and then started self-management.
87. On 16 April 2022 Payroll at the respondent wrote to the claimant informing her that the claimant had been overpaid. That she had left the respondent on 25 March 2022 and had been paid until 31 March 2022. The net overpayment figure was £490.73.
88. The claimant emailed the Payroll department on 11 May 2022 [252-253] informing them that she had previously emailed Payroll on 26 April 2022 to dispute the overpayment. The claimant explained in this email that she had attended PPI training on 30 March 2022 and 31 March 2022. Payroll started deducting £50 per week from the claimant's bank work pay without resolving the dispute with the claimant.
89. On 20 May 2022 the claimant lodged a grievance [254-264]. The claimant sent her grievance to the HR Business Partner, Mr. Mike Darling-Holmes. Mr. Darling-Holmes forward it to Capsticks who acknowledged it, but then did not respond for a number of months.
90. Mr. Foo Kune's evidence is that the respondent was having internal emails and discussions about the claimant's grievance. On 16 June 2022 the Deputy Head of Service Delivery at the respondent emailed the Senior HR Advisor at Capsticks to inform her that he needed to discuss the grievance with internal HR members [351]. Initially the Clinical Manager for Adult Specialist Services was appointed as the Investigating Officer, but it was decided that as he had been involved in the case (through advising Mr. Adeniyah) someone else should be the Investigating Officer. Mr. Foo Kune was then asked to be the

Investigating Officer because he had no prior involvement with the claimant's complaints.

91. The claimant presented her complaints of unfair dismissal, wrongful dismissal and unlawful deductions from wages to the tribunal on 7 July 2022.
92. Mr. Darling-Holmes emailed the claimant's trade union representative on 19 July 2022 [359] informing her that the grievance could not be found on the claimant's HR electronic file and to resend it. The claimant resent her grievance.
93. Mr. Foo Kune conducted the investigations for the grievance and his investigatory report [411-430] was sent to the claimant on 12 December 2022. One of Mr. Foo Kune's recommendations was that the claimant be paid for the two days of PPI training that she attended on 30 March 2022 and 31 March 2022. The claimant emailed Mr. Dalton on 12 January 2023 stating that she was unhappy with the grievance outcome and wanted to know if she had the right to appeal. The claimant was informed by the respondent that she was out of time to appeal.
94. The claimant's age on 25 March 2022 was 58. Her gross weekly pay was £750.00 and her net weekly pay was £516.99. The claimant did not claim benefits following the termination of her substantive employment.

LAW

Unfair dismissal

95. Section 94 of the ERA confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the tribunal under section 111. The employee must show that she was dismissed by the respondent under section 95.
96. Section 95(1) of the ERA states the following are dismissals for the purposes of unfair dismissal:

"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

Constructive Dismissal

97. **Western Excavating (ECC) Ltd -v- Sharp [1978] ICR 221, CA** imported the common law concept of a repudiatory breach of contract into section 95(1)(c) of the ERA. Lord Denning MR stated:

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

98. Firstly, a repudiatory or fundamental breach of the contract of employer by the employer is required.

99. **Malik and Mahmud -v- BCCI [1997] ICR 606** formulated the definition of a breach of the implied term of mutual trust and confidence by the employer as follows:

“Without reasonable and proper cause, conducted itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.”

100. The **Malik** test is objective and all the circumstances must be considered. It is not enough to show merely that the employer has behaved unreasonably. The line between serious unreasonableness and a breach of the implied term of mutual trust and confidence is a fine one.

101. A breach of trust and confidence might arise because of a series of events. **London Borough of Waltham Forest -v- Omilaju [2005] IRLR 35** confirmed if the last straw is completely innocuous or trivial, and none of the preceding matters amount to a fundamental breach of contract, the claim will fail. The last straw does not need to be a fundamental breach of contract, but it must contribute, however slightly, to the breach of trust and confidence.

102. In **Kaur -v- Leeds Teaching Hospitals NHS Trust [2018 EWCA Civ 978]** Underhill LJ proposed that the tribunal should ask itself the following questions:

102.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

102.2. Has he or she affirmed the contract since that act?

102.3. If not, was that act (or omission) by itself a repudiatory breach of contract?

102.4. If not, was it nevertheless a part ... of a course of conduct comprising several acts and omissions which, viewed cumulatively, amount to a (repudiatory) breach of the **Malik** term?

102.5. Did the employee resign in response (or partly) in response to that breach?

103. The employee must terminate the contract because of the fundamental breach. It need only be a reason for the resignation by the employee. It does not matter if there are other reasons. Where there are mixed motives, a tribunal must determine whether the employer’s repudiatory breach was an effective cause of the resignation. However, the breach need not be ‘the’ effective cause (**Wright -v- North Ayrshire Council [2014] IRLR 4**).

104. In **Weathersfield Ltd t/a Van and Truck Rentals v Sargent 1999 ICR 425, CA**, the Court of Appeal held that it was not necessary for an employee, in order to prove that a resignation was caused by a breach of contract, to inform the employer immediately of the reasons for his or her resignation. It was for the tribunal in each case to determine, as a matter of fact, whether the employee resigned in response to the employer's breach rather than for some other reason.

105. The employee must not have lost the right to resign by affirming the contract after the breach. The employee must not delay their resignation too long or do anything else which indicates acceptance of the changed basis of employment **WE Cox Toner (International Limited -v- Crook [1981] ICR 823**. Merely to protest at the time will not prevent such acceptance being inferred. An express reservation of rights may in some circumstances be effective.

106. In **Chindove -v- William Morrisons Supermarkets PLC UKEAT/0201/13/BA** Langstaff P stated:

“We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.”

107. Langstaff P further stated:

“26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context...”

27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force.

108. Essentially, if delay in resignation occurs whilst an employee is not otherwise performing the contract (e.g., when on sick leave) this is less likely to amount to an affirmation than if the employee carries on turning up for work.

109. Where there has been a repudiatory breach of contract by the employer, the breach is not capable of remedy in such a way as to preclude acceptance by the other party (**Buckland -v- Bournemouth University Higher Education Corporation [2010] EWCA Civ 121**). The wronged party has an unfettered choice whether to accept the breach or not. All the defaulting party can do is to invite affirmation of the contract by making amends.

Breach of contract – notice pay

104. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice.

105. The aim of damages for breach of contract is to put the claimant into the position they would have been in had the contract been performed in accordance with its terms. Damages for breach of contract are, therefore, calculated on a net basis, but may need to be grossed up to take account of any tax that may be payable on the damages. Damages relating to notice pay are subject to tax.

Unlawful deductions from wages

106. Section 13(9) of the ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of a deduction. An employee has the right to complain to an Employment Tribunal of an unauthorised deduction from wages pursuant to section 23 ERA.

107. Section 14(1)(a) of the ERA states:

*“Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—
(a) an overpayment of wages,”*

Remedy for unfair dismissal

108. The statutory provisions relating to the compensatory award are set out in section 123 of the ERA.

123 Compensatory award

(1) ... the amount of the compensatory award shall be such amount as the tribunal consider just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include-
(a) any expense reasonably incurred by the claimant in consequence of the dismissal,
and
(b) ... loss of any benefit which he might reasonably be expected to have had but for the dismissal.

...

(4) In ascertaining the loss referred to in subsection (1), the tribunal shall

apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales ...

124 Limits of compensatory award etc.

(1) The amount of –

... (b) a compensatory award to a person calculated in accordance with section 123 shall not exceed the amount specified in subsection 1ZA.

(1ZA) the amount specified in this subsection is the lower of –

(a) [£89,493.00 - for dismissal in 2021/2022], and

(b) 52 multiplied by a week's pay of the person concerned.

109. The **Norton Tool** rule from the case of **Norton Tool Co Ltd -v- Tewson [1972] ICR 501** provides that where an employee has been unfairly dismissed and takes up employment during what would have been their notice period the employee is entitled to receive a sum equivalent to their notice pay as part of their unfair dismissal compensation without giving credit for the monies they earned from the new employment. The Court of Appeal in **Langley and another -v- Burlo [2007] ICR 390** confirmed the rule in **Norton Tool** was still good law.

CONCLUSIONS

110. Ms. Maher and Miss. Ibbotson provided me with both written and oral submissions which I have considered and will refer to where necessary in reaching my conclusions.

Constructive dismissal

Was there a repudiatory breach of contract?

111. The only evidence that prior to the claimant resigning the respondent attempted to prevent her from attending a physiotherapy session is in respect of the physiotherapy appointment on 14 January 2022. Mr. Adeniya initially arranged a Stage 1 meeting under the Sickness Policy at 11 am on the same morning the claimant was due to start her face-to-face physiotherapy sessions. In fact, the claimant was on sick leave from 3 January 2022 to 24 February 2022 inclusive so, she did not attend the Stage 1 meeting and she attended her physiotherapy appointment and occupational health appointment on 14 January 2022. In the time period from when she returned to when she resigned (25 February 2022 to 4 March 2022) the claimant accepts that she did not miss a physiotherapy session. I conclude that this is not sufficient to be a breach of the implied term of trust and confidence.

112. In respect of the claimant being recalled to Hume Ward before her physiotherapy sessions had commenced Miss. Ibbotson submits the claimant's redeployment to BWV was always temporary and the claimant knew she would return to Hume Ward. Ms. Maher submits that it was the fact there was no plan in place to support the claimant's return to Hume

Ward that was a breach of the implied term of trust and confidence rather than the return to Hume Ward per se.

113. Mr. McIntyre had told the claimant in their meeting in mid-December 2021 that the respondent would refer her to Occupational Health so that a right plan would be in place for her return to Hume Ward. This referral was not made by the respondent before the claimant was due to return on 3 January 2022, so the claimant self-referred to Occupational Health in early January 2022.
114. Mr. Adeniya had told the claimant on a couple of occasions (April 2021 and 3 December 2021) that to be able to work on Hume Ward she needed to be able to undertake PPI. Mr. McIntyre in his email to the claimant on 10 December 2021 [195] also referred to the need to be able to undertake PPI in Hume Ward. I conclude that the claimant was, therefore, understandably confused when in their telephone conversation on 30 December 2021 Mr. Adeniya told the claimant she would be okay to work on Hume Ward because it contained the same patients as when the claimant was there before, and she knew all the patients and the ward was settled. This was contradictory to what the claimant had been told before by both Mr. Adeniya and Mr. McIntyre and it also was not an adequate support plan for her return to Hume Ward.
115. The claimant was having panic attacks because there was no support plan in place and she, therefore, took sick leave from 3 January 2022 to 24 February 2022. This failure to have a support plan in place prior to the claimant's scheduled return to Hume Ward on 3 January 2022 was a breach of the implied term of trust and confidence between the claimant and the respondent.
116. The management of the claimant's incident at work and her sickness was also unreasonable. It's not clear why the claimant was not referred to the fast-track physiotherapy service. As this was only raised by the claimant in the hearing there is no evidence in front of me on whether this service was still available in February 2021 during the Covid pandemic. The claimant's fall at work on 3 February 2021 was not RIDDOR reported when it should have been reported according to the Sickness Policy (because the claimant had been incapacitated for 7 days).
117. No Stage 1 meeting was held with the claimant, the respondent went straight to Stage 2. The definition of which Stage is appropriate is in the Sickness Policy. In respect of sicknesses lasting over 4 weeks it states Stage 1 will be triggered when sicknesses last over 4 weeks. The exception to this is where there is a long-term illness of over 4 weeks and there is no clear indicator of how long the duration of the absence from work will be. In that situation Stage 2 will be the starting point.
118. Although by the end of January 2022 the claimant had been absent for more than 4 weeks there was a clear end date in the note from her GP on 24 January 2022. The claimant's GP confirmed that the claimant was not fit to work from 10 January 2022 to 24 January 2022 inclusive. Her GP also confirmed that the claimant may be to fit work from 10 January 2022 to 24 February 2022 taking into account the GP's recommendations.

There was a clear end date of 24 February 2022 and I conclude this did not fall within the parameters of starting at Stage 2 in the respondent's Sickness Policy.

119. The claimant was not provided with five working days' notice of the Stage 2 meeting as envisaged by the Sickness Policy. The claimant was notified by email on 2 March 2022 of the Stage 2 meeting on 3 March 2022. Although she knew a Stage 2 meeting was going to be scheduled at some point after her return to work she did not know of the exact date and time until the day before. The claimant also did not receive the outcome letter [227-230] of the Stage 2 meeting within five working days of the meeting.
120. I accept the respondent's evidence that the Sickness Policy and the Stage 1 and Stage 2 meetings are designed to support the employees. It is clear from the content of the Stage 2 meeting on 3 March 2022 that by that date everyone accepted that the claimant could not work on Hume Ward when she was unable to undertake PPI and the discussion was focused on what temporary redeployment there was for the claimant. I conclude that although the respondent acted unreasonably by not following its own Sickness Policy these failings did not amount to a breach of the implied term of trust and confidence.
121. I have found above that Mr. Adeniya did say to the claimant on 3 December 2021 that if she cannot restrain, she had better start looking for a job elsewhere. This was not said in a meeting in which they were discussing temporary redeployment, this was a meeting about the claimant's temporary deployment to BWV ceasing and her impending return to Hume Ward. I conclude that the claimant did not misunderstand Mr. Adeniya and this statement was not said in the context of finding the claimant temporary work elsewhere. The possibility of further temporary redeployment was discussed many months later in the meeting on 3 March 2022. I conclude that this statement to the claimant on 3 December 2021 was a breach of the implied term of trust and confidence.

Did the claimant resign in response to the breaches of the implied term of trust and confidence?

122. Ms. Maher submits that the claimant's resignation letter was a clear cry for help and that due to her injuries at work the claimant wanted to concentrate on her physiotherapy without any disruptions. Ms. Maher also submits that Hume Ward was killing the claimant so, she had no choice but to leave, that the claimant was not being offered any choice but Hume Ward, which was not suitable for someone with her injuries. Miss. Ibbotson submits that the claimant resigned from her substantive position as Deputy Ward Manager on Hume Ward because she wanted to benefit from the flexibility of working as a bank staff member and she wanted to work as a bank staff member on BWV.
123. The two breaches of the implied term of trust and confidence that I have identified above are the failure to have a proper support plan in place for the claimant when she was scheduled to return to Hume Ward on 3 January 2022 and Mr. Adeniya's statement to her on 3 December 2021.

124. The focus of the claimant's resignation email [231-232] and her evidence to the tribunal was the need for her to attend her physiotherapy appointments. Her email says, "*I have decided to focus on my treatment and recovery.*" It is not necessary for an employee to inform their employer immediately of the reasons for her resignation. However, her evidence to the tribunal also placed more focus on the need for her to attend her physiotherapy sessions and that she would lose the referral if she missed two or more sessions and that was why she resigned.

125. The claimant also continued working for the respondent throughout 2022 and the early part of 2023 as a bank staff member, primarily working at BWV. The claimant does have more flexibility as a bank staff member than she would have as permanent staff member.

126. I also note that the claimant did not leap at the opportunity to work for FOS. Her evidence to the tribunal was there would be a lot of driving and her injuries meant she could not undertake a lot of driving, and she sometimes had difficulties opening medicine bottles. In the meeting on 3 March 2022 Mr. Adeniya indicated that he would ask FOS whether they had any vacancies, and the claimant did not raise her concerns about working for FOS in response to Mr. Adeniya's suggestion in the meeting on 3 March 2022. The claimant also knew that there was a vacancy in FOS that she could undertake temporarily before she resigned from her substantive position as Deputy Ward Manager and she did not raise her concerns about working for FOS in March 2022.

127. Given the above, I conclude that the breaches of the implied term of trust and confidence that I have identified above were not an effective cause of the claimant's resignation. The claimant resigned because she wanted the flexibility that working as a bank staff member would give her and to concentrate on her physiotherapy sessions.

128. I conclude that the claimant was not constructively dismissed by the respondent.

(Ordinary) Unfair Dismissal

129. The respondent, however, has admitted that it actually dismissed the claimant on 25 March 2022 during the claimant's notice period. The respondent has not pleaded or provided evidence of a fair reason for this dismissal on 25 March 2022.

130. I conclude that the claimant was unfairly dismissed on 25 March 2022 by the respondent.

Breach of contract – failure to pay notice pay

131. The respondent admits that it terminated the claimant's substantive employment on 25 March 2022 during the notice period the claimant had provided in her resignation email [231-232] and that it did not pay the claimant the remainder of her notice pay for her substantive role as Deputy Ward Manager from 26 March 2022 to 4 May 2022 inclusive.

Unlawful deductions from wages

132. The claimant did attend PPI training on 30 March 2022 and 31 March 2022. The claimant received an email on 1 April 2022 from Payroll confirming that her last day as a substantive staff member had been 25 March 2022 [244].

133. The respondent deducted £490.73 from the claimant's weekly pay by deducting £50 per week because it maintained the claimant should not have been paid for her salary for her substantive role as Deputy Ward Manager after 25 March 2022.

134. I conclude that as she attended the PPI training on 30 March 2022 and 31 March 2022 the claimant did work on those days for the respondent and is entitled to be paid for those days. The respondent should not have deducted £490.73 from her salary as an overpayment.

135. I conclude that the respondent did make an unauthorised deduction from the claimant's wages.

Remedy

136. After the hearing but before this reserved judgment was promulgated the claimant and respondent informed the Tribunal that they are going to attempt to settle the issue of remedy, but reserve their right to have a remedy hearing if they are unsuccessful.

Employment Judge Macey

Date: 27 March 2023