EMPLOYMENT TRIBUNALS

Claimant: Ms A Newman

Respondent: Myerscough College Further Education Corporation

Heard at: Manchester **On:** 2 – 4 August 2023 & 05 September 2023 (In chambers)

Before: Employment Judge Hill

REPRESENTATION:

Claimant: **Mr R Ross (counsel)**
Respondent: **Mr Lassey (counsel)**

JUDGMENT

The judgment of the Tribunal is that the Claimant's claims for unfair (constructive) dismissal, wrongful dismissal and holiday pay & unlawful deduction of wages fail and are dismissed.

REASONS

The Claims

1. The Claimant brought claims for unfair dismissal (constructive), wrongful dismissal, holiday pay and unlawful deduction of wages.

2. The Respondent resisted all the claims.

The Evidence

3. The Tribunal was provided with a bundle of documents numbered 1 – 682. The Tribunal heard evidence and was provided with written witness statements from the Claimant, Lisa Hartley Director of student Support and Welfare, M S Downham Clarke, Vice Principal and Deputy Chief Executive, Ms K Ball, SEND Funding and Education Health Care Plan Manager, Mr D Lovatt-Staines Senior HR Advisor and Ms J MacDonald, Senior HR Advisor.

Preliminary Issues

4. At the start of the hearing the parties were not in agreement in relation to an "agreed list of issues" that had been prepared prior to the hearing. The Respondent alleged that the Claimant had added to the list of alleged breaches relied upon and that not all were referred to in the ET1. The Claimant argued that it was merely a re- labelling exercise and background facts. After hearing submissions on the point there was a short adjournment whereupon the parties were able to agree a final revised list of issues that the Tribunal was required to determine. These have been set out below.

5. A witness statement had been produced for Ms V Senior the Claimant's line manager at the time. Ms Senior is no longer employed by the Respondent and the Respondent confirmed that she would not be called as a witness and that the witness statement would not be put before the Tribunal.

6. During evidence the Claimant conceded that she had received her holiday pay but that at the time she did not know what the amount was. She offered no evidence on what any amount should have been. No submissions were made in relation to holiday pay and it was not included in the final agreed list of issues for the Tribunal to determine. The Tribunal was not provided with any evidence on how much if any outstanding holiday pay was outstanding and the claim for holiday is dismissed.

The Issues for the Tribunal to Determine

Constructive dismissal: s 95(1)(c) of the Employment Rights Act 1996.

7. Has the Claimant discharged the burden of proof in showing that the following events/omissions occurred?

    a. That on or by 19 January 2022, she was demoted without reason and her job role was given to a new employee with less experience and qualifications?

    b. In a telephone call with Mr Lovatt-Staines on 21 January 2022, did he disregard the Claimant's concerns? The Claimant will say that he told her that the matter was 'no issue' and that it was 'not a constructive dismissal as she still had a contract', before apologising and saying that

he did not understand why the Claimant was being moved off of her motorsport group for a new employee.

c. On 28 January 2022, in communicating the outcome of his investigation, did Mr Lovatt-Staines demonstrate to the Claimant that he did not understand her concerns? The Claimant will say that: (i) her concern that she was being treated unfairly, less favourably and differently to other staff was changed to '2 points on favouritism'; and (ii) the Claimant's concern that Ms Haddaji was 'cold and gave no eye contact' was changed to 'unprofessional'.

d. On 28 January 2022, in communicating the outcome of his investigation by telephone, did Mr Lovatt-Staines pressure the Claimant into leaving and amending her end date?

e. On 26 May 2022, did the Claimant receive the minutes from her grievance meeting, 18 working days after the meeting had taken place?

f. On 27 May 2022, in communicating the outcome of the grievance investigation, did the grievance officer (Lisa Hartley) demonstrate that she had not listened to the Claimant?

g. On 19 July 2022, did the Claimant receive an automatic reply from the Appeal Officer (Steven Downham-Clarke) that he was on leave from 18 July to 1 August 2022, in effect extending an outcome to the Claimant's appeal by a further two weeks?

8. Did the above conduct amount to a breach of the implied term of mutual trust and confidence?

9. The Claimant will say that para 1g (above) was the final straw. The Tribunal will consider whether this act itself amounted to a breach of the implied term of mutual trust and confidence in that it delayed the outcome to the Claimant's grievance appeal.

10. Alternatively, the Tribunal will consider whether the 'final straw' event at para 1g was part of a course of conduct (at paras 1a to 1f) that cumulatively amounted to a breach of the implied term of mutual trust and confidence.

11. In considering, whether under para 2a or 2b, the final straw or the course of conduct amounted to a breach of the implied term of mutual trust and confidence, the Tribunal will need to consider:

12. Viewed objectively, whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between Claimant and Respondent; and

13. Whether the Respondent had reasonable and proper cause for doing what it did.

14. If there was a breach, was it a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

15. Did the Claimant resign (or partly resign) in response to the breach?

16. Did the Claimant affirm the contract before resigning?

17. If the Claimant was dismissed:

    a. What was the reason or principal reason for dismissal?

    b. Was the reason for the dismissal within the band of reasonable responses?

Wrongful dismissal/breach of contract.

18. If the Claimant is found to have been constructively dismissed, is the Claimant entitled to her notice period of two months?

Unlawful deduction of wages: s13 of the Employment Rights Act 1996.

19. Was the Claimant entitled to wages for the period from February to July 2022? What wages were 'properly payable' to her in this period? How much holiday pay was she entitled to?

20. Was the Respondent entitled to make deductions from the Claimant during this period, either under statute or contract?

Remedy if appropriate

21. *Constructive dismissal*.

    a. What basic award is payable to the Claimant, if any?

    b. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

    c. Should there be any reductions to the compensatory award?

    d. Should there be a Polkey deduction – i.e., is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

    e. If so, should the Claimant's compensation be reduced? By how much?

f. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

g. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

22. What should be the amount of the compensatory award? The Tribunal will decide:

    a. What financial losses has the dismissal caused the Claimant?

    b. Has the Claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

    c. If not, for what period of loss should the claimant be compensated?

    d. Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

Wrongful dismissal.

23. What is the amount to award under this head of claim? The Claimant will say that she was entitled to two months' notice pay.

Unlawful deduction of wages.

24. What award should be made in respect of the claim for unlawful deduction of wages? The Claimant will say that she is entitled to: (i) her monthly wage from 1 February 2022 to her resignation on 19 July 2022; and (ii) her accrued but untaken holiday pay.

25. Should the Tribunal make a declaration under s 24 of the Employment Rights Act 1996?

26. Should the Tribunal order the Tribunal to pay any additional sums pursuant to s 24(2) of the Employment Rights Act 1996?

Relevant findings of fact

27. I have set out below the relevant findings of fact that have enabled me to make determinations on the issues before me. I have read the witness statements and read the documents referred to in those statements as well as considered the oral evidence given at this hearing. This judgment is not intended to rehearse the evidence given or cover all documentary evidence provided but deals with the points relevant for me to determine whether the 'acts or omissions' complained of and set out in the list of issues amount to individual

breaches of contract or whether when looked at cumulatively amount to a breach of the implied term of mutual trust and confidence.

28. The Tribunal heard evidence on a number of background events, details of individual allegations contained in grievances and other meetings/discussions that took place and although those specific issues that we not pleaded or raised as an act relied upon have been given consideration in determining the issues before me.

29. Below I have set out the findings of fact relevant to each allegation in the list of issues and where relevant referred to background information.

Background

30. The Claimant was employed by the Respondent from 1 September 2010 to 19 July 2022 in the role of a British Sign Language ("BSL") Communicator/ Instructor. The Claimant also previously worked for the Respondent prior to 2010 but for the purpose of this hearing her period of continuous employment commenced on 1 September 2010. The Claimant worked 20 hours per week, usually across three days. The Respondent is a further education college based in Bilsborrow, Preston. The Respondent is a large employer having a total of 801 employees, with 670 employees being based with the Claimant's place of work.

31. There is no evidence that the Claimant had been subjected to any disciplinary proceedings or that any grievance proceedings had occurred prior to the incidences referred to below. The Respondent's view was that the Claimant was highly skilled and a valuable member of staff.

32. The Tribunal was provided with a copy of the Claimant's contract of employment, dated 2 December 2013 stating her continuous employment from 1 September 2010 and her job role as a BSL Communicator/ Instructor and that she would be required to perform such duties consistent with her position as may be required from time to time. The Claimant was also provided with a job description which confirmed her job title and that her role would involve working anywhere within the organisation, "you may be required to work at or from any building, location or premises of Myerscough College, and any other establishment where Myerscough College conducts business".

33. The Claimant was part of the Inclusive Learning Team and would be required to perform such duties as the Respondent required of her within Inclusive Learning. The Claimant was also a specialist note taker for students and it was accepted that the Claimant supported students with sensory loss not just BSL but also lip reading and non-signing. The Claimant explained in her evidence that she was qualified to Level 6 in BSL and a qualified specialist note taker. The Claimant also confirmed that during her employment she worked in a number of departments including animal studies, equine, maths, English and motorsports. The Respondent also employed Inclusive Learning Advisors (ILA)

who worked with students who need not need BSL, as note takers. The Claimant's role was more specialist and she received a higher salary. It was common ground between the parties that the Claimant was a highly regarded employee who had multiple skills and was dedicated to her students.

34. During cross examination the Claimant accepted that if a deaf student was enrolled onto a course that she would be assigned to that student on whatever course they were enrolled on and if no deaf students were at the college, she would be assigned to non-deaf students who needed specialist support, again on whatever course they were doing. In fact, the claimant stated during her evidence 'I was constantly deployed all over the college wherever I was needed' and agreed that she was not assigned to a particular area or course. Although the Claimant said in evidence that 'each member of staff tended to have an area they worked on'.

35. It was agreed between the parties was that from September 2021 the Claimant had worked 1.5 days in the Motorsports department an area that the Claimant particularly enjoyed working in and in which she says was her 'core area' of work. The Claimant enjoyed the work so much that she had taken additional qualification that she felt would help her assist the students better because of her understanding of the subject area. The Claimant was clearly committed to her work and explained that she had also learned to drive a tractor and taken math courses to assist her in helping students. The Claimant did however, accept that it was not a requirement of her role to do any additional courses or hold qualifications in the subject areas covered. The Claimant had been assigned to a student who had hearing difficulties and the remainder of her time was assigned to students with high learning needs.

36. When no deaf students were enrolled the Claimant would work alongside her inclusive learning colleagues working with other students who needed support, again in any area that required that support. The Claimant stated in her evidence that she wore 'different hats, I would work as an inclusive learning advisor and specialist note taker'. The Claimant continued to enjoy her higher salary and terms and conditions whether or not she was working with a deaf student.

37. The Claimant was line managed by Val Senior, who is no longer employed by the respondent due to her retirement and who did not give evidence to this Tribunal, but the Tribunal heard from Karen Ball who is a manager within the Inclusive Learning team. During the time the Claimant was employed Ms Ball supported Ms Senior with the management of the Inclusive Learning Service which included the Claimant's role.

38. Ms Ball's evidence supported the Claimant's evidence that she had been working approx. 1.5 days in the motorsports area since September 2021 and that she would work in various areas depending upon the needs of the students. When questioned on whether there was an expectation that certain staff would work in certain areas Ms Ball was clear that staff were allocated on the basis of

student need and not an employee's preference. Ms Ball also stated in her witness statement *"I do not agree that the Claimant's "core" area was Motorsports. It contradicts the very nature of her role which is clearly to provide BSL and specialist note taking to students of the Respondent."* The Claimant also confirmed this when cross examined and asked whether there were specific areas or course a person would be assigned to and that if that were the case then it would contradict the nature of her role. The Claimant's response was 'yes correct, but each member of staff tended to have an area they worked on. "*I was mainly working on anything with an engine….. if there was a shortage of staff in that area took priority"*

39. Based on the Claimant's own evidence and that of Ms Ball, the Tribunal finds that the Claimant was not employed to work solely in motorsports or that motorsports was her core area of work. The documentary evidence including the Claimant's contract of employment and job description is also clear that the Claimant was employed as a qualified specialist BSL communicator / instructor and that she could be required to work in area as required by the Respondent. The Tribunal finds that any expectation that she would always be allocated to the motorsports department was the Claimant's own making and that it was her preferred area of work but it was neither a contractual right, custom and practice or a reasonable expectation.

40. Between September 2021 and November 2021, the Respondent recruited to the role of Inclusive Learning advisor which was a more junior role at a lower salary. Ms Ball interviewed alongside Ms Senior and recruited Sylvia Dempsey who was a former neighbour of Ms Ball. The role of ILA was a lower paid role than the Claimant and did not require the specialist BSL qualifications. Ms Dempsey was appointed on a 30 hour a week contract. During the period from her appointment until new timetables were set for the following term, Ms Dempsey shadowed the Claimant in the motorsport area and also worked in the sports area.

41. Generally timetabling for staff was created by prioritising those employees with contracted hours, starting with full time staff and then through other members of staff by way of number of hours allocated. The Respondent also 'employed' hourly staff who would also be timetabled but their hours would be allocated last. The Claimant's evidence was that she would usually meet and discuss timetabling but in this instance the Claimant was off sick from 5 January 2021 until her return on 19th January 2021. It was not clear from the evidence when exactly the timetables were prepared but it is clear that when the Claimant returned from her sickness absence a timetable had not been prepared for her and that Ms Dempsey had been allocated ILA work in the motorsports area.

42. The Claimant's evidence was that she did not know that the timetabling was done in this way previously and that it was her belief that each work area coordinator could manage their own timetables. The Claimant also stated that Ms Dempsey had told her before Christmas that she liked working in motorsports and that was her preferred area and that the claimant was a

'spanner in the works'. The Claimant said that because Ms Dempsey was a neighbour of Ms Ball she had been prioritised for motorsport at the expense of the Claimant's hours in that area.

43. The Claimant stated in evidence that she felt she had been forced out of her area because of Ms Dempsey preference and that she had invested a lot of effort into that area and the students. The Claimant claimed that it was a demotion because she had worked in that area for 1.5 days per week since September 2021 and that there was no job there for Ms Dempsey. For clarity, it was accepted by both parties that at the time Ms Dempsey was allocated to the motorsport area there were no deaf students in that area that required BSL or specialist support and that Ms Dempsey whilst allocated to that area was not at any time given 'work' beyond her pay scale or work that only the Claimant would undertake.

44. Returning to the Claimant's sickness absence, the Claimant's evidence was that during this period she had asked about her timetable but that nothing had been forthcoming. The Claimant had emailed on 14 January 2022 requesting a copy of her timetable. The Respondent does not deny this but stated that they were unsure when the Claimant would be returning to work and that was the reason it was not prepared. The Claimant disputed this and said that it would have been apparent from her email that she would be returning to work on 19 January 2022. In any event the Claimant returned to work, and she was given a draft timetable. The Claimant was not given a finalised timetable because at that point the Respondent would not know the needs of the students until 26 January 2022. This was not disputed by the Claimant. The respondent stated that it was not uncommon for timetables to be changed but accepted that on the 19 January 2022, Jen Haddaji, Inclusive Learning Co-ordinator, informed the Claimant that she would not be working within the L2 Motorsport class. This was due to the student that the Claimant had been supporting was no longer studying on the Motorsport course.

45. At that time the Claimant discovered that Ms Dempsey had been allocated hours in the motorsports area. The Respondent stated that the reason Ms Dempsey had been given the hours was because she was considered to have the appropriate skill level to manage the learning needs of the new students within L2 Motorsport class and which didn't require BSL.

46. The Claimant was very upset and spoke to Ms Haddaji. The Claimant stated that she was told by Ms Haddaji "go onto welding, as Ms Dempsey's second". The Claimant took this comment along with being removed from the motorsports area as a demotion. The Respondent evidence was that Ms Haddaji had said as a "second person" and was said in the context of going into the department as an additional person and that it was not meant as second in command or as Ms Dempsey's junior.

47. The Claimant's evidence is that she considered it was a demotion and that she had been put 'under another employee'. The Claimant evidence was that she

was so upset about not being given hours in motorsports that she submitted her resignation on 20 January 2022. The resignation letter stated "*Dear HR Team, I wish to hand in my notice after working for Myerscough College for 16 years. I have reached this decision today and have spoken to my Line Manager Val Senior. I want to thank both Val and Joscelyn for all the support that I have been given in my role at Myerscough over the years and my Area Coordinator Jen. I feel it is time for me to look for a new job that is closer to home for personal reasons. I understand my notice period is 2 months which will give me time to find an alternative position."*

48. Whilst the resignation letter does not refer to any timetabling issues the Claimant was clear in her evidence that the reason, she submitted her resignation was because she had not been allocated any hours in motorsport and that she believed that Ms Dempsey had been given hours in preference to her and that the offer of hours in the motorsports area was as Ms Dempsey's second.

49. The Tribunal finds that there was no evidence that the Claimant had been guaranteed hours in motorsport or that Ms Dempsey had been given work that should have been performed by the Claimant. The Tribunal preferred the Respondent's evidence in respect of allocating work and in essence the Claimant during cross examination largely agreed. In relation to being put in a department as Ms Dempsey second the Tribunal finds that it is more likely than not that the Respondent's explanation that this referred to her being a second person in the department is more credible.

50. The Claimant's witness statement says that she spoke with her line manager Ms Senior on 20 January 2022 to express her upset and hurt at not been allocated motorsport hours. The Claimant's evidence was that she told her line manager that she was going to hand her notice in and that she was 'done' and that "Myerscough College had shit on me for the last time". The Claimant said that Ms Senior offered her six options. The Claimant's witness statement set out the options she said had been offered to her:
    a. *I could work for both her (VS) and the Assistant Head (JL) doing spreadsheets and (VS) would 'create me a job' and that I would not have to be managed by anyone else. I told her I had no interest in this.*
    b. *b)I could work on Apprenticeship and Skills which was offered twice in the office, a third time in an email by Assistant Head (JL) and a fourth time on Friday 21st January 2022 when Line Manager (VS) telephoned me. I stated that I had no interest in this.*
    c. *c)I was asked would I like to work with the tutors. I told (VS) that I did not wish to. d)I was asked would I like to work on plant/engineering. I stated my experience was on motorsport/ agricultural engineering.*
    d. *e)I was then shown a blank timetable and asked if I could choose to work, where would it be and what days.*

e. *f)I was finally told by Line Manager (VS) that I could work on motorsport and that she (VS) would move (SD) onto another*
f. *I felt extremely hurt that this choice was Line Manager (VS) last option and not the obvious first option."*

51. The Respondent accepted that the Claimant had spoken to her line manager Ms Senior and that Ms Senior give the Claimant several options. The Respondent's evidence was that the Claimant had at no time been demoted, she remained employed as a more highly skilled employee and that Ms Dempsey remained employed as a more junior employee. The Claimant did not accept any of the options and that whilst the respondent had no obligation to make such offers it did so in an attempt to resolve the Claimant's concerns as a valued member of staff. The Respondent's evidence was similar to that of the Claimant in that it made the following offers

    a. creating a new role for the Claimant, whereby she would work alongside Val Senior and Jocelyn Lever;
    b. working on apprenticeship and skills area;
    c. working with tutors;
    d. working on plant/ engineering;
    e. creating her own timetable, whereby the Claimant could choose where she worked; and
    f. confirming that she could work in the Motorsports department and moving SD elsewhere.

52. It is clear that the Respondent acted quickly when realising the Claimant was upset and wanted to keep a valuable employee. The offers made were reasonable and indeed effectively remedied the effects complained of by the Claimant.

53. After submitting her resignation, on 21 January 2022 the Claimant contacted HR to discuss her resignation. Mr Staines a HR advisor had already received her resignation and based on the content, that she was leaving to look for other employment closer to home, had not taken any action upon receipt. However, the Claimant made contact with HR to discuss the reasons she had resigned. It is agreed that Mr Staines and the Claimant had a telephone call and that it was a short call. The Claimant said that during this call Mr Staines disregarded her concerns and said that the matter was 'no issue' and that it was 'not a constructive dismissal as she still had a contract', before apologising and saying that he did not understand why the Claimant was being moved off of her motorsport group for a new employee. The Claimant agreed that Mr Staines sent a meeting invite for a face-to-face meeting and that she rejected that meeting. The Claimant also accepted that she shouted at Mr Staines when he returned her call to find out why she had rejected the meeting invitation.

54. The Claimant gave evidence that she had kept notes of these conversations but had not disclosed them to the Respondent and neither had she produced

them for these proceedings or indeed made reference to them prior to this hearing. The Tribunal did not find that evidence credible and in any event considered that as this was a particularly issue she relied upon as a breach of contract or part of a course of conduct the notes would have been a significant piece of evidence that it is likely the Claimant would have referred to in her ET1 or witness statement.

55. Mr Staine's evidence was that there was a short call where the Claimant express some of her concerns and that he thought it would be best to meet face to face. Mr Staines was unfamiliar with her role and so wanted to speak to her in person to ensure he understood her concerns. Mr Staines said it was a very short call and that at the end he agreed to send a meeting invite and did not consider there were any problems. Mr Staines sent the meeting invite immediately after the meeting and received a rejection notice. He said he was confused having received the rejection notice and immediately called the Claimant back to check whether he had got the time or the date wrong. The Claimant told Mr Staines that she was upset and was shouting and that it was not clear what he had said to upset her but she told him he did not understand the issues. Mr Staines told the Tribunal that in order to move things forward he apologised and offered the Claimant another HR advisor, she refused this offer and agreed to meet to discuss her concerns. Mr Staines stated that he had no recollection of referring to constructive dismissal in this telephone call.

56. The Claimant clearly felt that at that stage Mr Staines did not have a full grasp of her concerns and this frustrated her. However, Mr Staines was very clear in his evidence that he did not refer to constructive dismissal during this conversation and that as the Claimant was shouting at him during the conversation, an allegation the Claimant accepted, he had felt it would be better to meet in person to better understand her concerns. The Tribunal finds this was a reasonable course of action to take. Whilst Mr Staines admits that he was not certain of her concerns during the initial call it was because the Claimant was so upset and not because he disregarded her concerns but because he felt he needed to meet her in person to better understand. The Tribunal found Mr Staine's evidence to be credible and that whilst he agreed he was not familiar with the Claimant's role he was not disregarding her concerns but wanted to better understand what they were. Both parties agreed it was a short call the Tribunal finds that it is more likely than not that at that point Mr Staines would not have had a full grasp of the concerns raised but that did not mean that he disregarded her concerns.

57. The Tribunal finds that at this stage it was unlikely that Mr Staines would have been aware that the matter could or would amount to a constructive dismissal because he did not feel that he understood the full nature of her concerns at that time. Mr Staines' evidence on this point was that he did not refer at all to constructive dismissal during the call and the Tribunal accepted this evidence.

58. The Claimant and Mr Staines met for a meeting on 24 January 2022 where the Claimant told Mr Staines that she had resigned from her role due to *"being treated less favourably and differently to other staff."* A Further conversation took place on 28th January 2022 where the Claimant refused to expand or provide examples of other incidences. The Claimant told Mr Staines about Ms Dempsey being given hours in Motorsports and also referred to the conversation she had had with Ms Haddaji where the Claimant stated that she was *'cold and gave no eye contact".*

59. Mr Staines evidence was that he considered that the main concerns were Ms Dempsey being placed in the motorsports area and that she had not been placed in the motorsport area and what he considered would amount to unprofessional behaviour by Ms Haddaji. These were the main issues Mr Staines dealt with and as set out in his response letter at page 190 of the bundle Mr Staines sets out his findings.

60. It is clear Mr Staines tried to investigate what he considered were the issues raised by the Claimant. It is also clear that different language was used, for example, less favourable and unfairness vs favouritism and that Mr Staines referred to unprofessional behaviour. Whilst I understand and accept that the claimant was genuinely upset that her wording had not been used, the Tribunal finds that it is not uncommon or unreasonable for an employer to summarise an employee's concerns and that the substances of the complaints by the Claimant were not demonstrably different by the use of different language. Indeed, during these proceedings, the Claimant, herself referred to favouritism of Ms Dempsey during her oral evidence.

61. Mr Staines encouraged the Claimant to engage with the Respondent's internal Resolution policy so that her concerns could be dealt with, but this was not an option that the Claimant agreed to pursue. The Respondent accepted that the language used was different and that the Claimant stated that she had been treated less favourably and differently to other staff". However, the Claimant had refused to provide examples of such behaviour at the meeting with Mr Staines on 28 January 2022 so at that stage it could not be investigated.

62. The Tribunal finds that whilst the wording used was different it was not materially different and as such dealt with the main concerns of the claimant. The Respondent accepted that during the meeting on 24th January 2022 she had resigned from her role as a BSL Communicator due to "being treated less favourably and differently to other staff". During a further conversation with the Claimant on the 28 January 2022, Mr Staines asked the Claimant to provide examples of such treatment, the Claimant responded by stating she wanted to "keep her cards close to my chest". This prevented DS from being able to conduct further investigations. It became apparent that the Claimant's main concern was centred around Ms Dempsey working within the Motorsports department and that she had not been placed within the Motorsports department.

63. At page 190 of the bundle the Tribunal was provided with a copy of the letter sent to the Claimant from Mr Staines regarding the outcome of his investigation. At the end of that letter Mr Staines asked the Claimant to reconsider her position over the weekend and to confirm on the following Monday how she wished to proceed. Up to that point the Respondent had not processed the Claimant as a leaver due to attempting to resolve the concerns raised. Mr Staines also telephoned the Claimant to provide feedback from his investigation.

64. The Claimant alleged that Mr Staines had pressurised her into giving him an end date and had said that he thought she had acted hastily. The Claimant stated that she had had a bereavement that day and that she needed time to think.

65. Mr Staines was very clear that had not pressurised the Claimant into giving an end date and the Tribunal finds that looking at the evidence Mr Staines was reasonable in asking the Claimant to consider her position and request that she got back to him after the weekend and that this was not an attempt to pressurise the Claimant.

66. At or around this time the Claimant indicated that she intended raising a formal grievance and requested a copy of the grievance procedure. Mr Staines had continued to encourage the Claimant to engage in the resolution procedure. Also, during this time, the Claimant continued being absent from work. Mr Staines contacted the Claimant about her continued absence. In an email dated 14 February 2022 Mr Staines asked asking whether to process her payroll information as a month's notice and how she wished to proceed. Mr Staines was clear that he was not trying to put the Claimant under any pressure but payroll deadline was looming.

67. The Claimant did not confirm her resignation and in an email dated 22 February the Claimant stated that she was not in work because she had been put in an untenable position and felt unable to attend work. On the 15 February 2022 the Claimant sent a further email stating she was not ill and did not have a sick note.

68. Further attempts were made to ascertain when the Claimant would be sending in a grievance and when she would be returning to work. The Claimant was informed on 21 February 2022 that her absence was regarded as unauthorised and again on 7 March 2022.

69. The Claimant eventually raised a grievance on 5 April 2022. This is set out on pages 214 – 222 of the bundle. A further copy of the grievance was submitted on the resolution policy document provided by the Respondent on 11 April 2022. At that time the college was largely closed due to the Easter holidays, and this was explained to the Claimant in an email dated 11 April and that a meeting would be arranged as soon as possible when staff returned from the Easter break. The Claimant was contacted on 21 April by Ms J MacDonald confirming

that she had returned from annual leave and would be in touch once someone had been appointed to hear the grievance. A letter was sent to the Claimant on 26 April 2022 from Lisa Hartley to introduce herself and inform the Claimant that a meeting had been arranged for 29 April 2022.

70. The Claimant attended the meeting and sent an email to Lisa on 3 May 2022 thanking her for arranging the meeting and for providing a safe space for her to discuss her concerns. The Claimant and enclosing other documents she wished to be considered.

71. On 13 May 2022 Lisa wrote to the Claimant to provide an update and confirmed that she was reviewing her concerns but that she was not yet in a position to provide an outcome. The Claimant was unhappy at the delay and wrote to Lisa expressing her unhappiness and her belief that she should have had a response with 5-6 days according to the Respondent's grievance policy.

72. A further email was sent to the Claimant on 23 May with another progress report and that Lisa was still reviewing and gathering information in order to assist her with decision making.

73. On 26 May a copy of the meeting notes were sent to the Claimant. Ms Hartley explained during evidence that during the period between the hearing and sending the notes to the Claimant she had taken some annual leave, had external days off campus due to her additional roles and responsibilities and wanted to check the notes carefully before sending them out. Ms Hartly accepted during evidence that ideally it would have been better to have gotten the notes out sooner but felt that it was a reasonable time period given her other commitments. The Tribunal finds no evidence that there was any contractual right that the notes should have been supplied within a specified period but does accept that 18 days was a long time to wait for the notes but that given the Claimant was kept up to date with progress during this period and that other investigations were ongoing in order for Ms Hartley to determine the outcome of the grievance the Tribunal does not find that this was an unreasonable delay or that it breached the Claimant's contract of employment.

74. The Claimant said in evidence that the grievance procedure policy document sent to her by Mr Staines was different to the one in the bundle. This was not referred to in her ET1 or witness statement and she had not disclosed the document she referenced. The Tribunal did not find it credible that the document had been amended and considered that as this was a specific act the claimant was relying upon that if she had such evidence it would have been referred to at least in the ET1 or witness statement and certainly would have been relied upon as documentary evidence to support the Claimant's contention. On balance the Tribunal preferred the Respondent's evidence on this point.

75. The outcome of the meeting was sent to Claimant on 27 May 2022. This is set out at pages 333-340 of the bundle. The Claimant's grievance was not upheld.

76. Ms Hartley's evidence was that after receiving the grievance and reviewing its contents she considered there was an overlap between the concerns raised and decided to break them into eight areas of concern. Those were set out in the outcome letter as follows:

    a. Other members of the team were being offered the opportunity to work additional hours and often the Claimant was not given the option;

    b. Another member of staff, a BSL Communicator, was offered a 30 hour contract some years ago and the Claimant was not offered any additional hours on top of her20-hourcontract;

    c. The Claimant had not been given a timetable at the end of 2021/ start of January 2022, unlike other members of staff;

    d. The Claimant believed her recent Annual Review Development record for academic year 2020/21 had been altered after she had signed this;

    e. During a period of sickness absence in January 2022, the Claimant claimed her line manager telephoned her on a number of occasions to discuss work;

    f. On two past occasions, the Claimant had asked to change her working pattern, but this was not supported;

    g. The Claimant was taken off note taking and replaced by two individuals, who were friends of Karen Ball's (SEND Funding and Education, Health and Care Plan Manager at the Respondent) ("KB") daughter; and

    h. Sylvia Dempsey (Inclusive Learning Advisor at the Respondent) ("SD") had been treated more favourably

77. The grievance outcome letter was detailed and addressed the concerns raised by the Claimant. During cross examination of Ms Hartley, she was specifically referred to three areas where the Claimant considered demonstrated that she had not listened to the Claimant's concerned. Looking at those issues identified by the Claimant as the evidence showing that Ms Hartley did not listen the Tribunal was referred to the grievance document paragraph 16 (b) and 16 (d). The grievance letter is set out pages 214-22 of the bundle.

    a. Para 16(b) states *"On more than one occasion, if there were extra hours on sign language for open days or interviews, these were always offered to other BSL Communication Support workers first and often not offered to me at all, unless I challenged her "(Karen Ball) and then she (Karen Ball) would then offer me hours."*

    b. And 16 (d) *A BSL Communicator (Nicola) left the college and worked approximately 7 hours. Both the BSL Communicator (Jenny Naylor) and me were offered (Nicola's) hours split between us (me and Jenny Naylor) by my Line Manager (Val Senior). The BSL*

Communicator (Jenny Naylor) was given extra hours on top of her 30-hour contract. I was never given any extra hours."

78. Turning to the grievance outcome letter Ms Hartley's response to these two points were:

    a. "*Concern: Other members of the team were offered the opportunity to work additional hours and often you were not given the option. In our meeting on 29thApril, you explained that you had spoken to Karen Ball regarding not being included in communications to undertake overtime. You advised once you had raised this with Karen, you had seen an improvement and were included in the distribution of communication offering overtime. In addition to our meeting, I did review wider information which showed that you have undertaken additional hours over the last few years, albeit not this academic year. The information you highlighted along with the wider information, indicates that this situation had been resolved.*

    b. *Concern: Another member of staff, a BSL Communicator, was offered a 30-hour contract some years ago. You explained at the time you were not aware of these hours and were not offered any additional hours on top of your 20-hour contract. You therefore felt that this was unfair. As part of the fact-finding process undertaken, I did not identify any information to support this point of concern and therefore determine this point of concern to be inconclusive.*

79. The Tribunal finds that whilst the same wording was not used by Ms Hartley and she had summarised the Claimant's concerns (as referred to above), the Claimant's concerns were listened to and addressed by Ms Hartley. Therefore, I find that there was no breach of contract.

80. A further issue the Claimant stated had not been addressed and therefore demonstrated that Ms Hartley had not listened, was a complaint about telephone calls with Mark Cottom that had taken place some years earlier. The Respondent argued that this complaint did not appear in the Claimant's grievance and that it was not referenced in the original notes/record of the grievance hearing. The Tribunal was supplied with an alternative version of those notes that the Claimant had amended and which she considered a more accurate version. These are disputed by the Respondent and Ms Hartley and Ms MacDonald who were both present at the meeting confirmed in cross examination that they did not have recollection of this issue being raised. Ms MacDonald also confirmed that the notes had been typed up by Tracy Lancaster (PA- note taker) and they had been sent to her to check and that she would have cross referenced and then destroyed her own notes. The Tribunal accepts this evidence and found both Ms Hartley and Ms MacDonald to be credible witnesses who had no reason to not include anything the Claimant had raised in the meeting.

81. Overall, the Claimant was unhappy with the wording of the Respondent's response to her concerns and whilst the Tribunal acknowledges that different wording was used it does not accept that this resulted in the Respondent not listening or dealing with those concerns.

82. The Respondent argued that in any event it cannot be sensibly argued that this one point even if it was raised does not in itself demonstrate that Ms Hartley did not listen to the Claimant's concerns. The Tribunal accepts this submission and finds that Ms Hartley did listen to the Claimant's concerns and addressed them in her outcome letter.

83. The Claimant appealed the outcome of her grievance on 6 June 2022 and addressed her grievance to Mr Downham-Clarke who at the time was on annual leave. Upon his return the Claimant was invited to a grievance appeal meeting on 28 June 2022. Notes of that meeting are set out at pages 452-455 of the bundle.

84. The Claimant complains that the 'out of office' reply email on 19th of July 2022 was the 'final straw' which caused her to resign because it effectively delayed the grievance outcome by two weeks, Mr Dunham-Clarke being due to return to work on 1 August 2022. Whilst the Claimant has not specifically pleaded 'delay' as an overall concern it is worth noting that the outcome of the grievance took from 28 June to 25 July which may be considered quite a long time. However, the evidence before the Tribunal was that Mr Downham-Clarke listened carefully to the Claimant's concerns and carried out further investigations and interviews following the grievance appeal meeting to ensure that the points raised by the Claimant were investigated fully.

85. Further interviews were carried out with Ms Hartley; he also asked her to conduct further enquiries and review the Claimant's version of the grievance notes which included a paragraph by paragraph comparison between her response to the Claimant's grievance. Mr Downham-Clarke also conducted an interview with Ms Senior (the Claimant's line manager) on 4 July 2022 and asked Ms Lancaster and Ms MacDonald to review the notes provided by the Claimant. It is clear to the Tribunal that Mr Downham-Clarke was conducting a thorough review and the steps he took were reasonable and proportionate to properly conclude his appeal. Under cross examination the Claimant also agreed that the lines on enquiry and steps taken by Mr Dunham-Clarke were important and central to determining the outcome of the appeal and that those steps would take time.

86. Further Mr Downham-Clarke kept the Claimant up to date during this period and provided the Claimant with progress updates on 1 July 2022 and 11 July 2022. On 15 July 2022 the Claimant raised a query via email regarding email

communications and amendments to notes. On 18 July 2022 MR Downham-Clarke went on annual leave. The evidence shows that Mr Downham-Clarke continued to work on the Claimant's appeal and emailed her on 19 July to inform the Claimant that he had asked Ms Hartley to carry out some further investigations. This email in itself clearly indicated that Mr Downham-Clarke had not yet completed his investigation and that the outcome would not be forthcoming until after Ms Hartley had reported back to him.

87. The Claimant responded to this email and that is when she received the out of office from Mr Downham-Clarke's email. It was at this point that the Claimant says she considered that out of office meant that her outcome would be delayed by a further two weeks. The Tribunal accepts that receiving an out of office would naturally cause most people to consider that the person was not working but on annual leave. The Respondent has sought to suggest that as Mr Downham-Clarke had emailed the Claimant earlier in the day that her assumption that there would be a delay was unreasonable. The Tribunal does not agree but I do consider that the Claimant was aware that the investigation into her appeal was not yet completed and that the out of office did not impact on the fact that Ms Hartley who had been asked to carry out further investigations so Mr Downham-Clarke's presence in the business would not impact on that action and the Claimant had not shown any concern or raised any issue when she was notified that the appeal investigation was on going earlier in the day and would reasonably have been expecting a further period of time to pass before any outcome would have been sent to her.

88. In any event accepting the Claimant's evidence that she believed there would be a further delay the Tribunal does not find that this in itself was a fundamental breach of her contract of employment.

89. The outcome of the appeal meeting was sent to the Claimant on 25 July 2022 however this was received after the Claimant had resigned.

Breach of Contract Unlawful deduction of wages

90. The Claimant brought a claim of unlawful deduction of wages in respect of her absence from 20 January 2022 until her employment terminated on 19 July 2022. The Claimant resigned on 19 January but was not process as a leaver and during this period as attempts were made to resolve the concerns of the Claimant.

91. The Claimant received her normal wages at the end of January and therefore the Tribunal finds that there were not deductions between 20 January and 31 January 2022.

92. The Respondent's case is that between 1 February 2022 and 19 July 2022 the Claimant was on unauthorised absence and therefore not entitled to any

payment. The Respondent communicated with the Claimant and stated clearly that her absence was considered unauthorised. The Tribunal was referred to emails sent by the Respondent and at page 207 emails and page 210 dated 7 March setting out clearly that she would not be paid and her absence was viewed as unauthorised.

93. The Claimant was very clear in her responses to the Respondent that she was no ill but was not willing to attend work while her concerns were ongoing. There was no agreement between the Claimant and the Respondent that she could remain at home during this period. The Claimant accepted this in evidence. The Claimant's evidence when cross examined was *"The Respondent paid me up until the end of January…. I feel the college had duty to investigate my concerns and because they had caused it I was not in the business"*

94. The Tribunal finds that the Claimant was fully aware that her absence was unauthorised and that she was not going to be paid. The Claimant also appears not to have raised non-payment of wages during her grievances or further communications with the Respondent.

The Law

Constructive Dismissal

95. Section 91(1)(c) of the Employment Rights Act 1996 provides:

"Circumstances in which an employee is dismissed:
For the purposes of this Part an employee is dismissed by his employer if –

(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 or by reason of the employer's conduct."

96. The leading case in respect of constructive unfair dismissal is **Western Excavating (ECC) Limited v Sharp [1978] QB 761**. Lord Denning said *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct and he is constructively dismissed".* Guidance was also provided and the Tribunal should ask itself the following questions:

    i. Did the claimant resign in circumstances in which they were entitled to resign without notice by reason of the respondent's conduct?

    ii. If so, what was the repudiatory breach that entitled the claimant to resign?

    iii. Was there a series of breaches which entitled the claimant to resign, and if so, what was the last straw in such a series?

iv. Did the claimant resign in response to this breach?

v. Did the claimant delay in resigning and re-affirm the contract?

97. In order to be successful in a claim for constructive unfair dismissal the claimant must show that there has been a repudiatory or fundamental breach of contract going to the root of the contract, and it is not enough to show that an employer has merely acted unreasonably. Further, in cases where an employee is relying upon the implied term of mutual trust and confidence the Tribunal must consider the House of Lords decision in **Mahmood v BCCI SA, Malik v BCCI SA (in Liquidation) [1998] AC20 1997 3All ER 1** where it sets out that an employer shall not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between an employer and an employee.

98. A course of conduct may have the effect of undermining mutual trust and confidence and consequently amount to a fundamental breach following a last straw incident. Guidance is provided to the Tribunal in the Court of Appeal case of **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978** as set out at paragraph 55:

a. "(a) 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?
b. (b) Has he or she affirmed the contract since that act?
c. (c) If not, was that act or omission by itself a repudiatory breach of contract?
d. (d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach of the **Malik** term?
e. (e) Did the employer resign in response (or partly in response) to that breach?

99. Therefore, an employee claiming constructive dismissal on the basis of a last straw is entitled to rely on the totality of the employer's acts as a continuing cumulative breach of the implied duty of trust and confidence notwithstanding a prior affirmation of the contract, provided that the last straw formed part of the series, thus a last straw can revive the right to terminate the contract.

100. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R.** *35* the Court of Appeal explained that the final act (the so called "last straw") in a series of actions which cumulatively entitled an employee to repudiate his contract and claim constructive dismissal need not be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of had to be more than very trivial and had to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach.

101. The Tribunal is further assisted by the case of **Wood v Wm Car Services (Peterborough) Limited EAT 1981** where it states that the function of the

Tribunal is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it. The Tribunal when considering whether an employer's conduct has destroyed the relationship of trust and confidence must follow this objective test, and the burden of proof rests with the claimant.

Unlawful Deduction of Wages

102. The law relating to unauthorised deductions from wages is contained in section 13 of the Employment Rights Act 1996, which provides:

a. *"An employer shall not make a deduction from wages of a worker employed by him unless:-*

i. *(i) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract [Section 13(1)(a)]; or*

ii. *(ii) The worker has previously signified in writing his agreement or consent to the making of the deduction [Section 13(1)(b)]."*

b. Section 13 (2) states:

i. *"In this section "relevant provision," in relation to a worker's contract, means a provision of the contract comprised –*

ii. *(i) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question or, [Section 13(2)(a)]*

iii. *(ii) In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion [Section 13(2)(b)]."*

c. Section 13 (3) provides that:

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

103. The case of **Batty v BSB holdings (Cudworth) Ltd [2002] EWCA Civ 648** deals with the situation where an employee refused to return to work after a period of suspension. He argued that when the company stopped paying his salary after refusing to return to work that it constituted a breach of his contract of employment. Mr Recorder Kealy rejected his claim and stated "*I am satisfied here that Mr Batty did indeed know his suspension was lifted and in that state of knowledge refused to attend work. Accordingly, the copay was entitled to*

stop paying him. By doing so they were not in breach of the employment contract. The contract continued but the obligation to pay was in suspension so long as the Claimant refused to attend for work".

104. When the case reached the Court of Appeal M Justice Ward held that this finding was unassailable. Further the principle of 'no work no pay' was confirmed in the case of **Sunrise Brokers LLP v Rodgers 920140 EWHC 2633 (QB) IRLR 780**, where DHC Judge Richard Slater QC said "*work (or rather readiness or willingness to work) and wages are, in general, mutual obligations, they are concurrent conditions. The employee must be ready and willing to do the work in exchange for the wages."*

Conclusions

105. The Claimant relies upon the implied term of mutual trust and confidence and argues that the out of office email from Mr Downham-Clarke was the final straw and was in itself a breach of the implied term of mutual trust and confidence entitling the Claimant to resign and claim constructive dismissal. In the alternative the Claimant argues that the final straw act was part of a course of conduct that when viewed cumulatively amounted to a breach of the implied term of mutual trust and confidence and that in this case the final straw act/event does not in itself need to be a breach in accordance with the principals in Kaur.

106. The Tribunal needs to consider whether viewed objectively, the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the parties and whether the Respondent had reasonable and proper cause for doing what it did.

107. Importantly the Tribunal needs to consider whether if there was a breach, was it a fundamental breach that went to the root of the employment contract amounts to a repudiatory breach entitling the Claimant to resign and claim constructive dismissal.

108. The Tribunal has made findings of fact on the events/acts upon which the Claimant relies on to show that the Respondent fundamentally breached the implied term of mutual trust and confidence. In summary they are set out below and I have set out my conclusion on whether individually or cumulatively these acts or events amount to a fundamental breach entitling the Claimant to resign and claim constructively dismissal.

    a. That on or by 19 January 2022, she was demoted without reason and her job role was given to a new employee with less experience and qualifications?

i. The Tribunal has found that the Claimant was not demoted. There was no evidence to support this allegation. The Claimant herself in her oral evidence to the Tribunal accepted that she was not assigned to the motorsports area and it is clear that her role was not given to Ms Dempsy. Ms Dempsy was employed as an ILA and that was the role that she was to perform in the motorsport area. She was not BSL qualified and she was not undertaking BSL work or specialist note taking work. What is clear is that the Claimant had a preference to work in this area and was clearly very upset that she had no longer been allocated hours in the area. This however, does not amount to a demotion and cannot be said to be a breach of contract. The Respondent was entitled to wait until all students were known to them in determining whether the Claimant was required to work with any deaf students in any area before confirming her timetable and acted reasonably in assigning another employer to the ILA role within the motorsports area where the only deaf student had stopped doing the course and where they knew the skills and experience that the Claimant had would not be required. The Tribunal does not consider that viewed objectively it can be said that the failure of the Respondent to provide the Claimant with a timetable upon her return to work after a period of sickness amounts to a demotion because another employee employed in a different role and terms and conditions had been given hours in that department.

ii. It therefore follows that it cannot be said that the Respondent breached the Claimant's contract of employment fundamentally or at all. The Tribunal has found there was no demotion. The burden of proof rest with the Claimant and she has not provided any evidence to support this allegation other than her own perception of events at the time. The Tribunal notes that the Claimant accepted in evidence that Ms Dempsey was not employed as a BSL Interpreter and that her role within the motorsports department was not that of a BSL interpreter but that Ms Dempsey remained employed in a ILA role.

b. In a telephone call with Mr Lovatt-Staines on 21 January 2022, did he disregard the Claimant's concerns? The Claimant will say that he told her that the matter was 'no issue' and that it was 'not a constructive dismissal as she still had a contract', before apologising and saying that he did not understand why the Claimant was being moved off of her motorsport group for a new employee.

i. There was factual dispute between the parties as to who said what during these conversations. The Tribunal has preferred the Respondent's evidence in this regard and finds that there was no breach of contract. The Tribunal was not provided with any notes of the discussions and none were disclosed during the

proceedings. It was surprising that the Claimant who has been legally represented throughout, stated in her oral evidence that she had indeed taken notes but not disclosed them. Throughout these proceedings the Claimant has referred to her professional skills and abilities in relation to note taking and the importance of accurate notes and wording of those notes. She has relied upon her own accuracy to cast doubt on the minutes of the grievance meeting and yet has chosen not to disclose notes that she says would support her allegations in respect of Mr Staines. The Tribunal does not accept that this is credible explanation and prefers the evidence of Mr Staines.

c. On 28 January 2022, in communicating the outcome of his investigation, did Mr Lovatt-Staines demonstrate to the Claimant that he did not understand her concerns? The Claimant will say that: (i) her concern that she was being treated unfairly, less favourably and differently to other staff was changed to '2 points on favouritism'; and (ii) the Claimant's concern that Ms Haddaji was 'cold and gave no eye contact' was changed to 'unprofessional'.

    i. The Tribunal accepts that the language and terminology used in the outcome of Mr Staines investigation is different to that used by the Claimant. The alleged breach relied upon by the Claimant is that by changing the words and terminology he has demonstrated that he did not understand her concerns. There is no allegation that he did not deal with the substance of her concerns and under cross examination Mr Staines was asked about this point he was clear that when he enquired about other historical issues the Claimant would not share those with him stating that she was 'keeping her cards close to her chest'.
    ii. Also during cross examination Mr Staines was asked about the difference between the words favouritism and less favourable treatment and that unfairly treated was a broader complaint. However, the Claimant failed to go on to identify how that impacted on Mr Staine's outcome or set out what impact that alleged misinterpretation of the Claimant's concerns had on his investigation or what the likely outcome would have been had the same language or terminology been used.
    iii. Viewed objectively the Tribunal has found that the use of language did not impact on the Respondent's understanding of the Claimant's main concerns and that Mr Staines had a good understanding of her concerns and set out a good summary of what he understood to be the issues she was raising albeit not a verbatim account.

d. On 28 January 2022, in communicating the outcome of his investigation by telephone, did Mr Lovatt-Staines pressure the Claimant into leaving and amending her end date?

i. The Tribunal has found that no pressure was applied to the Claimant to resign other than reasonably enquiries and time given to the Claimant to consider her position. The Claimant had resigned, and the Respondent had agreed to hold off processing her resignation in order to attempt to resolve matters between the parties. Again, viewed objectively it is not unreasonable or unusual for the Respondent to have asked the Claimant her intentions particularly after she had made it clear she remained unhappy. The Tribunal does not find that the respondent breached the Claimant's contract.

e. On 26 May 2022, did the Claimant receive the minutes from her grievance meeting, 18 working days after the meeting had taken place?

i. It accepted that the minutes were sent 18 days after the grievance meeting. The Tribunal has also found that this was a long time. However, the Tribunal has found that the Claimant was kept up to date during this time and that the grievance procedure did not specify timeframes for sending minutes out after the grievance meeting. The Tribunal therefore finds, viewed objectively, that there was no breach of contract. The Claimant sought during cross examination to suggest that the grievance procedure had been amended and that the original procedure contained timeframes. The Tribunal has not accepted this evidence as reliable and accepts the Respondent's submissions that the absence of any reference to changes or amendments to the grievance policy do not appear in the ET1 or in the Claimant's witness statement. The Claimant also indicated that she had the original version but again had not disclosed it. Given that the Claimant is relying upon this allegation as a breach of contract or as a course of conduct when viewed cumulatively amounts to a fundamental breach of contract it is not credible that the Claimant would have omitted to provide the document or to have referred to it in her ET1 or statement.

f. On 27 May 2022, in communicating the outcome of the grievance investigation, did the grievance officer (Lisa Hartley) demonstrate that she had not listened to the Claimant?

i. The Claimant specifically referred to three points which she considered were not dealt with in the grievance and demonstrated that Ms Harley had not listened. The Tribunal has found that Ms Hartley did address those concerns both in the substance of the grievance outcome letter and which was further demonstrated in the document created for the appeal hearing.

ii. The Tribunal has also accepted that the concern around telephone calls that had taken place some years earlier with Mick Cottom were not included in the original grievance and therefore would not have been addressed in any outcome.

iii. The Tribunal finds that there was no breach of contract and that the Respondent's conduct viewed objectively demonstrates that Ms Hartley took a lot of time listening and considering the concerns raised by the Claimant and there is no evidence that she did not listen to the Claimant.

g. On 19 July 2022, did the Claimant receive an automatic reply from the Appeal Officer (Steven Downham-Clarke) that he was on leave from 18 July to 1 August 2022, in effect extending an outcome to the Claimant's appeal by a further two weeks?

h. The Tribunal has found that the Claimant's appeal was submitted on 6 June 2022 and that a hearing was held on 28 June 2022. As of 19 July 2022, the Claimant had not had the outcome of the appeal. The tribunal also accepts that on 19 July 2022 Mr Downham-Clarke was on annual leave and that the Claimant did receive an out of office. During the period from 28 June 2022 to 19 July Mr Downham-Clarke undertook a number of further investigations and interviews. This is not disputed by the Claimant. also accepted by the Claimant is that these further investigations were necessary and relevant to the appeal and that they were likely to take some time. In addition, it is uncontentious that the Claimant was kept up to date during this period by Mr Downham-Clarke and common ground that during this period no reference was made by the Claimant over any delay. However, it was suggested by the Claimant during submissions that when she received the out of office it was open to her to enquire at that point how long it was likely to take to get the outcome and that it should have been apparent to her that because he had sent an email earlier that he was clearly working on her appeal during his annual leave. The Tribunal does not agree. The Tribunal has not found that the Claimant was unreasonable in assuming her appeal outcome was not likely to be forthcoming while Mr Downham-Clarke was on annual leave. However, under cross examination the Claimant appeared annoyed that Mr Downham-Clarke was on annual leave and clearly frustrated but did not give any evidence that she was upset or stressed about any delay. She had been kept up to date and clearly understood that investigations and proper consideration of her lengthy appeal would take time. The Tribunal must consider whether this act amounts to a breach of contract and finds that it is not. There was no contractual right to receive the outcome within a particular time frame and viewing objectively it cannot be said that the Respondent delayed in sending the outcome because it was actively carrying out further investigations and keeping the Claimant up to date about what it was doing. The Claimant as stated accepted that the steps taken by the Respondent were necessary and therefore I find that whilst the out of office email could lead the Claimant to believe there would be a delay in her receiving her outcome, she was well aware that the Respondent had been actively engaged in her appeal throughout the period. Also viewed objectively it was not unreasonable for Mr Downham-Clarke to take leave and any delay whilst frustrating does not amount to a fundamental

breach of contract or a breach of the implied term of mutual trust and confidence.

Overall conclusions

109. The Claimant is relying upon the conduct referred to in the list of issues as being conduct that amounts to a breach of the implied term of mutual trust and confidence. The Claimant is relying upon the final event, that being, the out of office response and assumed subsequent delay in receiving the outcome to her appeal as being the final straw. As I have found that that event in itself is not a breach of the implied term of mutual trust and confidence.

110. I must look at whether there was a course of conduct that cumulatively amounted to a breach of the implied term of trust and confidence. When looking at a 'last straw' and/or course of conduct, I have considered the case of Kaur where it was held that a course of conduct may have the effect of undermining mutual trust and confidence and consequently amount to a fundamental breach following a last straw incident. Guidance provided by Kaur requires me to consider what was the most recent act or omission relied upon by the Claimant that triggered or caused her to resign. In this case it is the out of office reply and the assumption that this would delay her appeal outcome by two weeks. I have then considered whether the claimant has affirmed the contract since that act and find that she did not. Looking at the act itself does it in itself amount to a repudiatory breach and I have found that it does not. However, that is not the end of the matter I am must look at whether it was nevertheless part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach of the **Malik** term?

111. I have found that the acts/omission complained of by the Claimant individually do not amount to a breach of contract either explicitly or the implied term of mutual trust and confidence. Viewing the acts/omissions cumulatively and bearing in mind the guidance in Woods I have found that viewed objectively it cannot be said that the Respondent has acted in a way that was calculated or likely to undermine the duty of trust and confidence.

Unlawful Deduction of Wages Conclusion

112. The Tribunal has considered the submissions made by the Claimant that the Claimant's contract did not allow for deductions to be made. I was referred to the Claimant's contract page 69 section 12 where a list of examples was provided where deductions may be made. The Claimant further argued that as she was never disciplined, she was entitled to be paid.

113. I do not accept this argument. The principle of no work no pay is in my view applicable in this case. Further as confirmed in the cases of *Batty* and *Sunrise Brokers (referenced above)*, work and wages are in general mutual obligations. The Claimant knew that she was on unauthorised absence and did

not query this or take steps to make herself available for work. I do not accept that this was reasonable and was a deliberate act by the Claimant and the principles referred to above apply in this case.

114. Therefore the Claimant's claim for unlawful deduction of wages is not well founded and fails.

_____

Employment Judge Hill

Date 01 November 2023

JUDGMENT SENT TO THE PARTIES ON

08 November 2023

FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.