# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C L McCloskey

**Respondent:** Mersey and West Lancashire Teaching Hospitals NHS Trust

**Heard at:** Liverpool **On:** 9 November 2023

**Before:** Employment Judge Horne

**Representatives**

For the claimant: in person
For the respondent: Mr S Gorton, King's Counsel

## JUDGMENT AT A PRELIMINARY HEARING

1. In this judgment, "the Money Claims Table" means the table at pages 155 to 156 of the hearing bundle.
2. The claim for damages for breach of contract in Row 1 of the Money Claims Table is not struck out.

   (This means that the claimant can pursue her claim that the respondent breached her contract between 31 October 2013 and 31 October 2017 by failing to pay her 2.5% of her salary for travel time.)
3. All the remaining complaints of unauthorised deductions from wages are struck out.
4. All the remaining claims for damages for breach of contract are struck out.

## REASONS

**Scope of these reasons**

1. These are the reasons for:

   1.1. Paragraphs 3 and 4 of this judgment;

   1.2. The strike-out judgment sent to the parties on 28 July 2023; and

1.3. Paragraphs 3 and 4 of the case management order sent to the parties on 28 July 2023.

2. The earlier judgment and case management order were made at a hearing on 17 and 18 July 2023. They included decisions of mine that went in the claimant's favour. In accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013, the claimant requested written reasons for all the decisions made at that hearing. I have prioritised the reasons for the decisions that were unfavourable to the claimant. If the claimant wants the reasons for the decisions that were favourable to her, she must make a further request. The likelihood is that those reasons would not be provided until after the claim has been finally determined.

**Materials**

3. I considered a bundle of documents which, by 17 July 2023, had grown to 889 pages. I used the same bundle for today's hearing.

**Background**

4. I have already set out the procedural history to this case at some length. It can be found in the written reasons sent to the parties on 9 March 2023 ("the March Reasons")

5. Some further detail is now required.

6. The claim form stated that the claimant was owed "outstanding unpaid wages" for:

   6.1. Travelling time

   6.2. "Oculoplastics evening clinic weekly"

   6.3. "Admin time=1PA/week"

   6.4. "SSMDT = 0.25/week since 1 July 2014"

   6.5. "Postop patients = 0.25 PA/week"

   6.6. "Oculoplastic regional meetings March 2016 to February 2018-3 to 4 PA per year".

7. Nowhere in the claim form did the claimant allege that the respondent breached the implied term of trust and confidence. Nor did the claim form indicate a claim for damages for the lost chance of increased remuneration caused by the respondent obstructing the job planning process. There was no reference to any term of the Terms and Conditions – Consultants (England) 2003 requiring initiation of the job planning process.

8. The claimant's Further Information Document was submitted on 30 March 2020. It contained detailed calculations of the wages that the claimant was allegedly owed under the various headings. It did not, however, state what term of her contract had entitled her to those wages.

9. There was a preliminary hearing by telephone before Employment Judge Holmes on 14 March 2022. Following the hearing, EJ Holmes' written case management summary observed, "The claimant does not enjoy the best of health, becoming breathless, and therefore difficult to hear at times".

10. As recorded in the March Reasons, a preliminary hearing took place on 13 June 2022 before Employment Judge Serr.

11. In advance of that hearing, the claimant completed the template case management agenda form.

12. At Box 2.1 of the agenda form, the claimant indicated that one of her claims was "Breach of contract (breach of the expected conditions of a consultant contract). Box 9.4 asked her whether there were any special arrangements needed for the hearing. In answer, the claimant wrote, "The claimant has some breathing and mobility issues".

13. EJ Serr asked the claimant to clarify the contractual term on which she relied. In his case management order sent to the parties on 27 June 2022, EJ Serr recorded at paragraph 9:

> "The Claimant stated the contractual basis lay in custom and practice and there was no actual written document or documents that contained the agreement for such payment (although she did refer to some unspecified general further information documents available on the Respondents intranet or website). Whilst ultimately a matter for the Judge on the next occasion when considering the amendment application, the Tribunal observed that without being able to point to a specific contractual entitlement the Claimant may well struggle to prove any claim for breach of contract."

14. The Money Claims Table was prepared by the respondent. Row 2 of the Money Claims Table characterised the original claim for paid administration time as being purely a complaint of discrimination, and not a complaint about a deduction from wages. The claimant had conceded before Employment Judge Serr that the Money Claims Table accurately described which complaints were part of her original claim and which complaints required an amendment.

15. There was a preliminary hearing before me on 31 October 2022. The claimant repeated her concession that the Money Claims Table accurately described what was in her original claim. One of her proposed amendments was to include a deduction from wages complaint and a claim for damages for breach of contract by failing to pay for administration time. I refused permission to amend.

16. I also refused permission to the claimant to introduce a proposed complaint that I called "the administration time discrimination amendment". The respondent had understood the claimant to be complaining that the respondent had discriminated against her by paying her 1.0 PA for administration time whilst paying the men 1.5 PA for their administration time. Before EJ Serr she had conceded that the respondent's formulation of her original claim was accurate. At the hearing on 31 October 2022 the claimant told me that, in fact, the discrimination consisted of failing to pay the claimant for all the administration time that she *needed,* whereas the men were paid for all the administration time that they needed.

17. The amendment decisions were recorded in a case management order sent to the parties in November 2022 and which I called "the November CMO".

18. In the March Reasons, however, I indicated my provisional view that, so far as Row 2 of the Money Claims Table was concerned, the claimant may never have needed an amendment to her claim in the first place.

19. At paragraphs 99 and 100 of the March Reasons, I gave a further provisional view. This was that the claimant may have made a further erroneous concession. That

concession related to the administration time discrimination amendment. In the March Reasons I indicated, provisionally, that this had been part of her claim all along. I outlined my reasons in this way:

> "100. My provisional view is based on:
>
> 101.1 The reference in the claim form to the claimant's need for 2 admin PA because of the volume of work in oculoplastics
>
> 101.2 The comment made by the claimant recorded in paragraph (5) of the EJ Benson CMO;
>
> 101.3 The claimant's calculation of her damages for discrimination in her Schedule of Loss going beyond the apparent difference of 0.5 admin PA between the claimant and her comparators; and
>
> 101.4 The express words accompanying Section C of the Schedule of Loss."

20. The March Reasons relate that, in late 2021, the claimant was dangerously ill with Covid-19. As the claimant put it in a later hearing, "I was the longest in-patient in Covid history. I was expected to die."

21. On 4 April 2023, Dr C J McManus, consultant respiratory physician, wrote a letter to the claimant, stating:

> "To Whom it May Concern
>
> Miss Carmel Louise McCloskey was discharged from hospital on 16 December 2021 following an induced coma on 11 October 2021 and step down from ICU on 10 December 2021 to an acute medical ward.
>
> She was discharged home with a full care package including oxygen and medications.
>
> In my professional opinion, she would have been incapacitated with a confused state and physical disabilities for some time after discharge at least until she came off oxygen therapy which I know was weaned off around June 2022."

22. At the hearing on 17 and 18 July 2022 I made the following decisions:

22.1. I confirmed my original amendment decision (as recorded in the November CMO) so far as it concerned any claim for damages for breach of contract in Row 2 of the Money Claims Table.

22.2. I confirmed the November CMO regarding the administration time amendment.

22.3. At the same hearing, I decided that that no amendment was required for the complaint of unauthorised deduction from wages. The claimant's concession that she needed to amend her claim was obviously wrong. To that extent I varied the November CMO. Having assessed the prospects of success, however, I decided that the complaint of unauthorised deductions from wages, so far as it concerned Row 2 of the Money Claims Table, should in any case be struck out. The position was therefore effectively restored to what it had been in November 2022: the claimant could not claim wages or damages for breach of contract in relation to payment for administration time.

**Facts**

23. None of my judgments or case management orders involved determining any substantive issue. So far as the merits of the claim are concerned, my only function was to assess the prospects of success. That did not involve making any findings of fact on the evidence.

24. Nonetheless, I am able to set out a considerable amount of factual background based on facts that I understand to be undisputed. Where relevant facts are in dispute, these reasons make that dispute clear.

25. In 2005 the respondent advertised the position of Consultant Ophthalmologist. The advertisement was accompanied by a written job description dated April 2005.

26. Under the heading, "Timetable", the job description stated:

> "The appointee will be able to negotiate with the Head of Service to determine a mutually acceptable programme of work. It is envisaged that the programme will include the following programmed activities (PAs).
>
> 2 out-patient clinics – general ophthalmology
>
> 3 theatre sessions
>
> 1 out-patient clinic (subspecialist interest)
>
> 1 teaching PA
>
> 3 supporting professional activity sessions."

27. This list was followed by a "provisional weekly programme" consistent with that list.

28. Paragraph 5 of the job description stated:

> "The job description is intended to provide an outline of the duties of the post which may change with the development of the service on a mutually agreeable basis."

29. The claimant successfully applied for the role. She was offered employment and accepted it.

30. From the documents in the bundle, it is overwhelmingly likely that the tribunal will find that the offer was communicated to the claimant in a letter dated 3 October 2005. The letter stated:

> "The terms and conditions applying to the post are those relating to Consultants (England) 2003, ie the new Consultant Contract…
>
> …
>
> Your commencing salary will be equivalent to the rate of £69,298 per annum.
>
> …
>
> A Contract of Service prepared in accordance with the above mentioned Terms and Conditions of Service, giving details of the duties attached to the appointment will be forwarded in due course."

31. It is also virtually certain that the tribunal will find that the respondent's Human Resources Director, Anne-Marie Stretch, wrote to the claimant on 9 March 2006 enclosing copies of a contract of employment.

32. Paragraph 6.1 of the contract (or proposed contract) that was sent to the claimant stated:

> "You and your Clinical Manager have agreed a prospective Job Plan that sets out your main duties and responsibilities [and] a schedule for carrying out your Programmed Activities,"...
>
> You and your Clinical Manager will review the Job Plan annually in line with the provisions in Schedule 3 of the Terms and Conditions. Either may propose amendment of the Job Plan. You will help ensure through participating in Job Plan reviews that your Job Plan meets the criteria set out in the Terms and Conditions and that it contributes to the efficient and effective use of NHS resources."

33. At paragraph 7.1, the contract (or proposed contract), stated:

> "You and your Clinical Manager will agree in the schedule of your job plan the programmed activities that are necessary to fulfil your duties and responsibilities, and the times and locations at which these activities are scheduled to take place. You and your Clinical Manager will seek to reach agreement in the scheduling of all activities…
>
> …
>
> Your job plan will contain 10 Programmed Activities per week on average… A standard full-time Job Plan will contain 10 Programmed Activities subject to the provisions in Paragraph 7.6 to agree up to two extra Programmed Activities. Remuneration for Programmed Activities is set out in Section 21 below and Schedules 13 and 14 of the Terms and Conditions of Service."

34. Paragraph 7.2 contained provisions for flexible distribution of PAs across a job plan, with precise length of PAs varying from week to week "around the average assessment set out in the Job Plan".

35. Paragraph 7.6 provided,

> "You and the Trust may agree that you will undertake extra Programmed Activities over and above the Programmed Activities that constitute your standard contractual duties… The remuneration for these activities is covered by Section 21 below and Schedules 13 and 14 of the Terms and Conditions.
>
> Any such agreement will be made in writing and the additional Programmed Activities will be incorporated into your Job Plan schedule.

36. At paragraph 20.1, the contract, or proposed contract, stated,

> "Your basic salary on commencement is £69,298. This has been calculated in accordance with the provisions in Schedules 13 and 14 of the Terms and Conditions.
>
> …
>
> Your basic salary, together with any payments for extra Programmed Activities (see section 21 below) includes payment for all Contractual and Consequential Services."

37. Paragraph 21 stated,

> "Any additional Programmed Activities that you carry out, beyond the standard will be paid at the rates set out in Schedules 13 and 14 of the Terms and Conditions".

38. There is a dispute about whether the claimant signed and returned her copy of the contract that was sent to her. That dispute is highly unlikely to affect the outcome of the claim. The claimant has never suggested that she raised any objection to the proposed terms at the time. As she pointed out, that is not what newly-appointed consultants tend to do. She carried on working in her role for about another 13 years. The only reasonable conclusion that the tribunal would be able to draw is that the claimant accepted the terms offered to her in the 2006 contract.
39. The Terms and Conditions – Consultants (England) 2003 consisted of a Definitions Section followed by multiple Schedules.
40. "Contractual and Consequential Services" were defined as "the work that a consultant carries out by virtue of the duties and responsibilities set out in his or her Job Plan and any work reasonably incidental or consequential to those duties…"
41. Schedule 3 was headed, "Job planning".
42. Paragraph 1 read:

> "Job planning will be based on a partnership approach. The clinical manager will prepare a draft job plan, which will then be discussed and agreed with the consultant…"

43. Paragraph 3 listed the duties and responsibilities to be set out in a Job Plan.
44. Paragraph 23 stated:

> "The consultant and clinical manager will make every effort to agree any appropriate changes to the Job Plan at the annual or interim review. If it is not possible to reach agreement on the Job Plan, the consultant may refer to mediation and, if necessary, appeal as set out in Schedule 4."

45. Schedule 4 was headed, "Mediation and appeals".
46. Paragraph 1 stated, "Where it has not been possible to agree a Job Plan…a mediation procedure and an appeal procedure are available."
47. Schedule 14 set the basic salary for consultants appointed after 2003 (as the claimant was). Taken together with Schedules 15 and 16, it provided a mechanism for pay progression, uplifts, enhancements and nationally-agreed pay increases. It is not suggested that the claimant's entitlement to any of the sums claimed arose through any of those mechanisms.
48. Paragraph 7 of Schedule 14 provided that the annual rate of pay for any additional PAs was 10% of basic salary.
49. The detail of that procedure was set out in the rest of the schedule.
50. There is a dispute about whether the claimant and her clinical manager ever agreed on a Job Plan. The claimant says she was given a timetable. She did not dispute it during the early years of her employment.
51. In 2017, discussions took place about a proposed job plan. On 31 October 2017, Mr Andrew O'Brien sent a draft job plan to Colette Hunt, Professional Standards

Medical HR Manager. Ms Hunt added some proposed adjustments the following day.

52. The job plan was never agreed. The claimant was unhappy with a number of aspects of it. Mediation was unsuccessful.

53. In 2018 the respondent circulated a document headed, "Consultant Job Planning. Frequently Asked Questions". I call it the "Job Planning FAQs".

54. Answer A1 of the Job Planning FAQs stated that a job plan was "Contractually required and forms part of your contract of employment".

55. Answer A3 stated, "All Job Plans must be reviewed and signed off by the individual, [clinical director] and [directorate manager]…"

56. Question Q12 was "Is there a calculation for how much DCC Admin Time should be afforded to an individual as part of their Job Plan?" The answer given (A12) was, "Whilst there is no standard set allocation for DCC admin time, the Trust has "capped" this at between 1 and 1.5PA per week for a full-time consultant…"

57. At some point the claimant's salary was increased to the equivalent of 10.5 PAs. The claimant says that it was agreed that the additional 0.5 PA was for time on call. For today's purposes I take that assertion to be correct.

58. There was never any express agreement for payment (whether through a Job Plan or otherwise) for administration time, overrunning clinics, time spent in pre-op, attendance at sub-specialty multi-disciplinary meetings or oculoplastic regional meetings, or seeing post-operative patients.

**Relevant law**

Striking out

59. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 gives the tribunal the power to strike out part of a claim on the ground that it has no reasonable prospect of success.

Unauthorised deductions from wages

60. The tribunal cannot consider deductions from wages made more than 2 years before the date of presentation of the claim. See paragraphs 70 to 72 of the March Reasons for a more detailed explanation of this restriction.

61. A deduction from wages is defined in section 13(3) of the Employment Rights Act 1996. I have set it out here with added emphasis.

> "(3) 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 the 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."

62. Wages are only properly payable if the worker has some legal entitlement to those wages, for example, under a term in their contract.

63. The tribunal has no jurisdiction to consider a complaint of unauthorised deductions from wages unless the claim is for an identifiable sum: *Coors Brewers Ltd v. Adcock* [2007] EWCA Civ 19. Where the amount of wages properly payable

depends on some exercise of discretion by the employer, the sum cannot be quantified.

Implied terms

64. A contract may contain implied terms as well as express terms.

65. A term can be implied if it is necessary to give business efficacy to the contract. One way of testing whether or not an implied term is necessary is by asking how the parties would have reacted to an officious bystander, witnessing the agreement, if that person asked the parties whether the contract included the alleged implied term. If, in this imaginary scenario, the parties would have responded, "Of course!" that is an indicator that the implied term is necessary.

66. A term may also implied if it arises through custom and practice. For such a term to arise, it must be "reasonable, notorious and certain": *Devonald v. Rosser & Sons* [1906] 2 KB 728, CA.

67. A single incident is not enough to establish a custom and practice: *Waine v. R Oliver (Plant Hire) Ltd* [1977] IRLR 434.

68. Where an alleged implied term conflicts with an express term of the contract, the express term will prevail: *Johnson v. Unisys Ltd* [2001] ICR 480, HL.

69. Where an express term gives discretion to an employer, an implied term may operate to constrain the exercise of that discretion: *Stevens v. University of Birmingham* [2017[ ICR 96.

70. It is an implied term of every contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence: *Malik v. BCCI plc* [1997] IRLR 462.

71. Courts should be hesitant to imply a term that interferes with an express contractual agreement involving a carefully negotiated compromise: *Ali v. Christian Salvesen Food Services Ltd* [1997] ICR 25.

Deciding whether an allegation requires an amendment to the claim

72. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

73. In *Chandok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> "
>
> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in

> the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

74. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole.

75. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota QC distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

76. In relation to unrepresented claimants, tribunals must not be overly technical in their application of the *Chandok* approach. Where the claim form is capable of being read as including allegations (for example of constructive dismissal, or of dismissal on a different day), and the parties have attended the hearing prepared to deal with those allegations, the tribunal should ordinarily permit those allegations to be argued (*Aynge v. Trickett t/a Sully Club Restaurant* UKEAT/0264/17 at paras 10 and 13). If the claim form cannot bear that interpretation, consideration should be given to an amendment (para 14).

77. The claim form should not be interpreted in a vacuum. When deciding what complaints it raises, the tribunal is entitled to have regard to any clarification provided by the claimant subsequently: *MacFarlane v. Commissioner of Police for the Metropolis* [2023] EAT 111.

<u>Setting aside previous case management orders</u>

78. Rule 29 of the Employment Tribunal Rules of Procedure 2013 provides that "A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice…"

79. In *Liverpool Heart and Chest NHS Foundation Trust v. Poullis* [2022] EAT 9, HHJ Tayler said, relevantly, at paragraphs 42 and 43:

> "42. It is clear that determination of an application to revisit an order of the employment tribunal does not involve an exercise of discretion that is at large. It is… subject to … a principled curtailment of an otherwise apparently open discretion. It seems to me that the principled curtailment is that exercise of the power will generally require a material change of circumstances or some other unusual circumstances, subject … to the wide variety of orders and the spectrum of the degree of oversight required…
>
> 43. The underlying principles are that judges should not, in effect, hear an appeal against their own decisions, or those of a judge at an equivalent level, and that there should be finality in litigation so that, particularly where a party has taken significant steps and/or expended costs in reliance on an order, they should not find that it has been altered absent a material change in circumstances. If, objectively, there has been no change of circumstances it clearly would be an erroneous exercise of discretion to vary an order on the basis that there has been."

80. *Poullis* is not authority for saying that there *always* has to be a material change in circumstances before an employment judge can set aside an earlier case management order. Discretion to set aside is also exercisable in principle where there are "some other unusual circumstances". These could, in my view, include circumstances where a tribunal makes a decision based on a concession by a litigant in person, with some cognitive impairment, about what their claim form contained and the judge later forms the view that, on a fair reading of that claim form, the concession was obviously wrongly made. Whether or not those circumstances make it appropriate to set aside an earlier case management order will depend on all the circumstances, having regard to the overriding objective, the test of necessity in rule 29, and the principle of finality in litigation.

## Conclusions

<u>Administration time amendment dispute</u>

81. The respondent persuaded me not to set aside my original decision in the November CMO. I took account of the various ways in which the claimant has formulated her administration time discrimination complaint, set out in paragraph 100 of the March Reasons. It may have been harsh to hold the claimant to a concession that she had not fully thought through. But it was not obviously wrong. I bore in mind, of course, the factors that I had originally identified in support of my provisional view. But balanced against those factors are the following considerations:

    81.1. EJ Benson understood the claimant to be claiming only in respect of the difference of 0.5 PA between the claimant and her comparators.

    81.2. As Mr Williams (sitting beside Mr Gorton) pointed out, the claimant had a further go in May 2022 at setting out comprehensively what her discrimination complaint was all about. This was the May amendment application. That document was obviously the product of careful thought. It continued to characterise her claim (SXD2) as a complaint about the differential of 0.5 PA between the claimant and her comparators. If it had always been part of the claimant's case that the less favourable treatment consisted of failing to pay

her for all the administration time she *needed,* one would have expected her to have made that point when describing SXD2.

81.3. The claimant can be taken not to have intended to bring a claim which she knew would not succeed. Answer A12 of the Job Planning FAQs, which the claimant included in the bundle, capped paid administration time at 1.5 PA. The existence of the cap would be a complete answer to any complaint of less favourable treatment by failure to pay the claimant for more than 1.5 PA for administration time.

82. I took into account the claimant's health. It appeared likely to me that the claimant did have some cognitive impairment at the time of the preliminary hearing before EJ Serr. I had to be alive to the risk that she might have been confused during the hearing and made a concession that she did not really intend to make.

83. The respondent argued that Dr McManus' letter was not evidence that the claimant had any cognitive impairment at any time relevant to this claim. In particular, the respondent pointed out that Dr McManus was not a neurologist. His (or her) opinion was, said the respondent, contradicted by EJ Holmes observations about the claimant's health following the 14 March 2022 preliminary hearing, and also by what the claimant wrote in Box 9.4 of her agenda form for the June 2022 preliminary hearing. I did not accept these points. One would hope that a consultant respiratory physician would have some expertise on the question of whether oxygen therapy causes a patient to be in a state of confusion or not. It would be an important side-effect for the physician to think about before deciding whether oxygen therapy was indicated for any particular patient. It is unlikely that EJ Holmes had anything more than a cursory discussion with the claimant about her Covid illness. Had he done so, it is unlikely that he would have used the somewhat glib phrase "does not enjoy the best of health". Box 9.4 of the claimant's agenda form was not asking her to describe her cognitive abilities. Rather it was asking for reasons why special arrangements might have to be made for the hearing.

84. All that said, I did not think that the claimant had been unable to put her thoughts on paper at the time of making the May amendment application. This was partly because it was self-evidently a carefully-considered document. As the respondent pointed out, the claimant had been able not just to formulate the May amendment application, but also to collate a large quantity of documents in support of her claim.

85. Whatever impairment the claimant might have had in her thinking in June 2022, she no longer had it at the time of the hearing before me on 31 October 2022. Dr McManus' letter was written in April 2023, looking back retrospectively at the claimant's history of recovery from Covid. It was clearly prepared for the purposes of this litigation. If the claimant believed that she had been unable to think straight in October 2022, I am quite sure that she would have asked Dr McManus to address that point in his (or her) letter. This is significant. My amendment decisions (as recorded in the November CMO) were based not just on the claimant's concession to EJ Serr in June 2022, but also on the fact that she had repeated that concession to me.

86. The claimant's concession that she needed an amendment was not obviously wrong. The circumstances were not unusual enough to justify departing from a

previous case management order. It was not necessary in the interests of justice. The November CMO is not set aside.

Did the claimant ever have a job plan?

87. For today's purposes I have to allow for the possibility that the tribunal might find that the claimant never had any agreed job plan. In coming to this view, I have (for today's purposes) rejected two of the respondents' arguments:

    87.1. Paragraph 6.1 of the 2006 contract stated that the claimant and her clinical manager had "agreed a prospective job plan". That was a statement of fact, which was either true or false. The claimant and respondent could not agree that the job plan existed if in fact it did not exist. All that paragraph shows is that the agreed terms pre-supposed that a job plan was in place.

    87.2. At the preliminary hearing in July 2023, the respondent advanced the submission that the claimant did have a job plan. According to the respondent, the job plan was contained in the job description that formed part of the advertisement for the role. I would need to hear evidence and find more facts before I could accept that submission. I could not reach that conclusion from the mere fact of the job description being advertised and the claimant accepting the 2005 offer of employment. All the job description stated was that the programme of activities was "envisaged", and that the role-holder would have the opportunity to negotiate the actual programme of work with the head of service. It is clear from Schedule 3 of the 2003 Terms and Conditions that further steps would have had to be taken before a job plan could be agreed. In particular, the clinical manager would have to prepare a draft job plan, and there would have to be a process of discussion and agreement.

88. I also assume, for today, that the claimant has a reasonable prospect of showing that her clinical director did not initiate the job planning process at any stage prior to 2017.

Express terms of the contract

89. It is overwhelmingly likely that the tribunal will find that the parties were bound by the contract sent to the claimant in 2006.

90. The 2003 Terms and Conditions were expressly incorporated into that contract.

91. Even if the parties were not bound by the 2006 contract, they were, in any event, bound by the 2003 Terms and Conditions. It is unthinkable that a consultant would work for an NHS Trust for over 13 years without at least impliedly agreeing to be bound by those conditions.

92. The claimant's basic salary was expressly agreed. It was an express term of the claimant's contract that her salary would be £69,298 per annum, subject to (irrelevant) thresholds, enhancements and pay increases under the 2003 Terms and Conditions.

93. It was an express term of the contract that the claimant's basic salary, plus payment for additional PAs, would include her entire remuneration for all Contractual and Consequential Services, that is, all the work set out in, and incidental to, her Job Plan.

94. There was no clear express term about what would happen if:

(a) The claimant and her clinical manager never agreed on a job plan; and

(b) The clinical manager never even initiated the job planning process under Schedule 3 by preparing a draft job plan.

95. The contract did not spell out whether, in those circumstances, there would be any change to the claimant's remuneration, or the job plan would be deemed to have any particular content.

96. The parties did expressly agree, however, that in those circumstances, the claimant should not be left entirely without any remedy. The agreed remedy was procedural. It could be found in Schedule 4, paragraph 1, of the 2003 Terms and Conditions. If the clinical manager failed to take even the basic step of preparing a draft job plan, the consultant's remedy would be to invoke the dispute resolution procedures on the ground that "it has not been possible to agree a Job Plan".

97. In my view, the 2006 contract, together with the 2003 Terms and Conditions, contained a carefully-balanced set of rules for deciding on the content of a job plan. Consensus was a fundamental principle running through the scheme. The agreed solution to a lack of consensus was a detailed mediation and dispute-resolution mechanism. The parties agreed to be bound to follow a *process,* but not to achieve any particular *outcome.*

Implied terms

98. For the purposes of this judgment, I put to one side any implied term relating to payment for travel time. Whether or not such a term existed will be determined at the final hearing.

99. The claimant's contract contained the implied term of trust and confidence, as all employment contracts do. If a clinical manager, without reasonable and proper cause, deliberately obstructed or frustrated the job planning process, he or she would risk breaching that term. But it is not part of the claimant's claim that the respondent breached the implied term of trust and confidence. That allegation cannot be found in the claim form. Nor can a claim for damages for loss of a chance of improved remuneration caused by the respondent frustrating the job planning process. The claimant did not rely on that term in the preliminary hearing on 13 June 2022 when Employment Judge Serr asked her to explain her contractual entitlement to payment for additional PAs. Instead, she told him that there was a custom and practice. The claimant did not rely on the implied term of trust and confidence at today's hearing either.

100. At one point during the hearing, it appeared that the claimant might be relying on an implied term that she would be paid for all the work that she did. Later in the hearing, though, the claimant told me that she was not suggesting that her contract contained such a term. That concession was realistic. The nature of a consultant's work is such that such a term would be completely unworkable. There is no system in place for measuring a consultant's output, or working time, in any way that would be reliable enough to make it a determinant of pay. Consultants will have a clinic that overruns one week and goes short the next. Some patient appointments, or surgical procedures, may be significantly more challenging and time-consuming than others. That is the point of a contractual framework that remunerates a consultant according to an agreed job plan.

101. Having disavowed that implied term, the claimant clarified the implied term on which she actually did rely. This is the term that she alleges the respondent breached in all her claims for damages in the Money Claims Table. It is also the term under which the claimant says her wages were properly payable. The term was:

> "An implied term that I would have a job plan that reflected the work I did."

102. To create an entitlement to additional remuneration, that term would have to require that the job plan should increase the number of PAs to reach the level necessary to reflect the actual work done by the consultant.

103. I cannot see any reasonable prospect of the tribunal finding that this term was implied into the claimant's contract. There was no need for it.

104. In coming to this view, I have taken into account the careful balance that the expressly-agreed job planning process sought to strike. It allowed for conversations about workload, efficient working, appropriate booking of clinics and theatres, consultant welfare and patient safety. The implied term sought by the claimant would significantly interfere with that agreed framework.

105. The point can be illustrated by examining rows 3, 4 and 6 of the Money Claims Table. The claimant relies on the alleged implied term as entitling her to additional payment for the extra work she did in clinics and theatres. These are paradigm examples of the kinds of workload that the parties intended should be negotiated through the expressly agreed job planning process.

106. I have considered whether or not it could be necessary to imply the term where (on today's assumed facts) the clinical manager failed even to initiate the job planning process. In my view there is no reasonable prospect of the term being found to be necessary, even on those facts.

107. The question might be asked, rhetorically, in this scenario, what was there, then, to stop a clinical manager from exploiting a consultant? Without an implied term as to the number of PAs in a job plan, what prevents a clinical manager deliberately failing to initiate the job planning process by extracting more than 10 PAs' worth of work whilst continuing only to pay them for the 10 PAs reflected in the basic salary? I have pondered that question, but I still do not think it raises any reasonable prospect of successfully arguing for the existence of the implied term. Exploitation could, potentially, be avoided by:

107.1. Invocation of the dispute resolution procedures in Schedule 14;

107.2. A claim for damages for breach of the implied term of trust and confidence;

107.3. Arguably, a claim for damages for breach of paragraph 1 of Schedule 3 of the 2003 Terms and Conditions;

107.4. Arguably, an implied term that, in the absence of any draft job plan, the consultant's workload must be no more onerous than the provisional schedule contained in the job description;

107.5. A concomitant right on the consultant's part to refuse to carry out additional work beyond that schedule;

107.6. Depending on the facts, a custom and practice that particular identifiable additional working time be separately remunerated.

108. I have made no finding as to whether or not any of these terms existed, or a claim for any of these remedies would succeed. With the exception of remuneration for travel time, the claimant does not rely on any of these terms or remedies. Even if I could treat them as part of the claim, they would not assist her in a complaint of unauthorised deduction from wages. This is because none of these terms or remedies could enable the claimant to bring a claim for a quantifiable sum.

109. Finally I considered whether the claimant had any reasonable prospect of showing that the alleged term had been implied through custom and practice. There is no such prospect. This is because:

109.1. There is no reasonable prospect of the claimant showing that the term was notorious and certain. I could not find evidence in the bundle to support such a practice. Other consultants may well have had job plans that properly reflected their workload, but that is not evidence of anyone behaving as if the implied term existed. The natural explanation for the existence of those job plans is that the consultant's clinical manager had approved them. There is nothing to suggest that the clinical manager believed themselves to be legally constrained to approve a job plan that he or she would not otherwise have approved.

109.2. When it comes to Rows 2 to 9 of the Money Claims Table, the purported implied term would not be reasonable. It would go against the grain of the express contractual framework.

<u>Money Claims Table Row 1 – deduction from wages</u>

110. Row 1 of the Money Claims Table is about travelling time. The claim, as originally formulated, was for payment of travel time from 2 June 2013 to 2 June 2019.

111. At today's hearing, the claimant accepted that there had been no deductions from her wages for travel time since 31 October 2017. Since that date she had been paid for all the travel time that was the subject of her claim.

112. I allowed the claim to proceed with a claim for damages for breach of contract. The complaint of unauthorised deduction from wages, however, is doomed to fail. This is because all the deductions now complained of were allegedly made more than two years before the date of presentation of the claim.

<u>Money Claims Table Row 2 – damages for breach of contract</u>

113. Consistently with the claimant's concession to EJ Serr, and contrary to my own provisional view in the March Reason, I decided on 18 July 2023 that the claimant did need permission to amend her claim to bring a claim for damages for breach of contract.

114. The claim form, whilst raising a complaint of unauthorised deductions from wages, did not mention damages for breach of contract in connection with paid administration time.

115. The claim form should not be interpreted in a vacuum. The claimant's Further Information Document did suggest that there may be such a claim. That

interpretation was consistent with a claim period of 6 years. But that hint at a claim for damages was not enough for me to set aside my original decision. The Further Information Document was submitted 5 months after the original claim form. Its contents did not mean that the claim form had obviously included a claim for damages for breach of contract for administration time. The claimant's concession to EJ Serr that she needed an amendment was not obviously wrong. There was not a change in circumstances, or other sufficiently unusual circumstances, that would justify my departing from my original decision refusing permission to amend.

116. Had I considered the merits of the claim for damages on 17 and 18 July 2023, I would have struck it out on the ground that it had no reasonable prospect of success.

117. The claimant's case was that wages were properly payable for her administration time. She claimed 1.5 PA. She was only paid for 1 PA of administration time.

118. There was no express agreement to pay the claimant for any more than 10.5 PA overall, and no express agreement to pay the claimant for any more than 1 PA for administration time.

119. At the hearing on 17 and 18 July 2023 claimant did not clarify the term of her contract which she said the respondent had broken. There is no reason to think that the claimant would have relied on any implied term that was different from the term on which she relied today for Rows 3 to 9 of the Money Claims Table. That is the implied term that she would have a job plan that included paid PAs reflective of the work she actually did. I have found that there is no reasonable prospect of the claimant establishing that any such term was implied.

Money Claims Table Row 2 – deduction from wages

120. On 18 July 2023 I actually did strike out the complaint of unauthorised deduction from wages.

121. The reason I gave then was that, even if the claimant could prove that her contract was breached by not giving her a job plan, or failure to include the additional administration time in it, the tribunal would still have no jurisdiction to consider a breach of section 13 of ERA. This is because the claimant was not bringing a claim for an identifiable sum.

Money Claims Table Rows 3 to 9

122. The claimant has no reasonable prospect of demonstrating that she was entitled to additional payment for oculoplastic clinics (Rows 3, 4 and 6), theatre pre-op (Row 5), attending subspecialty multi-disciplinary meetings (Row 7), oculoplastic regional meetings (Row 8), or seeing post-operative patients (Row 9).

123. There is no reasonable prospect of the claimant showing that her contract contained the implied term on which she relies.

124. So far as it concerns Rows 3 to 9 of the Money Claims Table, the claim for damages for breach of contract is therefore struck out.

125. For the same reason, the complaint of unauthorised deduction from wages is also struck out.

Employment Judge Horne

23 November 2023

ORDER SENT TO THE PARTIES ON

27 November 2023

FOR THE TRIBUNAL OFFICE