



EMPLOYMENT TRIBUNALS

Claimant: Ms T Plummer

Respondent: Lifeways Community Care Limited

Heard at: Bury St Edmunds (by CVP video link)

On: 26, 27 and 28 June 2024

Before: Employment Judge Skehan (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr Haywood, counsel.

RESERVED JUDGMENT

- 1) The claimant's claim for constructive unfair dismissal against the respondent is well-founded and successful. Remedy in this matter will be determined at the forthcoming remedy hearing.
- 2) The claimant's claim for breach of contract/ unauthorised deduction from wages in respect of the non-payment of company sick pay is unsuccessful and dismissed.

REASONS

Preliminary Issues

1. At the outset of the hearing the claimant told me that she suffered from anxiety and it was agreed that regular breaks would be provided throughout the hearing.
2. The claimant objected to the inclusion of the respondent's witness statement on the basis that they were not exchanged in accordance with the tribunal timetable. The respondent had applied to the employment tribunal for a relatively short extension to time to allow exchange of witness statements. Both parties confirmed that they had had sufficient opportunity to read the witness statements and prepare for the hearing and I considered it in line with the overriding objective to admit the respondent's witness statements.

3. The claimant objected to what she considered was 'without prejudice' material within the respondent's witness statements. I was unable to identify any privilege attached to the information highlighted and declined to strike out those parts of the respondent's witnesses statements.
4. There were various issues in respect of the bundle. Late disclosure was accepted from both parties, a redacted copy of the bundle was agreed to protect the identity of vulnerable service users and the bundle was finally agreed only at the conclusion of day 2.
5. Time was taken to revisit the list of issues as set out in writing by EJ Moore at the previous hearing held on 15 March 2024. I noted the use of the word 'whistleblowing' in the documentation and that the list of issues as discussed at the previous hearing and agreed by the parties made no reference to any potential claim relating to a protected disclosure. The claimant, acting in person, told me that she considered that a claim did include a claim for 'whistleblowing'. Following discussion, I identified that the gist of the claimant's position was:
 - a. she made a disclosure (that she states was a protected disclosure) to the CQC some time prior to the end of her employment. She told them that:
 - i. the respondent had forged documents and didn't retain documents as it should have.
 - ii. Has was not run properly and support staff could not get in contact with management
 - iii. there was an issue in respect of a knife in the house; and
 - iv. there was an issue in relation to medication left on a cabinet.
 - b. The claimant submitted that because of this disclosure she was treated to her detriment, life was made difficult for her and she was removed from the house.
6. I heard submissions from the respondent who objected to the inclusion of this claim. On review, I noted that while the gist of the claimant's claim as understood as set out above, I did not have precise wording in writing and the claim could fairly be described as vague. I considered that this claim was not identifiable from a fair reading of the ET1. Further, these matters had not been raised by the claimant at the preliminary hearing on 15 March 2024. The claimant had attended the preliminary hearing, the issues to be decided were set out in writing following that hearing and the claimant had been expressly instructed to inform the tribunal and respondent in writing should there be any error or omission within the list of issues. I therefore concluded that there was no whistleblowing element within the litigation. As the claimant was acting in person, I also considered whether or not I should allow the claim to be amended to include this claim. I noted that the claimant had not set out this potential claim in writing. From my initial reading, there was no evidence within the claimant's witness statement that supported he various elements of this claim. This claim was obviously considerably outside the primary limitation period and it appeared obviously reasonably practicable for the claimant to bring these claims within that limitation period or at least at the previous preliminary hearing, where the claim was discussed in detail. The respondent had not been aware and were not prepared to answer this potential claim. Any inclusion of

the claim at this time would involve abandoning our 3 day hearing and relisting the matter before a full tribunal. I concluded that the balance of hardship in allowing such a late amendment fell squarely with the respondent. For this reason, I declined to allow the claimant to amend her claim. The matter proceeded.

7. It was agreed that the hearing would deal with liability only. It was agreed that identified parts of the respondent's witness statements dealing with matters that related to remedy should be disregarded. It was initially intended that remedy, if appropriate should be dealt with on day 3. However, at the conclusion of the hearing, Mr Haywood noted his instructions to apply for written reasons in this matter regardless of the outcome. I considered it in line with the overriding objective to reserve my decision to allow the parties to consider these written reasons prior to dealing with remedy.

The Issues

8. The claimant brings a claim for unauthorised deduction from wages/breach of contract and constructive unfair dismissal. The unauthorised deduction from wages/breach of contract claim is limited to the claim for company sick pay during her sickness absence. In relation to the constructive unfair dismissal claim, the claimant is relying upon the implied term of trust and confidence, namely the respondent's duty not to behave in a way calculated or likely to destroy or seriously damage the trust and confidence between the claimant and respondent without reasonable and proper cause for doing so. The list of issues identified at the previous hearing is set out below within my deliberations section.

The Facts

9. As is not unusual in these cases, the parties have referred in evidence to a wider range of issues than I deal with in my findings. Where I fail to deal with any issue raised by a party, or deal with it in the detail in which I heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance in determining the issues within this litigation. I only set out my principal findings of fact. I make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
10. All witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence-in-chief. Other than are set out below, all witnesses, were cross-examined. I heard from the claimant on her own behalf, along with Ms Goodridge & Mr Lewis. Mr Woolsey's and Ms McCormick's witness statements were accepted as their evidence in chief and they were not cross-examined. Ms Kaur had technical difficulties joining the hearing. Mr Haywood indicated that he did not have cross examination for Miss Kaur and her witness statement was accepted as her evidence in chief. We were also due to hear from Ms Bedwell. Mr Haywood indicated that he did have some cross examination questions for her. Ms Bedwell was trying to fit her evidence around her work as a midwife but ultimately was unable to attend. I explained that while I had read her witness statement, reduced weight would be placed upon it as she had not attended to be cross-examined.

11. On behalf of the respondent, I heard from Ms Hyde, the respondent's Head of HR Business Partnering and Ms Okenla, a HR Business Partner employed by the respondent.
12. The respondent is a provider of residential care services to service users with a range of needs such as learning disabilities, autism, physical disabilities, acquired brain injuries and mental health needs. The respondent is a large employer with approximately 10,000 people working within the organisation. The claimant worked for the respondent as a Support Worker from 10 February 2021 until 16 May 2023 when she resigned without notice. Early Conciliation took place between 30 May 2023 and 3 July 2023. The Claim Form was lodged on 16 July 2023.
13. It is common ground that the claimant was a diligent, hard-working and valued employee who regularly undertook tasks outside of her job descriptions such as rota organisation due to understaffing within the respondent organisation. There is reference in the documents to the claimant doing, '...19 days straight to cover shortages...'. There is reference in the documentation to the claimant consistently arriving at work half an hour before the start of her shift.
14. The documentation contains a risk assessment dated 21 April 2021 recording the claimant as an Epi Pen user and unable to work on a 1:1 basis for safety reasons. There is also subsequent follow-up documentation from the claimant's GP confirming the position. It is common ground between the parties that the claimant was unable to undertake 1:1 care duties due to her use of an EpiPen.
15. On 13 December 2022 the claimant was attacked and injured by one of the respondents service users (referred to as 'E' within this judgment). An ambulance was called by the claimant's colleagues but when it did not turn up, the claimant was taken home by a manager. The claimant contacted her GP later that day and was sent to hospital and subsequently was signed off work sick. The claimant has an ongoing personal injury claim arising from this incident and I do not comment further on the incident itself.
16. The claimant returned to work on 3 January 2023 following her initial period of sick leave. On this day the respondent completed an initial debrief of the incident that occurred on 13 December 2022. The claimant returned to work for only a short period and was on sick leave from 24 January 2023 until her resignation on 16 May 2023.
17. The respondent's position is that the claimant was entitled to statutory sick pay (SSP) only. It is common ground that there were problems and mistakes on the respondent's part in relation to calculating the claimant's SSP entitlement however these were rectified by the respondent prior to the termination of employment.
18. The claimant complains that she has not been paid normal pay during her sickness absence. It is common ground that respondent operates a discretionary company sick pay scheme. The respondent has a policy contained within the management guidance following an incident of workplace

violence or aggression that provides 'where appropriate, discretionary payments may be made where there is authorisation from a regional director on a case-by-case basis'.

19. The respondent declined to pay the claimant discretionary company pay following the incident of 13 December 2022. Ms Hyde's evidence was that while the respondent accepted that an incident occurred, it did not class it as a 'serious incident'. Ms Hyde was concerned that the claimant had also, prior to the assault, requested holiday absence during the Christmas period. Ms Hyde considered that this detrimentally affected the claimant's credibility.
20. Ms Okenla's evidence on company sick pay was that:
 - a. it was not commonplace for the respondent to pay discretionary company pay following an assault at work. Discretion tended to be exercised in cases involving life-changing injuries and the claimant's injuries did not appear to be in this category.
 - b. In any event, discretionary pay could not be considered until a proper debrief document was available to the respondent. The document completed by the respondent on 3 January 2023 was considered insufficient as it did not have sufficient information relating to the incident.
 - c. No debrief document, considered compliant by the respondent, was ever completed.
 - d. Ms Okenla acknowledged that the claimant had chased this document and was incorrectly informed that the existing debrief document was compliant.
 - e. There was no explanation as to why a debrief document had not been properly completed or followed up in any way by the respondent.
 - f. In any event, Ms Okenla noted that the claimant had commenced a personal injury claim for loss of earnings during that time.
21. There is no documentation whatsoever produced by the respondent that demonstrates or suggests that the respondent considered the claimant's request for company sick pay or made any attempt to follow up outstanding documentation.
22. On 11 January 2023 the claimant was involved in a second incident where the same service user, E, kicked and tried but failed to pull her hair.
23. The claimant describes an incident on 21 January 2023. The gist of the claimant's evidence was that she was contacted on a day when she was not working by an inexperienced bank worker who wanted her advice as to what to do. The bank worker told the claimant that 'management had stopped the medication E was taking daily for agitation....' The claimant was informed that E was banging his head and lashing out. The claimant suggested that an ambulance be called. 999 was duly called and the ambulance crew came out. They examined E and called 111 as they were informed by the bank worker that E's medication had been stopped by the management. There is documentation within the bundle from the ambulance crew noting that the specific medication should be administered. The claimant says that although it was not her job she contacted management and arranged staff to visit the

premises on the afternoon of 21 January.

24. Mr Ullah, the respondent's area manager and senior on-call manager for the region attended the claimant's workplace on 22 January 2023. His report is within the bundle. The report states that the claimant informed Mr Ullah that, '... They had been informed to call 111 before administering [the medication] because the Bedford manager had stopped it. I stressed that I had a conversation with Sheila before visiting the service today I confirm that this was not the case and asked her where she got this communication or instruction from as it did not come from Sheila? She was not clear... I also confirmed that no[medication] have been stopped...'. There was a discussion in relation to the process. The respondent launched by formal investigation into the claimant's conduct as a result of Mr Ullah's report.
25. On 23 January 2023 the claimant met with Rebecca Peters and Sheila Fielding. No notes have been provided in respect of this meeting. The claimant was informed in writing that she was to be relocated to Staplehall Road by the respondent while an investigation was undertaken. The claimant was provided with 5 potential shift times, the first 3 of which were shadow 2:1 shifts, the last two were 1:1 shifts. The letter states that 'the reason for this relocation is down to concerns from numerous professionals and colleagues regarding incidents relating to medication and recent behavioural incidents with people we support' Both of the respondent's witnesses stated that Mr Ullah report was the trigger for the investigation and there was no explanation for or documentation explaining the reference to 'numerous professionals and colleagues'. The claimant claims that when discussing the proposed move to Staplehall Road, her inability to work 1:1 shifts was identified and disregarded. The claimant's evidence is corroborated by the GP letter within the bundle dated 25 January 2023 reiterating her inability to work on a one-to-one basis with service users. It is likely that this letter was obtained by the claimant as her previous representations to the respondent had been disregarded.
26. The claimant did not undertake any duties at Staplehall Road. The claimant was thereafter signed off sick for work-related stress and injuries. She did not return to work following this time.
27. The respondent's witnesses explained that there was no follow-up at all to the investigation into the claimant commenced by Mr Ullah. No evidence was gathered from any individual. There is documentation within the bundle from the claimant requesting that this investigation be progressed. Ms Hyde told me that issues relating to medication were really serious and must be looked at properly and followed up in a timely manner. Ms Hyde described it as unfortunate that the investigation did not progress.
28. On 27 January 2023 claimant raised a grievance with the respondent. The claimant received the outcome of her formal grievance on 4 April 2023. The claimant's grievance was partially upheld. Inter-alia it was noted that:
 - a. it was accepted that the claimant's debrief was not properly completed and the respondent did not complete the required welfare checks following the claimant's absence on sickness leave due to her assault;

- b. the claimant's move was intended to be temporary and shadow shifts were on a 2:1 basis;
 - c. it was incorrectly alleged (corrected on appeal) that the claimant could work on a 1:1 basis;
 - d. The claimant's requested outcome was that, 'she wanted to be returned to Halswell Place, have an apology be left alone'. The respondent concluded that the decision to move the claimant was the correct decision at the time....
29. On 30 January 2023, responsibility for providing care to E in Halswell Place was transferred from the respondent to a different provider 'Havilah Care'. This resulted in less importance being placed by the respondent upon the debrief document and the investigation, both of which related to the care the respondent provided for E. This transfer also resulted in the respondent's care workers working alongside and in close proximity with care workers engaged by Havilah Care.
30. The claimant wrote to the respondent on 16 April 2024. She highlights her severe financial distress including her use of food banks. She refers to 'an unlawful deduction from wages' and states inter-alia '.... due to a debrief being done wrong and not on time threw no fault of my own I was not allowed company sick pay either I just became the middle of a whole sorry mess between HR yourself and managers which is completely unfair on me...'.
31. The claimant appealed the outcome of her grievance on 6 April 2023 . There were various grounds of appeal that included that the failure to properly complete the debrief had a detrimental financial impact on the claimant.
32. The respondent confirmed the outcome of the claimant's appeal by letter dated 5 May 2023 from Ms Garus. The appeal was partially upheld. Ms Garus acknowledges again that the debrief completed by the respondent was not done correctly by the respondent and this has a potential financial impact upon the claimant . Part of the claimant's complaints were not dealt with as Ms Garus concludes, 'This part of the process has not been concluded as the investigation was never completed, therefore I cannot make any further comment on the above at this time.' Even this outcome did not prompt any further action to progress the investigation on the respondent's part.
33. In late April 2023 there was a meeting between the respondent and the local authority where the respondent was told that contract for providing care the remaining two resident's within Haswell Place would be moving to Havilah Care. Initially the local authority considered that 'TUPE' did not apply and there would be no transfer of staff between providers. Both providers believed that 'TUPE' would apply and staff assigned to the facility would transfer their employment to the new provider by operation of law.
34. As workers for the two providers worked side-by-side within Haswell Place, the respondent was concerned that information was being provided indirectly to its employees. For this reason, the respondent called a short notice staff meeting on 26 April 2023. The claimant was off sick at this time and not invited. The

claimant found out about the meeting and contacted the respondent on the same day. Mr Lewis gave evidence that the meeting was arranged at very short notice, it was carried out in the office over teams and he recalled Ms Winney stating that the claimant was not to be invited as she was under investigation at that time. There is correspondence between the claimant and Ms Read from the respondent dated 27 April 2023 mentioning a call of 26 April 2023.

35. The claimant emailed the respondent 26 April 2023 stating that she was “still an active employee of Lifeways”, asserting that TUPE applied and she should be consulted. The claimant’s email also refers to the claimant being off sick since January 2023 due to being beaten badly and the stress of working with staff who do not care or support her. She includes the sentence, ‘I am very keen to speak with you about my concerns as this is serious now...’.
36. The respondent received confirmation from the local authority that the care packages were moving to Havilah care on around 30 April 2023. Thereafter the respondent undertook consultation with employees are it considered affected by the transfer and the claimant was involved in those consultation meetings on 4,5 and 12 May 2023.
37. The claimant made direct contact with Havilvah care and was informed by them that she would not be permitted to work in Halswell Place due to the risk created by E and his apparent fixation upon her.
38. The claimant was very concerned in respect of a potential transfer to Havilah care and there was considerable confusion on her part. It was these worries about potential actions by the new provider when they took over Halswell Place, rather than any concern linked to the transfer itself, or a return to the property where she was previously assaulted, that fuelled the claimant’s concerns in respect of the proposed transfer. In particular the claimant was concerned that:
 - a. As the investigation commenced by Mr Ullah was outstanding, this would be transferred to Havilah Care. The background information relevant to the investigation would not be known by the new provider.
 - b. The claimant was concerned that details in relation to her assault would not be shared.
39. The claimant shared her concerns with the respondent however those concerns were heightened as she was told by the respondent that details of her personal circumstances could not be shared with the new provider due to GDPR constraints. The claimant was worried that without background information she could be ‘sacked for gross misconduct’ by the new provider. Ms Okenla believe that the claimant was mistaken and all relevant information would have been shared with the new provider. However, she acknowledged that the claimant had queried this matter internally. I note the reference within the bundle to the respondent telling the claimant that her personal information could not be shared with the new provider to GDPR concerns. Ms Okenla conceded that the claimant had understandable concerns.
40. Ms Hyde said that this investigation should have moved faster. She initially said that it would have concluded before the proposed transfer and the respondent

would have 'closed the problem down' to ensure that a new provider was not having to deal with it. However she conceded that it would not have been concluded before the transfer. Ms Hyde said that she understood the claimant's concerns.

41. The claimant was also worried that her personal injury claim would be in some way prejudiced by the proposed transfer. The claimant was concerned that the respondent was trying to effectively 'get rid of her' and offload her employment onto Havilah Care.
42. On 5 May 2023 the claimant emailed the respondent stating inter-alia, '... Regards to the investigation please can I have this done in the next week as I want all of this over and done with. My mental health cannot cope no more with the allegations that I have hanging over me and I need closure...'
43. On 10 May 2023 the claimant emailed Ms Winney and says inter-alia '...i I am not sure what is holding up investigation as if I need to answer any questions, surely this can be dealt with by teams? Am unsure as to why the investigation is taking so long, now almost 5 months.... I have asked and reached out for help many times my stress levels have been on a high since last year... I have told [the respondent] due to the debrief not been carried out properly where I may [have] being able to [have] gained company sick pay for something that was not my fault that I have suffered a massive financial impact not being able to pay bills at risk of losing my home I cannot afford to shop and have been having to reach out to food banks... yourself and HR saying [the debrief] wasn't done properly, both Kim and Rebecca Peters states that it was and the only person to suffer from all of this and to be in the middle of the sandwich is my family and myself ... led to a further deterioration on my mental health... the trust is totally broken down...
44. On 11 May 2023 Ms Winnie wrote to the claimant stating inter-alia:
 - a. your period of sickness commenced after 23 January 2023 due to you being aggrieved to other related issues pending an investigation and not related to personal injury.
 - b. ... We are all clear that you are legally assigned to the current contract... Both Havilah and [the respondent] are clear that your employment will be transferred to the new provider on 18 May 2023.
 - c. Are you informing me that you are refusing to transfer under TUPE regulations. I am writing to inform you that you have the right to formally object to the transfer, however, by doing so you are effectively tendering your resignation...
45. The claimant responded on 12 May 2023 stating inter-alia:
 - a. Ms Winnie was incorrect and the claimant remained off work due to work-related injuries and work-related stress and her absence was not as a result of being aggrieved in relation to other issues.
 - b. '... I have not refused to TUPE...
46. On 15 May 2023 the claimant writes to the respondent stating inter-alia:
 - a. ...upon logging in to my account this morning I can see that monies [SSP]

owed to me have still not been paid. Which is obviously having a massive impact on me... And a massive impact on my mental health... I am in a situation where I am about to lose everything... I cannot afford to feed my family and I am going to have to try to reach out to food banks which is humiliating for me... This is an unlawful deduction off my wages... Due to a debrief being done wrong and not on time... I was not allowed company sick pay ...

47. The claimant resigned with immediate effect on 16 May 2023. The email sets out reasons as:
- a. unlawful deduction from my wages
 - b. treated less favourably than other staff members
 - c. been bullied and victimised by higher management
 - d. my human rights have been denied in all aspects
 - e. complete breakdown of professional working relationship with management and trust and
 - f. ...lack of support prior to her resignation the claimant was very concerned

The Law

48. Section 95 of the Employment Rights Act 1998 sets out circumstances in which an employee is dismissed:

“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only 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 by reason of the employer's conduct.”

49. ‘Constructive dismissal’ as set out in sub-section 1(c) is the statutory version of a principle originally from common law. The burden is on the employee to prove constructive dismissal. In order to establish that she has been constructively dismissed, the employee must show:

- a. there was a fundamental breach of contract on the part of the employer that repudiated the contract of employment;
- b. the employer's breach caused the employee to resign, and
- c. the employee did not delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal.

50. The implied term of mutual trust and confidence provides that employers (and employees) will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. In cases where a breach of the implied term is alleged, the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

51. The tribunal has to decide whether the conduct in question in a particular case amounts to a breach of the term, by considering:
- d. Whether there was a 'reasonable and proper cause' for the conduct; and
 - e. If not, whether the conduct was 'calculated or likely to destroy or seriously damage trust and confidence'.
52. Where the claimant does satisfy the Tribunal that there was a repudiatory breach of the implied term of trust and confidence (noting that all breaches of this implied term are repudiatory) There are two further hurdles:
- a. Has she nevertheless affirmed the contract; and,
 - b. Did she resign, at least in part in response to the last straw claimed. The breach must have caused the resignation, but it need not be the only cause. All The test is whether the employee resigned in response to the conduct which constituted the breach. This is a question of fact for the tribunal.
53. If the claimant was dismissed, the tribunal must then consider whether the dismissal was unfair dismissal in accordance with the provision of the Employment Rights Act 1996. Mr Haywood sensibly submitted that should the employment tribunal conclude that the claimant was dismissed, which the respondents deny, the respondent does not seek to argue that that dismissal was for any potentially fair reason and a finding of unfair dismissal would therefore follow. For this reason I do not set out the relevant law on unfair dismissal.
54. The general prohibition on unauthorised deductions from wages is set out in S.13(1) ERA, which states that: 'An employer shall not make a deduction from wages of a worker employed by him.' The key issues involved in determining whether or not there has been a deduction that infringes the provisions are whether the wages are 'properly payable' to the worker; and whether the payment of less than the properly due sum is authorised. The courts have consistently held that the question of what is properly payable to a worker turns on the contract of employment.

Deliberation and decision.

55. In general terms I found the claimant to give considered and helpful evidence to the tribunal. It can be seen from the background documentation that the claimant was a dedicated and hard-working member of the respondent staff. The claimant, acting in person, obviously found the litigation process difficult. Parts of her evidence were at times difficult to follow. However, I conclude that this is a result of the claimant's difficulty with the process and there is nothing within the evidence that would lead me to question her honesty.
56. There are difficulties with Ms Hyde's evidence are set out below and it was unreliable in places. I consider that Ms Okenla's evidence was straightforward and helpful. I acknowledge the remainder of the claimant's witnesses and have commented where their evidence assists with determining the issues.
57. For the sake of completeness, I note that during Mr Lewis's evidence, Mr Haywood noted that Mr Lewis was drinking from a can of Stella. I did not see

this but my clerk also brought this to my attention. Mr Lewis had some brief technical problems and was required to rejoin the hearing. There were no further sightings of inappropriate drinks. It is obviously highly inappropriate to drink alcohol during any hearing. Such action reduces the weight placed upon his oral evidence provided during the hearing. I comment further on Mr Lewis's evidence below but do not consider that this incident had any material effect within this litigation.

(a) Delay in reporting the assault to which the claimant was subjected by a service user on 13 December 2022. (c) Refusing to pay the claimant normal pay rather than statutory sick pay during that sick leave

58. While the claimant referred in places to various regulatory and other requirements on the respondent to report the assault, this evidence was unclear. There was no coherent evidence supporting any 'delay in reporting the assault' other than the evidence of internal delay, being the respondent's failure to properly complete the debrief documents following the claimant's assault. For this reason, I have grouped these complaints together. When looking at the claimant's complaints relating to payment of company sick pay it is common ground that:
- a. company sick pay was discretionary;
 - b. the respondent's policies envisaged that consideration would be given to company sick pay where the employee had been a victim of violence at work.
59. The respondent's evidence on this point was conflicting. Ms Hyde's evidence was that company sick pay was considered and declined however Ms Okenla referenced the requirement for a proper debrief document prior to consideration for company sick pay. Ms Okenla's evidence corresponds with the documentation and is preferred. Ms Okenla explained that the debrief was important for two reasons, being the payment of sick pay but also allowing the respondent to feed back into the care provided to E, the vulnerable service user. The fact that the claimant's request for company sick pay following her assault did not generate a single internal email or document on the respondent's side suggests that no proper consideration was given to the claimant's request
60. Ms Hyde's evidence was that the claimant's request for sick pay was rejected as the respondent questioned the claimant's credibility. This was only based on the fact that the claimant had, prior to her attack, requested holiday over the Christmas period. It can be seen from the documentation that the claimant had on various occasions, despite her own personal difficult circumstances, worked as requested by the respondent to assist the respondent. I can see no reasonable basis for Ms Hyde to question the claimant's credibility. There can be no suggestion that the timing of the attack was in any way controlled by the claimant. I find Ms Hyde's approach unreasonable as she had limited information in relation to the assault, the claimant's injuries or any ongoing impact upon the claimant. She was or should have been aware that the respondent did not have a proper debrief document and took no steps to obtain one. Ms Hyde's evidence to the tribunal, in failing to explain the relevance of and absence of the debrief document and unreasonably questioning the

claimant's credibility, led me to conclude that her evidence was unreliable on this matter.

61. It is difficult to see how the respondent could reasonably conclude that the claimant's injuries following her assault were 'not serious' when it did not have and took no reasonable steps to acquire basic information. I was not referred to any policy documentation that confined company sick pay to cases of 'life changing injuries'. There is no documentary evidence within the bundle showing that the respondent has in practice limited its discretion to scenarios with 'life changing injuries'. I conclude that following the claimant's assault, the respondent unreasonably failed to follow up and complete the required internal documentation and unreasonably failed to consider whether the claimant should be paid company sick pay in accordance with its internal policies.
 62. In reviewing this matter, I am unable to identify any reasonable and proper cause for the respondent acting as it did. There are multiple reasons that are likely to have contributed to the respondent's decision, including that E was no longer within their care and therefore the respondent did not require the debrief document for reasons related to him, there is a suggestion that the claimant bringing a personal injury claim detracted from the respondent's willingness to properly consider the payment of company sick pay. There is a level of internal disorganisation apparent from the documentation and conflicting messages provided to the claimant as to the adequacy or otherwise of the debrief document. None of these matters amount to reasonable and proper cause for failing to properly consider the claimant's entitlement to company sick pay following her assault at work. I conclude that this is conduct highly likely to destroy or seriously damage trust and confidence between employer and employee.
 63. There is a suggestion within the evidence by the respondent that the period of time the claimant was absent from work due to her assault is limited to January 2023, as the claimant returned to work for a short period of time. The respondent's position is unsupported by any medical documentation. This is disputed by the claimant, who claims that the entirety of her sick leave period was related to her assault. The sick notes within the bundle record work-related injuries/work-related stress. I conclude that the respondent's obligation to consider payment of company sick pay under its internal policies was ongoing and related to the entire period of the claimant's sickness absence.
- (b) Failing to contact the claimant during her subsequent period of sick leave.
64. There was contact between the claimant and the respondent in relation to administrative matters during her period of sick leave. It was accepted by the respondent during the grievance process that the respondent's internal processes provide specifically for welfare contact in circumstances where staff have been subject to violent assault and this did not happen in the claimant's case during her initial period of leave. I acknowledge that a violent assault at work is likely to be a particularly distressing event. The lack of welfare contact is unlikely to have been calculated. As there was some contact between the parties, I do not consider that this slip, in isolation, is conduct likely to destroy or seriously damage confidence. However, when viewed alongside the other

matters it forms a pattern of the claimant's welfare being ignored by the respondent and when viewed cumulatively, I conclude that this is conduct likely to destroy or seriously damage trust and confidence.

(D) Removing the claimant from the house where she was working (Haswell Place) and moving her to a different house (Staplehall Road). (F) On or about 23 January 2023 telling the claimant she would have to do 1 to 1 shifts while at Staplehall Road and that a health and safety assessment which said the claimant should only do 2 to 1 shifts (because she carries an EpiPen) would be disregarded. (e) Asking the claimant to ensure the rota was covered before removing her from Haswell Place although this was not in her job description. (g) Carrying out an investigation into the claimant and/or Haswell Place which implied the claimant was at fault. (h) Making allegations against the claimant in respect of medication, including accusing the claimant of overdosing individuals at Haswell Place and being responsible for the behaviour of service users.

65. I have considered all of these matters together as they all relate to the investigation and related actions to which the claimant was subject. I conclude that the respondent's dealing in its entirety with the investigation into the claimant's conduct can be fairly inferred by any fair reading of the list of issues. I note that the claim form includes the wording '...the whole investigation was awful...' and '...the investigation was not held properly...'
66. It is likely, by reference to the claimant's witnesses evidence that the claimant regularly assisted the respondent by preparing rotas in the absence of managerial staff. I consider it likely that the claimant was requested to complete the rota for Haswell Place prior to her leaving as she has claimed. The implied criticism from the claimant as I understand it, is that her goodwill to 'act up' should not be relied upon in circumstances where the claimant is unhappy with the respondent's actions and the respondent had no reasonable basis for the imposition of this task. However, while this duty may be outside her contractual obligation, I do not believe that this request either alone or alongside the other matters could reasonably be said to be behaviour calculated or likely to destroy trust and confidence.
67. There are no notes or witness evidence provided by the respondent relating to the conversations held with the claimant surrounding her move to Staplehall Road. I conclude by reference to the letter produced at the time that it is likely that the claimant was removed from her normal place of work Haswell Place on a temporary basis to allow the respondent to conduct the investigation. There is no evidence to support a contention that the claimant was transferred at that time on a permanent basis.
68. The claimant's evidence alongside the documentation within the bundle leads me to conclude that it is more likely than not that while a number of shadow (2:1) shifts were scheduled for familiarisation purposes, the normal requirement from the claimant for work at Staplehall Road involved predominantly 1:1 shifts. It is likely that the fact that the claimant was unable to do 1:1 shifts, as recorded within the respondent's own documentation, was raised by the claimant but disregarded by the respondent for reasons that were not explained to the

tribunal. The respondent's reference to the shadow shifts in response to the claimant's concerns does not properly engage with the claimant's concerns.

69. It is obviously the case that where an employer has concerns in respect of a breakdown of communication/ administration of medication, that employer has reasonable and proper cause for such a matter to be investigated. This respondent is a large employer with substantial administrative resources. It is likely, due to the nature of the respondent's work that such investigations are commonplace. In the claimant's case, it is the case that there was a breakdown of communication relating to E's medication and an investigation was reasonable. The investigation is triggered by the report of Mr Ullah. However, the respondent did not take a single step to commence, progress or conclude this investigation. The respondent's witnesses confirmed that prompt investigation while memories were fresh would be required in these circumstances.
70. There is no evidence from the respondent to address why this investigation was launched into the claimant's conduct only, particularly in circumstances where the claimant alleges she was not on shift at the time of the breakdown in communication. These matters are legitimate concerns on the claimant's part, and could have been addressed during the course of the investigation had it progressed.
71. The respondent's evidence acknowledged the difficult circumstances the claimant was placed in by the respondent's failure to progress the investigation and particularly to progress the investigation prior to the transfer to a new provider.
72. I have considered whether the claimant's absence on sick leave provided reasonable cause for the lack of progress with the investigation. The claimant wanted the investigation to proceed. The respondent proceeded with the grievance procedure during her sickness absence. Some of the matters raised by the claimant within the grievance process were not dealt with as they were said to be part of this outstanding investigation. However, again, even this response did not prompt any action to progress the investigation on the respondent's part. The respondent is a large organisation that could have easily tried to progress the investigation. I do not consider that the claimant's absence on sickness leave provides any reasonable or proper ground for the respondent's inaction.
73. I have considered whether the relatively tight timescale imposed upon the respondent in respect of the proposed transfer provides any reasonable and proper basis for the respondent's failure to complete the investigation. The respondent took no action at all to even commence the investigation. There is nothing in the evidence to suggest that the respondent sought in any way to progress this matter but was hampered by any imposed timescale. The far more likely scenario is that the claimant's predicament was ignored.
74. Once she learned of the proposed transfer of her employment to a new provider, the claimant knew that the respondent's failure to progress the investigation

would have additional detrimental consequence for her. The respondent was or should have been aware of this scenario. It was likely that those who would be tasked with the investigation following transfer would have no background knowledge of the matter. No reassurances were provided to the claimant. The respondent's communication added to her concerns as she was told of constraints imposed by GDPR would prevent the passing of information and she genuinely believed that she would be severely disadvantaged.

75. This was an overall escalation of the consequences of the respondent's failure to progress the investigation. This is a situation that was or should have been known to the respondent however the claimant's predicament was ignored. The proposed TUPE transfer was effectively a clear line that indicated, the respondent had left progressing the investigation into the claimant's conduct too late. It was no longer reasonable to expect the claimant to put up with it.
76. On review, while I conclude that the respondent had a reasonable and proper cause to investigate a concern and reasonable and proper cause for the claimant to be moved temporarily to allow the investigation to be undertaken, I consider that there are real issues with the respondent's conduct. In particular:
- a. The respondent took no steps at all to progress this investigation. No investigator was appointed. No investigation commenced.
 - b. The appropriateness of Staplehall Road as the claimant's workplace was not properly considered. The respondent unreasonably ignored the claimant's inability to work 1:1 in requesting her to work at Stapel Hall.
 - c. Once responsibility for E was transferred away from the respondent, the respondent took no steps to review the situation and either progress the investigation or officially abandon the investigation and lift any restriction upon the claimant. Further, once the respondent was not responsible for E, It is difficult to understand why the respondent maintained that the claimant could work at Staplehall Road but not Haswell Place while any investigation was ongoing.
 - d. The respondent further ignored the increased detrimental impact upon the claimant of their delay in dealing with the investigation caused by the envisaged TUPE transfer. It is difficult to envisage how the respondent could, even if it had wanted to, some 4 months after the event, have carried out a reasonable investigation into this type of incident. The level of difficulty would be increased substantially following the transfer of the claimant to a new employer where it had no/limited background information or even access to witnesses who remained employed by the respondent. The respondent was or should have been aware of this situation, yet it took no action to progress and/or conclude their investigation.
77. I conclude that there was no reasonable and proper cause for the respondent's conduct. The respondent's failures had a serious impact upon the claimant and were likely to destroy or seriously damage trust and confidence between employer and employee.

Being told by another member of staff (Rachel Page) at the end of April/beginning of May 2023 that there would be a TUPE transfer which would result in the claimant

working back in the house (Haswell Place) where she had been assaulted.

78. Looking at this allegation I have considered the matters arising due to the proposed transfer of the claimant's employment. It is common ground that the claimant was not invited to the initial staff meeting expressly referred to. It is likely that this meeting was held at very short notice. I consider that Mr Lewis's evidence that the claimant was expressly excluded is inconsistent with the documentation. Mr Lewis is in a dispute with the respondent and as stated above appeared to be drinking alcohol during his oral evidence. While it is the case that the claimant was excluded I consider that this was most likely to be inadvertent. This was followed up quickly by both parties. It is obvious from the subsequent actions that the respondent wished to include the claimant within that TUPE process. Indeed, it is the claimant's position that the respondent wished to inappropriately include her within the transfer process and somehow inappropriately include or offload her employment onto the new provider. In the circumstances I do not consider that any matter relating to the inclusion of otherwise of the claimant within the initial meeting could reasonably be said to be calculated or likely to destroy or seriously damage trust and confidence between employer and employee.
79. I consider that any consideration on the respondent's part of whether or not the claimant was properly assigned to Haswell Place or whether her employment should transfer to the new provider under the automatically applicable provisions of TUPE has reasonable and proper cause in that the respondent is obliged to take steps to comply with the applicable legislation. I conclude that this cannot be a breach of the implied term of trust either alone or in conjunction with any other matter.
80. What is the last breach relied upon by the claimant? I have not identified any breach of contract by reference to the respondent's preparation for and compliance with its legal obligations under TUPE. Therefore the last breach relied upon by the claimant is relates to the respondent's handling of the investigation are set out above.
81. When did this breach occur? An employer is allowed a reasonable time to complete an investigation. How late is too late? The reasons set out above I conclude that 'too late' in the circumstances coincides with the proposed transfer date and the claimant's resignation date.
82. Did the claimant affirm the contract since that act? I heard detailed submissions from Mr Haywood on this point and carefully considered the position in respect of affirmation. The respondent submits that the claimant expressly affirmed her contract on at least two occasions being:
- a. By emailing the respondent on 26 April 2023 and stating that she was "still an active employee of Lifeways", asserting that TUPE applied and she should be consulted, and then by attending the subsequent consultations;
 - b. By responding to an e-mail warning her of the risk of inadvertent resignation if she objected to TUPE by asserting she was not refusing on 12 May 2023.

83. The respondent submits that by asserting that the right contingent upon her contract of employment to be consulted persisted, the claimant was expressly treating the contract as continuing and has affirmed the contract.

a. The claimant's problems related to ongoing internal issues were amplified by the transfer timing. The claimant's email of 26 April 2023 also refers to the claimant being off sick since January 2023 due to being beaten badly and the stress of working with staff who do not care or support her. She includes the sentence, 'I am very keen to speak with you about my concerns as this is serious now'. The email of 12 May 2023 also references that the claimant is off work for work-related stress and disputes that her absence is for any other reason. The claimant also refers to the 'allegations made against me which yet again I dispute as being untrue'. This refers to the outstanding investigation process. It was reasonable for the claimant to respond to a question raised by the respondent to ensure that her concerns caused by the timing of the transfer were not conflated with concerns related to the TUPE transfer in itself. I consider that a fair reason of the claimant's correspondence demonstrates an intention on the claimant's part to preserve her position by references the respondent's previous and ongoing breaches of the implied term of trust and confidence. I conclude that the claimant has not affirmed the contract by making these statements as alleged. In any event, if I am wrong, the respondents failure to take reasonable and proper steps prior to the proposed transfer date constituted a breach of the implied term that crystallised on the resignation date and post-dated the above correspondence.

84. I have also considered whether there is delay on the part of the claimant that would effectively constitute affirmation on her part. The claimant wanted the respondent to take action and repeatedly requested the respondent to do so. I do not consider that the claimant has affirmed the contract by reference to the passage of time or delay. The respondent consistently ignored the claimant and it became too late to rectify the situation as of the date of the claimant's resignation.

Did the claimant resign in response to the breaches.

85. It can be seen from the correspondence that the claimant resigned for more than one reason however it is clear from the background documentation that material part of the claimant's reasons included the matters set out above within her list of issues and found to be breaches of the implied term of trust and confidence, in particular: the respondent's failure to deal with the investigation and the claimant's concerns that she would be disadvantaged by the investigation being carried out by individuals with no background information; and; the claimant's concerns in respect of her pay. The claimant repeatedly refers to severe financial pressure and the severe consequences she experienced as a result of the respondents failure to consider payment of company sick pay.

86. For the reasons set out above, I conclude that the claimant has been constructively dismissed. The next question is whether the claimant's dismissal was fair and I look to identify a potentially fair reason for the dismissal as defined

within the Employment Rights Act 1996. The respondent's submissions related entirely to their defence of the constructive dismissal claim. It is conceded that, as I have found the claimant to be constructively dismissed, there is no potentially fair reason for dismissal and I conclude that the claimant was unfairly dismissed. Remedy in this matter will be determined at a separate remedy hearing.

Unauthorised deduction from wages/breach of contract.

87. While I have concluded that the respondent did not consider whether the claimant was entitled to company sick pay, this does not assist the claimant with her unauthorised deduction from wages claim. It is common ground that the claimant did not have a contractual entitlement to company sick pay.
88. I was told at the outset of this hearing that the parties have expressly not commented upon the circumstances of the claimant's assault and the injuries that the claimant sustained, as this matter is the subject of a separate personal injury claim. I have therefore made no findings in relation to the claimant's injuries. It is not possible for me to conclude that company sick pay was 'properly payable'. Nothing within this judgement is intended to prevent the court dealing with any element of the claimant's personal injury claim.
89. I conclude that the claimant's claim for unauthorised deduction from her wages and/or breach of contract in respect of the company sick pay entitlement fails and is dismissed.

Employment Judge Skehan

Date: 25 July 2024

JUDGMENT SENT TO THE PARTIES ON
26 July 2024

.....
AND ENTERED IN THE REGISTER

.....
FOR THE TRIBUNAL OFFICE