EMPLOYMENT TRIBUNALS

Claimant: Mr S Meiarasu

Respondent: Pennine Care NHS Foundation Trust

HELD AT: Manchester **ON:** 6 and 7 February 2017
8 February 2017
(in Chambers)

BEFORE: Employment Judge Slater
(sitting alone)

REPRESENTATION:

Claimant: Mr P Gorasia of Counsel
Respondent: Mr S Lewinski of Counsel

JUDGMENT

The complaint of unlawful deduction from wages is not well founded.

REASONS

Claims and Issues

1. The claimant brings a claim under section 13 Employment Rights Act 1996 for unlawful deduction from his wages for the period April 2015 to January 2016. The parties agreed that the only issue to be determined was that identified at 3.1 of the notes of the preliminary hearing on 26 August 2016 i.e. was the respondent entitled to treat the claimant as on sick leave during the relevant period? If the respondent was entitled to treat the claimant as on sick leave during the relevant period, the claimant was not entitled to pay during the period, having exhausted his contractual entitlement to six months' full pay/six months' half pay. If the respondent was not entitled to treat the claimant as on sick leave during the relevant period, the claimant was entitled to be paid full pay during the relevant period.

2. If I found in the claimant's favour, the parties were confident of being able to agree the amount to be paid without the need for a remedy hearing, remedy being a matter of simple calculation.

The Facts

3. There was little dispute as to relevant facts. Mr Lewinski helpfully set out in his skeleton argument a chronology which I adopt in large part in these reasons.

4. The claimant is employed by the respondent as a Specialty Doctor Paediatrician. He was appointed with effect from 6 December 2010. His contractual role is to undertake clinical duties together with the necessary administrative generated in connection with that clinical work. He works within the Community Paediatric Department in Oldham, mainly providing statutory medical advice to the local authority for looked after children and children undergoing educational and health care plans within education. In addition to the claimant's contractual role, he served as a governor for the respondent Trust on a voluntary basis. He is also an examiner for the undergraduate medical students at the University of Manchester and University of Liverpool. He also holds senior positions within the British Medical Association.

5. In summary, this case concerns whether the claimant was entitled to be paid for a period of absence between 26 April 2015 and 25 January 2016, the date when the claimant was treated as having returned to work. This period of absence followed on from a lengthy period of absence which had begun in December 2013. There was no dispute about the claimant's unfitness for work during the majority of the absence prior to the period with which we are concerned. The claimant received contractual sick pay until this was exhausted and, as will be seen from the more detailed findings of fact which follow, the claimant, in fact, received in total more than six months' full pay and six months' half pay before the period with which we are concerned. In the period 26 April 2015 to 24 January 2016, the claimant did not receive any pay. The respondent says that this was because, on the evidence available to them, they did not consider the claimant fit to carry out his clinical duties and they, therefore, regarded him as being on sick leave. Since he had exhausted his entitlement to contractual sick pay, the respondent says he was not entitled to any pay. The claimant says that his GP had indicated that he would be fit to return to work at the expiry of his last fit note and he was entitled to be paid because he was ready to attend work. He says that, if the respondent did not wish him to attend work whilst it carried out further investigations into his fitness to work, he should have been medically suspended. He claims he was entitled to full pay during the relevant period.

6. The contractual provisions relating to sickness absence and contractual sick pay are contained in a number of documents. General mutual obligations set out in the claimant's contract of employment include the obligation to cooperate with each other and "to carry out our respective obligations relating to the organisation's policies, objectives, rules, working practices and protocols". The contract of employment states that the claimant's appointment is subject to the national terms and conditions of service for specialty doctors. The terms and conditions of service for specialty doctors include the provision at clause 17 that:

> "A doctor absent from duty owing to illness (including injury or other disability) shall, subject to the provisions of paragraphs 18-32, be entitled to receive an allowance in accordance with the following table." [The table then being set out].

7. It is agreed that the claimant's contractual entitlement to sick pay in accordance with the table was to six months' full pay and six months' half pay. Paragraph 18 provides that the employer has discretion to extend a doctor's sick leave entitlement. Paragraph 19 provides that an employer has the discretion to allow a doctor to return to work on reduced hours or to be encouraged to work from home without loss of pay to aid rehabilitation. Paragraph 20 sets out rules for the calculation of allowances. This has the effect that the allowance applies for an aggregated period of absence beginning with the 12 months immediately preceding the first day of absence. Paragraphs 25 and 26 provide as follows:

> "(25) A doctor who is incapable of doing his or her normal work because of illness shall immediately notify his or her employer in accordance with the employer's procedures.
>
> (26) Any absence of more than seven days shall be certified by a doctor (other than the sick doctor). Statements shall be submitted in accordance with the employer's procedures."

8. Paragraph 30 provides:

> "The employer may at any time require a doctor who is unable to perform his or her duties as a consequence of illness to submit to an examination by a medical doctor nominated by the employer. Any expense incurred in connection with such an examination shall be met with the employer."

9. "Maintaining High Professional Standards in the Modern NHS" (MHPS) is a framework agreed by the Department of Health with the British Medical Association and British Dental Association. Part I of the framework covers action when a concern arises, Part II covers the restriction of practice and exclusion, and Part V relates to handling concerns about a practitioner's health. In Part I, at paragraph 7, the framework states:

> "At any stage of the handling of a case consideration should be given to the involvement of the NCAS."

10. The NCAS is the national authority which was established to improve arrangements for dealing with poor clinical performance of doctors. When the advice of the NCAS is sought in relation to a particular doctor, the NCAS will allocate a number to that doctor, and correspondence will then refer to the doctor by that number rather than by name.

11. Paragraph 20 of Part I states:

> "Where an employing body is considering excluding a doctor or dentist, whether or not his or her performance is under discussion with the NCAS, it is important for the NCAS to know of this at an early stage, so that alternatives to exclusion can be considered."

12. Part II, restriction of practice and exclusion from work, includes the following provisions at paragraph 3:

> "Exclusion from work is used only as an interim measure whilst action to resolve a problem is being considered."

13. Paragraph 5 states:

> "Exclusion of clinical staff from the workplace is a temporary expedient. Under this framework, exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work ('suspension') should be reserved for only the most exceptional circumstances."

14. Paragraph 6 sets out the purpose of exclusion which is:

> "To protect the interests of patients or other staff; and/or
>
> To assist the investigative process where there is a clear risk that the practitioner's presence would impede the gathering of evidence."

15. The paragraph goes on to state:

> "It is imperative that exclusion from work is not misused or seen as the only course of action that could be taken."

16. Paragraph 7 sets out a non exhaustive list of alternative ways to manage risks avoiding exclusion, which includes:

> "Sick leave for the investigation of specific health problems."

17. Part V of the framework, "Handling concerns about a Practitioner's health," includes the following provisions. At paragraph 3 it states:

> "Wherever possible the Trust should attempt to continue to employ the individual provided this does not place patients or colleagues at risk."

A box then sets out what are described as examples of action to take, which include:

> "Sick leave for the practitioner (the practitioner to be contacted frequently on a pastoral basis to stop them feeling isolated)."

18. Paragraph 7 provides that the NCAS should be approached to offer advice on any situation at any point where the employer is concerned about a doctor or dentist.

19. Paragraph 8 relates to the situation where a reference is made to Occupational Health. This states:

> "The occupational physician should agree a course of action with the practitioner and send his/her recommendations to the Medical Director and a meeting should be convened with the Director or Head of HR, the Medical Director or case manager, the practitioner and caseworker from the OHS to agree a timetable of action and rehabilitation (where appropriate)."

20. This provision does not state what happens if the occupational physician and the practitioner do not agree on a course of action. However, there is reference in other provisions to possible disciplinary action if an individual refuses to cooperate with the employer to resolve an underlying situation e.g. by repeatedly refusing a referral to Occupational Health or unreasonable refusal to accept a referral to, or to cooperate with, the OHS.

21. Paragraph 9 provides:

> "If a doctor or dentist's ill health makes them a danger to patients and they do not recognise that or are not prepared to co-operate with measures to protect patients, then exclusion from work must be considered and the Professional Regulatory Body must be informed, irrespective of whether or not they have retired on the grounds of ill health."

22. The claimant was originally employed with Oldham Primary Care Trust. The Community Clinical Services transferred to the respondent Trust and the claimant transferred to the respondent's employment with those services. Oldham Primary Care NHS Trust had a sickness absence policy which included the following provisions at clause 2.5:

> "The role of the Occupational Health department is important to ensure that medical advice is obtained to assist in coming to any decision. Members of staff may be referred to the Occupational Health department by their manager or may approach the department of their own volition."

23. Clause 4 sets out the procedure for notification and certification of sickness absence and return to work. This includes the requirement for employees to submit a medical certificate from a doctor to cover absence from the eighth calendar day of absence onwards. Clause 4.8 states that:

> "Where possible, staff should give advance notice to their line manager or supervisor of their expected date and time of return to duty following any period of sickness absence."

24. Clause 8 deals with long-term sick absence. This includes the provision that after a continuous period of four week's absence managers shall notify Occupational Health who will initiate an assessment as appropriate. Further provisions in clause 8 include that medical evidence will be obtained by Occupational Health. Any liaison with the employee's GP and/or consultant will be undertaken by Occupational Health with the employee's written consent. Reports to management will not disclose confidential medical information. Clause 8.6 provides that, on receipt of a medical report, the employee will be invited to attend a formal interview to discuss the report. The provisions do not expressly cover the situation where the Occupational Health report is not provided to the employer because the individual does not consent to this being done. As detailed later in these findings of fact, the claimant refused to allow one Occupational Health report to be provided to the employer. It has not been suggested by either party that the respondent had a right to see the report even if the claimant did not consent to this.

25. Clause 10 of the Oldham Primary Care NHS Trust sickness absence policy provides that staff may be required to undergo a medical examination by a medical

practitioner of the Trust's choice, and that refusal to undergo such an examination or failure to attend any such appointment may be considered gross misconduct. The clause stated that the details of any such appointment would normally be strictly confidential with the advice being received by management relating to issues such as likely date of return to work, limitations to the redeployment of employees, whether there are underlying medical reasons for attendance records and likelihood of future regular and efficient service. Clause 10.4 provides that, at all stages, employees may submit alternative medical advice if they wish. In the event of a conflict of medical opinion, arrangements would be made for a further medical examination by a medical adviser jointly agreed by the Trust and the employee.

26. In questions and answers appended to the sickness absence policy, one question posed is: what could the individual do if they did not agree with a medical report from the Occupational Health department? The reply is that they could submit an independent medical report by a medical adviser jointly agreed by the PCT and the employee.

27. On 11 September 2013, Dr Ticehurst, Medical Director, wrote to the claimant following a meeting the previous day. Dr Ticehurst recorded that Dr Ticehurst and Dr Snowdon, the claimant's line manager, had informed the claimant that concerns raised about the claimant in the form of a patient complaint and another concern about conduct at work would be investigated following standard procedure. It also recorded that the claimant raised concerns. The letter included, "You stated that there was some coordinated action by some third party against you and involving your neighbour, your neighbourhood and work", and recorded some examples. Dr Ticehurst wrote that, previously, the claimant had been requested to attend Occupational Health as concerns had been expressed about his mental health. Dr Ticehurst did not propose at this stage that there be a further referral to Occupational Health. However, he recorded a plan that the patient complaint and the concern regarding conduct at work would be investigated and the claimant's concerns as to how he was being treated would be investigated.

28. The claimant, in evidence, disputed that he had sought to draw links between matters at work and outside work. However, the letter which he sent following that meeting included the following:

> "I said that I noticed a pattern: whenever I did something to prevent these or protect my family from aggression; that reflected in some form of backlash at work. The example of me contacting my son's head teacher (to support my son quoting my work and family situation) followed immediately by the 'vague reporting of prescription error incident report' pointing finger at me."

29. I find, on the balance of probabilities, that the claimant was likely to have spoken in similar terms at the meeting to the terms in which he wrote and find that Dr Ticehurst understood from what the claimant was saying that the claimant was drawing links between things at work and outside work, and that Dr Ticehurst had genuine concerns about this.

30. Dr Ticehurst wrote again to the claimant on 16 September 2013. He wrote that he had now had further advice from an HR perspective and had been directed to refer the claimant to Occupational Health. The claimant did not attend an Occupational Health appointment at this time. The claimant says this was because he was seeking

through his BMA representative, but did not get, clarification as to the reasons for the referral.

31. Dr Ticehurst consulted the NCAS about the claimant. A letter from the NCAS dated 21 October 2013 recorded that Dr Ticehurst had said that the claimant was refusing to attend Occupational Health and that Dr Ticehurst was arranging to meet with the claimant and his BMA representative to discuss this further. The letter recorded that Dr Ticehurst was minded to say that he was making a reasonable management request for the claimant to attend Occupational Health in his own interest as well as the interest of the service, and that, if he refused unreasonably to do so, the Trust would consider pursuing the matter using local conduct procedures.

32. In the event, and as recorded in a further letter from NCAS dated 27 November 2013, the Trust's handling of the concerns about the claimant were "overtaken by events" as the claimant needed to take compassionate leave at short notice as his wife was seriously unwell. The claimant was absent for this reason from 5-24 November 2013.

33. In a letter of 27 November 2013, the NCAS advised that the claimant's present employment status needed to be clarified as a matter of priority. The letter recorded:

> "I concurred with you that he cannot remain indefinitely on compassionate leave or annual leave; and I would remind you that paragraph 29 of Part II of MHPS makes it clear that informal exclusion, so-called 'gardening leave', is expressly prohibited as a means of resolving performance concerns. You may therefore need to revisit with Dr 14942 his visiting Occupational Health (OH) and requesting that he be signed off as sick. As we have discussed previously, a continuing refusal to cooperate with an OH referral could in itself be treated as a matter of misconduct. You may also need to review whether there would be any risk to patient safety should Dr 14942 return to work, in which case exclusion or restriction to non clinical practice would need to be considered."

34. Again, the proposed handling of the case was overtaken by other events. The claimant was signed off sick by his GP from 16 December 2013. Two occupational health appointments were arranged for the claimant on 19 December 2013 and 22 January 2014 but, by reason of the claimant's personal circumstances, he was unable to attend these appointments. In a letter dated 22 January 2014, the NCAS recorded that the claimant had a current sick note from his GP which would remain valid for the following three weeks. The letter recorded that the respondent would require the claimant to attend for Occupational Health assessment before allowing him to return to work.

35. On 3 February 2014, Dr Howard, the claimant's line manager, wrote to Occupational Health asking them to arrange an appointment for the claimant. She wrote that the claimant had been absent from work for over four weeks, having been signed off sick by his GP for social reasons. His sick note was dated to expire on Monday 17 February 2014.

36. On 5 February 2014, Dr Howard received an email which she subsequently forwarded to Dr Ticehurst. The email purported to be from the claimant's wife. The claimant gave evidence as to why he does not believe that the email was from his

wife; however, he does not dispute that the respondent received the email. He does not assert that there was any reason for the respondent not to believe, at the time, that it was an authentic email from the claimant's wife. The email expressed concerns about the claimant's mental state, describing him as paranoid and delusional and giving examples of his alleged conduct. The writer wrote:

> "I feel that I have a moral duty to inform you about his mental status because of his occupation as a paediatrician. I have already sent a letter to my GP, Dr Freeman, at Urmston Group Practice, about this and I have expressed concerns that he is a danger to himself and others if he does not undergo treatment."

The writer wrote that they had expressed concerns that the claimant was a danger to himself and others if he did not undergo treatment.

37. The respondent had not been aware of any correspondence to the claimant's GP until this email and did not see that letter until during the course of these proceedings. I have been shown a letter to the claimant's GP dated 23 January 2014 purporting to be from the claimant's wife. However, the claimant disputes that the letter was written by his wife.

38. As is apparent from a letter from the NCAS dated 6 February 2014, Dr Ticehurst contacted the NCAS to update them on the case, informing them about the email, which they understood to be from the claimant's wife. Steve Evans of the NCAS wrote:

> "You said that Dr 14942 has an extant sick note from his GP which runs until 17 February. I concurred with you that under all the circumstances it would be unwise to allow Dr 14942 to return to work until a specialist opinion on his mental health has been obtained. I suggested that you should make an urgent referral to your Occupational Health Service, suggesting that a psychiatric opinion be sought. If Dr 14942 were to attempt to return to work and refused an assessment of his mental health, it would then be open to the Trust, in the interests of patient safety, to consider exclusion in line with the guidance set out in paragraph 9 of Part V of MHPS. In this context, we also discussed briefly the risk that Dr 14942 might seek to work elsewhere – whilst you consider this to be unlikely, you will nevertheless discuss the case as a matter of priority with your local GMC ELA."

39. Dr Ticehurst referred the claimant to the GMC on 7 February 2014. After various correspondence between the claimant and the respondent, an Occupational Health appointment was attended by the claimant with Dr Choudhry on 9 May 2014. Dr Choudhry is a Consultant Occupational Physician. She wrote in a report dated 12 May 2014, amended on 30 May and 6 June, that the claimant had been placed under an immense amount of stress secondary to personal issues and that there had been difficulties due to his wife's ill health and that his father had died in December 2013 necessitating a trip to India. She wrote:

> "He is not taking any medication and has had no changes to his health since his last review at Occupational Health. You may recall Dr Meiarasu was referred to an independent psychiatrist and deemed not to be suffering with any underlying psychiatric health concerns."

This was a reference to a report in September 2012 from Dr Sillince, an independent Consultant Psychiatrist. Dr Choudhry continued:

> “Dr Meiarasu’s situation is complicated and rather complex. I understand he has also been referred to the GMC.
>
> He is currently unfit to return to work and I have advised him to remain so until I review him again in 4-6 weeks’ time.”

40. Dr Choudhry asked for information relating to the circumstances around the referral to the GMC and any other concerns that needed to be addressed prior to the next assessment.

41. Dr Choudhry saw the claimant again on 6 June. She wrote that, since her last assessment with the claimant, he remained under the care of his GP and, in her opinion, remained unfit for work. Dr Choudhry noted that the claimant had been referred to the GMC and NCAS and that she awaited information in regards to this. She said she would like to review the claimant in six weeks’ time.

42. On 13 June 2014, the claimant’s pay reduced to half pay in accordance with the respondent’s contractual sick pay provisions.

43. In a statement of fitness for work dated 23 July 2014, the claimant's GP wrote that he had assessed the claimant’s case on 16 July 2014 and the claimant was not fit for work because of stressful events affecting family and household for the period 15 July 2014 to 18 July 2014. The GP indicated that they would not need to assess the claimant’s fitness for work again at the end of this period. This was the final fit note issued by the claimant's GP in relation to the periods of time we are concerned with.

44. Before the date of this fit note, the claimant attended a further Occupational Health appointment on 18 July 2014. Dr Choudhry wrote a report dated 21 July 2014. This was addressed to Dr Howard. I accept that this report did not reach Dr Ticehurst until after he sent an email to Dr Choudhry on 14 August 2014.

45. Dr Choudhry wrote on 21 July 2014 that, since her last review with the claimant, he was feeling much better and coping better with his personal difficulties. Dr Choudhry records that she has still not received any further information with respect to the basis of the GMC referral. She wrote:

> “Dr Meiarasu has been under an immense amount of personal stress but otherwise has no underlying health concerns. I have found no evidence of any mental health issues in my assessment but am aware of my limitations in this competence. I have suggested a further referral for assessment and evaluation but Dr Meiarasu has been counselled by his defence organisation to refuse this. Under the current circumstances I can see no reason to compel Dr Meiarasu with this request. I can also see no substantial reason for him to not return to work. However I am aware of the GMC referral and possible incomplete information in this regard; thus feel that Meiarasu should not undertake any clinical work. This situation should continue until a case conference takes place.”

46. On 12 August 2014, before Dr Ticehurst saw Dr Choudhry's report, an email from DI Myra Ball of Greater Manchester Police (GMP) of that date was forwarded to him. DI Ball wrote:

> "Under the working together protocol I believe I am duty bound to inform you that I have some concerns about Dr Meiarasu's mental health bearing in mind that he has a role caring for children."

She wrote that she was hoping to discuss her concerns with them.

47. Dr Ticehurst contacted DI Ball and DI Ball wrote to Dr Ticehurst. She wrote that Dr Meiarasu had recently been a victim of crime. She wrote:

> "My concerns were initially raised by a uniformed constable who had spoken to him about the crime and is formulating his witness statement. From my conversation with her she will say that his NVC's are appropriate and plausible. However, whilst talking to him he is reporting that the police are in collusion with the offenders for this recent crime. In actual fact, we are the ones who have instigated the crime upon him. Furthermore he is adding weight to this conspiracy theory by now resurrecting the older incidents which I find irrelevant."

She wrote, amongst other things, that she proposed to make a referral to the Local Authority Designated Officer ("LADO").

48. In evidence, the claimant disputes that he had said to the police at this time that he was holding them responsible. He says that he was reporting something which had been said to him by one of the perpetrators of the crime. When referred in cross examination to a statement dated 27 July 2014 from the claimant that began "I submit this statement with a heavy heart and deep sorrow as I did not expect a police officer to order three men to assault me", the claimant said that he later came to hold the police responsible when they had not investigated his concern. It is not necessary for me to decide whether the claimant did, in fact, hold the police responsible for the crime from an early stage. It is relevant only to record that this was the information given to Dr Ticehurst by Greater Manchester Police about what the claimant was saying around 12 August 2014.

49. On 14 August 2014, Dr Ticehurst wrote to Dr Choudhry. He wrote:

> "There are a number of issues that we are having with his return to work. I understand that Dr Meiarasu is informing us that he has been passed as being fit to return by his GP, and by yourself. I have seen no OH report to that extent. Furthermore, I now have had communication from the GMP (attached, in an email trail below), which concerns me greatly."

He attached the email trail and wrote that he was sharing it with Dr Choudhry as he believed this had implications for the claimant's ability to return to work. He concluded:

> "I would be grateful if the concerns laid out by the police were taken into account before any decisions are made as to his return to work, and any help that he may require before he does so."

50. Dr Choudhry replied by email the same day. She wrote that she had asked admin support to forward copies of all communication that had been released with Dr Meiarasu's consent. She wrote:

> "With respect to fitness to return to work; my advice was dependent on management information and a case conference. With the little information given to me but awareness of GMC involvement, I concluded that Dr Meiarasu was fit to resume work but in a limited capacity, only undertaking administrative duties and NO clinical work.
>
> I have noted the concerns raised by GMP and this makes the need for further review and assessment. I would advice [sic] that Dr Meiarasu is unfit until I have seen him again and/or case conference has taken place."

51. A further reference was made to Occupational Health. An appointment was arranged for 9 September 2014 but postponed due to the claimant's ill health.

52. On 9 September 2014, Dr Ticehurst wrote to Dr Choudhry by email. He wrote:

> "Further to the postponement of the case conference due to Dr M's ill health, it would appear from correspondence with his BMA rep that he is of the opinion that he has been declared fit to return to wok by yourself. I wonder if you could confirm your position (i.e. that he is not fit to return to work) with Dr M, and copy us in to avoid any confusion."

53. Dr Choudhry replied on 12 September 2014. She wrote:

> "I still am of the opinion that in view of information from Greater Manchester Police, Dr M should be considered unfit for all duties until I have seen him. I am aware that I have not had the opportunity to discuss this with him and as such have arranged to review him as soon as I possibly can."

Dr Choudhry also wrote that they were no longer providing Occupational Health services to the respondent and she would need them to ensure that the next provider had a Consultant Occupational Physician who had demonstrated competencies in dealing with doctors in difficulty. She wrote that it was important that she was able to hand over the case as continuity was in both the claimant's and the respondent's interests.

54. Sara Higgins, HR lead for the Medical Directorate, provided HR advice to Dr Ticehurst in relation to the claimant. By an email dated 16 September 2014, she advised that, as the claimant's GP was saying that he was fit and it was the Trust who was asking him to refrain from work in relation to concerns about his health, they could not continue to class him formally as sick and pay him through sick pay methods. She advised that Dr Ticehurst should consider temporary medical exclusion pending the Occupational Health review and case conference. She wrote that:

> "As the BMA are pushing re his pay and saying he is fit for work I think the Trust need to formalise a position as to why he is off otherwise it could effectively be like you are putting him on gardening leave which is not permitted under MHPS."

She wrote that, whatever he decided as next steps, they would need to re-invoke the claimant's pay.

55. Sara Higgins continued to advise that medical exclusion would be appropriate and to advise that the claimant's pay should be reinstated.

56. Dr Ticehurst spoke to the claimant's BMA representative on 2 October 2014 to say that he did not consider it appropriate for Dr Meiarasu to return to work until they had advice from a further Occupational Health review. He wrote:

> "I will request that his pay is reinstated at full pay, but I am also aware that as things stand, with Dr My stating that he is fit to work, and with the OH opinion so obviously to the contrary, I now need a framework to work with so we can proceed."

57. The claimant's pay was reinstated, backdated to 18 July 2014, the date of the expiry of the claimant's last fit note from his GP.

58. The claimant attended an Occupational Health appointment on 27 November 2014. Dr Choudhry produced a report dated 1 December 2014. However, the claimant refused to allow the report to be released to the respondent. This report, which was not seen by the respondent at the time, suggested that the only way to satisfy all the parties concerned that the claimant had no underlying mental health condition would be referral to an independent psychiatrist. Dr Choudhry recorded that the claimant was adamant that he did not wish to comply with the psychiatric assessment and she wrote that she could not compel him to do so. She wrote that, in her opinion, the claimant remained unfit for clinical work. Fitness to return to work in a non clinical capacity with support and supervision was possible but this would need to be a managerial decision based on whether he was safe and any disruption caused would be acceptable.

59. Dr Ticehurst again sought advice from the NCAS. The letter from NCAS dated 4 December 2014 recorded that, as Dr Ticehurst understood it at the time, the claimant was still awaiting an appointment with Occupational Health and was not prepared to declare himself sick pending the appointment being made. Steve Evans of NCAS wrote:

> "You have therefore decided to exclude him from work from 5 December under the provisions of paragraph 9 of Part V of MHPS on the grounds that his state of health may represent a risk to patient safety."

Mr Evans wrote that exclusion should be seen as a last resort and advised that they should attempt to expedite the review by Occupational Health and meet with the claimant, which would give him an opportunity to suggest alternatives to exclusion.

60. On 22 December 2014, the claimant's BMA representative sent to Dr Ticehurst, at the claimant's request, information including a statement relating to events involving GMP. This information included a statement from the claimant that he did not expect a police officer to order three men to assault him.

61. It is apparent from correspondence between Dr Ticehurst and Sara Higgins that the respondent was preparing to exclude the claimant prior to taking legal advice.

They took legal advice on 22 January 2015. Privilege having not been waived, I am not aware of the legal advice that was given. However, following legal advice, the respondent took a different approach to the previously intended exclusion.

62. Dr Ticehurst wrote to the claimant on 10 February 2015. He wrote that the respondent was still not in receipt of a copy of the Occupational Health report undertaken by Dr Choudhry in November and that the claimant had advised that he would not allow the release of this report to the Trust. Dr Ticehurst recorded that he had suggested that they would be happy to receive both the report and a copy of the claimant's comments in response to the report but understood the claimant did not agree to this and that the claimant had informed him that the MDU had advised him not to consent to release the report. Dr Ticehurst wrote:

> "As you have continued to refuse access to the report from Occupational Health, the Trust must make a decision on how we move forward with your absence based on the information it has to date.
>
> The Tribunal continues to have significant concerns in relation to your health. It is recognised that your GP has confirmed your fitness to work in a fit note. The opinion of your GP as expressed in the fit note does not allay our concerns regarding your fitness to work, especially as the health concerns affect a specialised area of medical practice. It was for this reason that we requested you attend Occupational Health. As the fit note is not conclusive of your wellbeing and as the Trust concerns remain unaddressed, the Trust is of the view, after careful consideration, that you are not fit for work.
>
> The Trust position is, therefore, that you are now on sick leave and will be treated as having been so continuously from 16 December 2013."

63. Dr Ticehurst continued by outlining the pay the claimant had received while absent due to sickness and the claimant's entitlement. He wrote that treating the period from 16 December 2013 as a continuous period of sickness absence meant that the claimant should now be in half pay and ordinarily that would expire on 26 April 2015. He wrote that they understood that moving onto half pay could be difficult and therefore the Trust would continue to pay full pay for the next four weeks ending on 10 March 2015, but thereafter would reduce to half pay. He wrote that that meant that the claimant's contractual sick pay would expire on 26 April 2015. Dr Ticehurst wrote that the Trust proposed to continue to manage the matter in accordance with Part V of Maintaining High Professional Standards. He wrote that he would be arranging another case conference in accordance with paragraphs 7 and 8 of Maintaining High Professional Standards, and would be in touch shortly with the arrangements.

64. Dr Ticehurst contacted the NCAS again on 18 February 2015. William Beaumont of NCAS wrote on 23 February to record their discussion. Mr Beaumont wrote that his colleague, Dr Evans, had advised the respondent in January 2015 that the Trust should either exclude the claimant from work or he should be signed off sick by Occupational Health or by his GP. He wrote that his understanding was that the Trust then decided that the claimant would be excluded from work with effect from 5 January 2015 but the decision to exclude was subsequently amended in the way he continued to record in the letter. Mr Beaumont wrote:

> "You told me that following a discussion about the matter with the LADO, you and senior management colleagues agreed that there is sufficient evidence of Dr 14942 being unwell for a decision to be taken to sign him off as sick and unfit to work. This decision was taken even though at this time Dr 14942 is not prepared to declare himself sick, and you have not sight of his OH review report. His GP has also provided a differing opinion. You explained that the decision was taken to protect the interests of patients and to safeguard Dr 14942.
>
> We discussed the need for the Trust to obtain legal advice in this matter, and you confirmed that the Trust's decision to place Dr 14942 on sick leave, as an alternative to exclusion, has been taken with the benefit of appropriate legal advice."

65. It appears that Dr Ticehurst's letter of 10 February 2015 was sent only to the claimant and not also to his BMA representative. It appears that the claimant did not copy the letter to his representative as soon as he received it. This appears to explain the delay in the claimant's BMA representative writing to the respondent in relation to the letter dated 10 February.

66. Ms Allen, the claimant's BMA representative, wrote to Dr Ticehurst on 7 April 2015 including the following:

> "I am disappointed to note that you have taken the decision to treat Dr Meiarasu as if he was on sick leave and pay him accordingly. While I understand that you have concerns about Dr Meiarasu's health, there is no medical evidence at all to support this view and the Trust cannot unilaterally decide that he should be placed on sick leave as a result. If you do have concerns about his health, MHPS does allow for a practitioner to be excluded on medical grounds, which requires him to be paid as normal, and I would request that you do this instead of placing Dr Meiarasu on sick leave.
>
> The resultant deduction and non payment of salary may be consider [sic] to be an unlawful deduction and a breach of contract and I do not understand why the Trust would want to pursue such an approach that will only result in the BMA having to take legal advice and action if not rectified. I would be grateful therefore if you could reconsider your position and if you have concerns about Dr Meiarasu's health, exclude him on medical grounds, and thereafter set out what action you will be taking to move this matter forward towards a resolution."

67. Dr Ticehurst replied to this email on 15 April 2015. He wrote:

> "The Trust does have real and genuine concerns about the health of Dr Meiarasu and he was referred to Occupational Health as a result. As you know, Dr Meiarasu has refused to release the Occupational Health report and so the Trust must make its decisions on the information available, as explained in previous correspondence. The Trust has received no explanation for the refusal of Dr Meiarasu to release the report.
>
> The Trust has considered the exclusion of Dr Meiarasu on health grounds in accordance with paragraph 9 of Part V of MHPS. Having referred Dr Meiarasu

to Occupational Health, the Trust reviewed the position in December 2014 when the report was anticipated to be in our possession. Of course, I had to carry out the review in the absence of the report. I am satisfied that it was reasonable to conclude that Dr Meiarasu should be treated as being on sick leave and this was the more appropriate way forward rather than medical suspension.

If the undisclosed Occupational Health report does, in fact, say that there are no health issues and that Dr Meiarasu is fit for work then, of course, I would be willing to review the position."

68. Dr Ticehurst wrote that there had been a further referral to Occupational Health so that he could receive a recommendation with a view to arranging a meeting in accordance with paragraph 8. He trusted that Dr Meiarasu would cooperate with that process.

69. On 11 May 2015, the claimant submitted a grievance about the decision to place him on sick leave, thus placing him on sick pay. He wrote:

> "This decision has been taken without reference to any medical evidence confirming that I am unfit to work and represents an actionable breach of my contract and an unlawful deduction from wages. While MHPS Part V does allow a Trust to place a practitioner on sick leave if concerns about health exist, given the exhaustion of my sick pay entitlement, this decision is punitive rather than supportive. These provisions are supposed to be fair and neutral and the practitioner should not experience a detriment as a result of being taken through this process."

70. The claimant saw Dr Giridhar of PAM OH Solutions, the respondent's new Occupational Health providers, on 28 May 2015. This report was provided to the respondent. Dr Giridhar wrote:

> "Please note this is an interim report as I am waiting for his previous Occupational Health record."

Dr Giridhar wrote that, during the consultation, the claimant was pleasant and co-operative and there were no features to suggest he had an ongoing mental illness. She wrote:

> "Purely from a medical point of view, Dr Meiarasu is fit to return to work. I am however mindful of the concerns of the organisation. I have requested him to send us a copy of Dr Sillince's report and have obtained an AMRA for me to access it. I will also review his previous Occupational Health records which were not available today. On receipt of this I will be able to provide further advice."

She wrote that a paper review would be undertaken on receipt of the above before providing further advice.

71. On 16 June 2015, Imogen Wills, Technical Operations Manager with PAM OH Solutions, wrote to Sharon Smith in the respondent's HR team. She referred to having had a long discussion with Dr Giridhar who had, since seeing the claimant,

done a comprehensive case file review. She suggested that they discuss the case and next steps. Sharon Smith replied that they were waiting for the final report and needed to arrange a case conference as soon as possible to look at next steps. He wrote:

> "Really could do with this asap just really mindful the [sic] Dr M is not in work and is without any pay at all."

72. Imogen Wills replied on 16 June 2015 to say she had spoken to Dr Howard in depth and handed over to Dr Giridhar. She summarised the conversation as follows:

> "Dr Giridhar did not intend to imply that SM was fit for work in her report as she feels that there are barriers to this in the form of concerns raised by the employer, and following her case file review, which need to be addressed. She feels that SM has misinterpreted her report. Whilst there is no current psychiatric diagnosis, she wants to address concerns raised through referring for a psychiatric assessment with and obtaining a report from Dr Sillince, with whom SM has a good relationship."

She wrote that Dr Giridhar suggested that Dr Giridhar should meet with the claimant again face to face for a further consultation and to explain her position in relation to his fitness for work and obtain his consent for the psychiatric assessment. Imogen Wills wrote that, if the claimant failed to consent to this, he would be in breach of GMC requirements. She wrote:

> "Dr Giridhar feels that further assessment is required by Dr Sillince as she does not feel that Dr Sillince had access to previous GP records and correspondence from SM's wife which she feels are important to the understanding of the case."

She wrote that Dr Giridhar felt that a case conference would be better arranged following receipt of Dr Sillince's report. The next steps were set out as follows:

> "Arrange another OHP consultation for SM with Dr Giridhar and arrange a meeting between Dr Howard and Dr Giridhar to precede this.
>
> Obtain consent for referral of SM to Dr Sillince for a psychiatric assessment.
>
> SM should be restricted from work until we have reviewed the assessment outcome report."

73. The claimant's solicitors sent a formal "letter before action" to the respondent on 29 June 2015. They wrote that, unless they received confirmation in writing that the Trust would allow Dr Meiarasu to return to work with immediate effect within seven days from the date of the letter, they would make an application for injunctive relief to protect the claimant's position. In the event, no application was made for an injunction.

74. In a letter dated 8 July 2015, the claimant's solicitors asserted that an Occupational Health report dated 4 June 2015 confirmed that the claimant was fully fit to return to work unconditionally.

75. The respondent’s solicitors replied on 9 July 2015, writing that the report of 4 June 2014 was not an unconditional advice that Dr Meiarasu was fit for work and that it stated that further advice was to follow. They quoted from the email of 16 June 2015. They wrote:

> “As you can see, the advice of Occupational Health is that there should be a referral back to them with a view to arranging a psychiatric assessment. It appears that Dr Meiarasu is aware of this because he has been in communication with Occupational Health.”

They set out dates which Dr Meiarasu had been offered for an Occupational Health appointment and asked for confirmation that the claimant would attend. On advice from his legal representatives, the claimant declined to attend any such meeting.

76. By a letter dated 14 July 2015, the respondent, by its solicitors, offered to extend the claimant's half pay by three months in return for his co-operation in the application of its procedures. The claimant's solicitors responded to this by a letter dated 24 July 2015 placing a number of conditions on the claimant’s co-operation. In relation to the claimant meeting with Dr Giridhar again, they wrote:

> “In the meantime, and at the instigation of the GMC, Dr Meiarasu has an appointment with a consultant psychiatrist in August 2015 for a full psychiatric assessment. Dr Meiarasu is prepared to agree to the release of this psychiatric report to the Trust. We would hope that this report will satisfy the Trust as to Dr Meiarasu’s mental state and will facilitate his return to work.”

They also wrote:

> “[The claimant] remains resolute that no medical professional has declared that he is currently sick and therefore the Trust is not entitled to treat him as being on sick leave with the associated effect on his pay. The last OH report conducted by Dr Giridhar unequivocally states that Dr Meiarasu is fit to return to work.”

77. The claimant did not attend any further appointment with the respondent’s Occupational Health specialists in 2015 nor did he attend a psychiatric assessment arranged by the respondent or its Occupational Health specialists. However, the claimant did attend two assessments by GMC appointed psychiatrists (Professor Damian Longson and Dr McWilliam) on 17 August 2015 and 16 September 2015 respectively. Details of those reports were not provided to the respondent.

78. At an Occupational Health assessment on 25 January 2016, the claimant attended with a letter he had been sent by the GMC dated 10 December 2015. This letter set out in detail the findings of the two psychiatric reports undertaken; it set out the decision that no further action was to be taken by the GMC on his registration. On the basis of this letter, the Occupational Health specialist concluded that the claimant was fit to return to work and informed the respondent accordingly at a case conference which took place the same day. The Occupational Health report wrote:

> “The independent psychiatric assessment as well as a complete review of his case file led the GMC to conclude Dr Meiarasu is fit to continue practising, without restriction. The GMC concluded that there is insufficient medical

> evidence to suggest Dr Meiarasu has an underlying psychiatric condition which will hamper his fitness to practise."

The Occupational Health specialist gave his opinion that the claimant was medically fit to look at returning to work with immediate effect. He wrote that he did not believe the claimant had an underlying medical condition which would hamper his ability to carry out his duties. He wrote that he had insufficient medical evidence to conclude that Dr Meiarasu had an underlying medical condition which would recur in the future.

79. The claimant was immediately reinstated to full pay and arrangements were made for his return to work, initially on a phased basis.

80. The claimant's grievance proceeded and was rejected at each stage of the process.

Submissions

81. Mr Gorasia and Mr Lewinski made oral submissions to supplement the written skeleton arguments which they had prepared before the start of the hearing.

82. In summary, the claimant argues that the contract of employment and associated terms refer to sick pay from the perspective of an employee presenting himself as unfit for work; the actions taken by the respondent for the material period ought properly to have been under the exclusion from work procedures. The claimant contends that he was fit to work and this was supported by the GP fit note, he was presenting himself as ready to work and, in accordance with the approach taken in *Beveridge v KLM UK Ltd [2000] IRLR 765,* he was entitled to be paid for the period when the respondent was preventing him from attending work. Failure to pay him was an unlawful deduction from wages.

83. In summary, the respondent argues that, on a proper interpretation of the contract, the categorisation of an employee as sick is not something which is wholly to be determined subjectively by the employee. The respondent argues that whether someone is to be properly regarded as sick or unfit for duties at any particular time is to be determined on the evidence available at the time. The claimant was repeatedly held by Occupational Health to be unfit for work – either entirely or for clinical duties. The claimant's contractual role was to perform clinical duties; he had no contractual right to return to work to do duties different from his contractual duties. The claimant was contractually entitled only to be paid during his absence according to the provisions of his contract applicable to sickness absence. Having been paid more than his contractual entitlement, no further sum was due to him.

The Law

84. Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

85. In *Beveridge v KLM UK Ltd [2000] IRLR 765,* the EAT held that a tribunal erred in holding that an employee had not been entitled to pay during a period when, although the claimant was willing to work and certified by her own doctor as fit to do so, the respondent did not allow the claimant to return to work whilst they awaited confirmation from their medical adviser that she was fit to return to work. There was no express term governing the position.

86. The EAT held, at paragraph 9:

> " All contracts of employment are governed, obviously, essentially by their expressed terms, but we are satisfied that at common law an employee who is offering his or her services to his or her employer is entitled to be paid in that situation and in those circumstances unless a specific condition of the contract regulates otherwise. In the present case we consider that the employee could do no more, in respect of her side of the mutual contract, than proffring her services against a background of a certificate of good health. It was thus for the employer to show that in this context the contract expressly entitled the employer to withhold payment. There is no such provision in this contract."

87. The EAT observed, in paragraph 11, that "if the employers in this case had directed themselves to the fitness or otherwise of the employee in terms of the medical investigations they wished to carry out during the relevant period while she was still off sick, the whole problem could have been avoided."

88. Terms may be implied into a contract in a variety of ways. Traditionally, implied terms have been classified under the headings of: implied by conduct; officious bystander test; custom; business efficacy and characteristic terms. Conduct, custom and characteristic terms are not of relevance for this case. The officious bystander test allows the implication of a term into the contract if it is something so obvious that the parties must have intended it. Business efficacy allows the implication of a term which is necessary if the contract is to work properly. The term must be "necessary in the business sense to give efficacy to the contract": *Reigate v Union Manufacturing Co (Ramsbotton) Ltd [1918] 1 KB 592.*

Conclusions

89. The issue to be determined is whether the respondent was entitled to treat the claimant as on sick leave during the period 26 April 2015 to 24 January 2016. This requires an examination of the relevant contractual terms. Should the contractual terms relating to sick leave be interpreted as meaning, as the claimant contends, that it can be the claimant only who can declare himself to be ill, supported by fit notes as required? Or, as the respondent contends, should the terms be interpreted in such a way that the claimant can correctly be regarded as on sick leave, even if he expresses himself to be fit, where there is advice from Occupational Health that he is unfit for work?

90. The contractual provisions are clear that, when the claimant was absent due to sick leave, his entitlement to pay was as set out in the Terms and Conditions of Employment for Specialty Doctors. This provided for 6 months full pay and 6 months half pay. By the relevant period, the claimant had exhausted that entitlement.

91. If the claimant is correctly regarded as on sick leave in the relevant period, then the consequence is that the claimant was not entitled to pay during that period and the respondent did not make unlawful deductions from wages by not paying him during this period.

92. The terms and conditions of service for specialty doctors include the provision at clause 17 that “A doctor absent from duty owing to illness (including injury or other disability) shall, subject to the provisions of paragraphs 18-32, be entitled to receive an allowance” [as set out in a table which followed].

93. The terms for speciality doctors and the Oldham Primary Care NHS Trust sickness absence policy set out the doctor’s obligations to notify the employer if unable to work due to illness and to obtain fit notes to cover any absence longer than 7 days. However, the contractual terms do not expressly state that this is the only way that a doctor can be regarded as being absent from duty owing to illness. The contractual provisions do not expressly state whether an employer can determine that a doctor is unfit for work if he asserts himself to be fit and, if so, in what circumstances.

94. I do not accept the claimant’s argument that the contractual provisions can be interpreted as making the categorisation of the doctor as being absent from duty owing to illness a matter for the doctor alone to determine. Whilst the doctor is to be regarded as unfit for work if the doctor follows the correct procedure for notification of absence, it does not necessarily follow that this is the only way the doctor can be categorised as absent from duty due to illness. There is no express term to the effect that this is a matter for the doctor alone and I do not consider that such a term can be implied. This is not something that is so obvious that the parties must have intended it or something necessary to give efficacy to the contract. Such a term could result in an obviously incorrect situation that a doctor, in the face of clear medical evidence that he or she was not fit for work, could assert that they were fit for work and either attend work, with possible dangers to patients, colleagues and themselves, or have to be excluded, with the resultant right to full pay if contractual sick pay has been exhausted.

95. The claimant argues that the exclusion provisions mean that the respondent cannot, unilaterally, declare that he is unfit for work and should receive sick pay, rather than full pay. I reject this argument. It appears to me that the exclusion provisions are to be used as a temporary measure whilst information is gathered to inform what course of action is to be taken. This would be entirely appropriate for someone who was attending work and started exhibiting behaviour which could be a risk to others or themselves, which could be misconduct but also might be consistent with mental illness, but there was no medical evidence at the time. The imperative would be to remove the person from the workplace until an assessment could be made as to the appropriate course of action. If the investigation suggested ill health, it would not be inconsistent with the MHPS for the respondent to place the employee on sick leave, even if the employee continued to insist that there was nothing wrong with them. This would, in fact, be consistent with the provisions about exclusion being a temporary measure and an alternative way to manage risk, avoiding exclusion, to be sick leave for the investigation of specific health problems. Paragraph 6 of Part I of MHPS states: “It is imperative that exclusion from work is not

misused or seen as the only course of action that could be taken." Paragraph 7 of Part I of MHPS sets out a non exhaustive list of alternative ways to manage risks avoiding exclusion, which includes: "Sick leave for the investigation of specific health problems."

96. I consider these provisions of MHPS to be consistent with there being circumstances where the employer may unilaterally, on the basis of appropriate evidence, designate the employee as being on sick leave. I consider that the contractual terms can be interpreted as allowing this. Alternatively, a term to this effect should be implied by means of the officious bystander test or business efficacy. Such an interpretation or implied term does not give the employer an unfettered discretion to designate someone as on sick leave in the face of evidence that the employee is fit and well. Acting consistently with the implied duty of mutual trust and confidence would require the employer to designate someone as on sick leave only where there were reasonable, evidence based, grounds for doing so.

97. I must, therefore, consider whether the respondent had reasonable grounds for concluding that the claimant was unfit for work and, therefore, absent from duty owing to illness during the relevant period.

98. The claimant's last fit note expired on 18 July 2014. However, by the start of the relevant period, the respondent had other, more up to date, information available to it, in the form of Occupational Health reports. The respondent obtained other Occupational Health advice during the course of the relevant period.

99. The last Occupational Health report available to the respondent prior to the start of the relevant period i.e. 26 April 2015, was the report of Dr Choudry dated 21 July 2014, which stated that the claimant should not undertake any clinical work (although, at that time, she considered he could undertake administrative duties) with the addition of the email of 14 August 2014 in which she wrote, after learning of the concerns raised by GMP, that the claimant was "unfit until I have seen him again and/or case conference has taken place." In a further email dated 12 September 2014, Dr Choudry wrote that "Dr M should be considered unfit for all duties until I have seen him."

100. The report and subsequent emails from Dr Choudry all post-dated the claimant's GP's fit note, which had said that the GP did not need to see the claimant again after the certified period of absence which ended on 18 July 2014.

101. The report of Dr Choudry dated 1 December 2014, which the claimant refused to be released to the respondent, advised that the claimant remained unfit for clinical work. This does not support the claimant's position that he was, throughout the relevant period, fit to return to work.

102. The report dated 4 June 2015 from Dr Giridhar was expressly stated to be an interim report. It was apparent from the report that Dr Giridhar had not seen the independent psychiatrist's report and had not seen the claimant's previous occupational health records (there having been a change in the respondent's occupational health provider, Dr Giridhar being with the new provider and Dr Choudry having been from the old provider). It would, perhaps, have been helpful if

the section of the report under "Management Advice" had been written in clearer terms. Dr Giridhar wrote:

103. "Purely from a medical point of view, Dr Meiarasu is fit to return to work. I am however mindful of the concerns of the organisation. I have requested him to send us a copy of Dr Sillence's report and have obtained an AMRA for me to access it. I will also review his previous occupational health records which were not available today. On receipt of this I would be able to provide further advice."

104. I do not consider that this is an unambiguous statement that the claimant is fit to return to work. Dr Giridhar expressly states that she will provide further advice after undertaking a paper review on receipt of the information she had requested.

105. The review and further advice followed fairly swiftly, in the email of 16 June 2015 from Imogen Wills, recording the advice of Dr Giridhar. This cleared up any ambiguity in the last report, stating that Dr Giridhar did not intend to imply in her report that the claimant was fit for work and she felt that the claimant had misinterpreted her report. Her advice included referring the claimant for a psychiatric assessment.

106. As at June 2015, therefore, the evidence available to the respondent from their OH advisers was that the claimant was not fit for work.

107. The respondent sought to arrange a further OH meeting but the claimant declined, on the basis of legal advice, to attend. The respondent was, therefore, unable to obtain any further advice as to the claimant's fitness to work until the occupational health assessment and case conference on 25 January 2016. Only on this day did the claimant provide to the Occupational Health adviser a letter from the GMC which referred to the psychiatric assessments carried out on the claimant and the GMC's conclusions. On the basis of this information, the respondent accepted that the claimant was fit for work. The claimant was paid from that day and a phased return to work arranged.

108. This situation is very different to the situation in *Beveridge,* where, at the time the respondent was preventing the claimant from returning to work, the only medical evidence (the GP's certificate of fitness) was to the effect that the claimant was fit to return to work.

109. Whilst the claimant was asserting that he was fit to work, the most recent evidence available to the respondent, which was from its Occupational Health advisers, was that the claimant was not fit to undertake clinical duties. This advice post-dated the claimant's GP's fit note.

110. The respondent in this case, unlike the respondent in *Beveridge,* did direct themselves to the fitness or otherwise of the claimant in terms of the medical investigations they wished to carry out during the period the claimant was still certified by his GP as off sick. They had been seeking to arrange OH assessments from as early as September 2013. The delay in obtaining reports was due to a variety of reasons but not to any fault on the part of the respondent in trying to arrange appointments in a timely manner. Reports in May and June 2014 declared the claimant unfit for any work. The report of 21 July 2014 advised that the claimant

should not undertake any clinical work until a case conference. Dr Choudry's emails of August and September 2014 then advised that the claimant was unfit for any work until assessed again by Occupational Health.

111. In no report from the respondent's occupational health advisers which the respondent was allowed to see (and even in the one the respondent refused to release to them), until the report of January 2016, did the Occupational Health adviser state that the claimant was fit to perform his contractual duties i.e. clinical work.

112. There was no need for the respondent to invoke the exclusion provisions because the claimant was already on sick leave when investigations began. By the time the claimant's GP ceased to certify him as unfit for work, there was advice from the respondent's occupational health advisers that the claimant was unfit either for all work or, at times, for clinical work. The claimant was employed to do clinical work. If he was unfit for clinical work, he was unfit to carry out his contractual role. In these circumstances, the respondent had reasonable grounds for treating the claimant as being on sick leave.

113. I conclude that the respondent was entitled to treat the claimant as on sick leave. Since the claimant was on sick leave, the contractual provisions relating to pay during sick leave applied. Since, by 26 April 2015, the claimant had exhausted his entitlement to contractual sick pay, the claimant was not entitled to any pay until he was declared fit to work. This did not happen until 25 January 2016.

114. I conclude, therefore, that the claimant was not entitled to pay in the period 26 April 2015 to 25 January 2016. The respondent did not make an unlawful deduction from wages. The complaint is not well founded.

Employment Judge Slater

17 February 2017

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 February 2017

FOR THE TRIBUNAL OFFICE