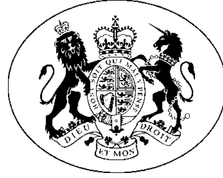

EMPLOYMENT TRIBUNALS

Claimant: **Mr Dillan Egan**

Respondents: **Imperial College Healthcare NHS Trust**

Heard at: London Central

On: 23 - 25 February & 1 March 2022

Before: Employment Judge Brown

Members: Mr R Baber
Ms S Brazier

Appearances
For the claimant: In person
For the respondent: Mr C Edwards, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The Respondent wrongfully dismissed the Claimant and the Claimant was entitled to 1 week's notice pay in compensation for wrongful dismissal.**

2. **The Respondent did not automatically unfairly dismiss the Claimant.**

REASONS

Preliminary Matters - The Claims and Case Management

1. By a claim form presented on 14 June 2021, the Claimant brought complaints of automatic unfair dismissal under the *Agency Worker Regulations 2010*, alternatively under the *Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002*, and wrongful dismissal/notice pay. The Respondent resists these complaints.

2. The issues in the claim had been established at a Preliminary Hearing (by CVP video link) on 19 November 2021. The parties had each subsequently redrafted the list of issues and had not agreed on a final version. At the start of the Final Hearing the Respondent said that it did not know whether the Claimant was pursuing all his claims. The Tribunal said that, unless and until the Claimant withdrew any of his claims, the Tribunal would determine all the claims as comprehensively set out at the 19 November 2021 preliminary hearing. It therefore confirmed that the List of Issues was as set out at that hearing:

   First, a complaint for wrongful dismissal/notice pay. The Respondent does not dispute liability. The Respondent states and admits that (i) it was required to give the Claimant written notice of termination (ii) it did not given him written notice (iii) the Claimant's date of termination was 30 April 2021 (iv) it breached the Claimant's contract by not giving him written notice (v) the Claimant was entitled to 1 week's notice pay, which it has now paid him (the Claimant told the Tribunal he has now received this payment). Remedy/compensation is the only outstanding issue, which turns on whether the Claimant was entitled to (a) 1 week's notice (Respondent's case), or (b) 5 weeks' notice (Claimant's case)

   Second, a complaint under Regs 17(1) – (3)(a)(iv) of the Agency Worker Regulations 2010 (AWR 2010) that the reason/principal reason for his dismissal was that he done "anything" under the AWR 2010 in relation to a temporary work agency, hirer or any other person. In support of this claim, the Claimant will be alleging that (i) he was advancing towards obtaining his qualifying rights after 12 weeks employment (ii) he refused to forego those rights (iii) he had 2 episodes of being unwell (iv) he would have accrued his sickness pay. The Claimant confirmed he is relying on nothing else. The Respondent's counsel confirmed this description is sufficient for its purposes.

   Third, a complaint under Regs 17(1) – (3)(a)(v) of the AWR 2010 that the reason/principal reason for his dismissal was that he had alleged that the Respondent (as hirer) had breached the AWR 2010. In support of this claim, the Claimant will be alleging that on 30 April 2021 he spoke to the Respondent's Vicky Newey and told her that (i) he was not being dismissed (ii) he refused to be dismissed (iii) he wanted his notice pay (iv) if the Respondent continued with his dismissal it would be in breach of Regulation 17 of the AWR 2010. The Claimant confirmed he is relying on nothing else. The Respondent's counsel confirmed this description is sufficient for its purposes.

   Fourth, a complaint under Regs 17(1) – (3)(a)(vi) of the AWR 2010 that the reason/principal reason for his dismissal was that he had refused (or proposed to refuse) to forego a right conferred by the AWR 2010. In support of this claim, the Claimant will be alleging that on 30 April 2021 in his conversation with Vickey Newey he refused to forego (i) his right to notice pay (ii) his right to access a qualifying period under the AWR 2010. The Claimant confirmed he is relying on nothing else. The Respondent's counsel confirmed this description is sufficient for its purposes.

Fifth, a complaint under Regs 17(1) – 3(b) of the AWR 2010 that the reason/principal reason for his dismissal was that the Respondent (as hirer) believed or suspected that he had done or intended to do any of the things mentioned in paragraphs 36-38 above.

Sixth, if the Tribunal does not accept that the Claimant was an agency worker entitled to assert the AWR 2010 complaints recited at paragraphs 36-39 above, identical alternative complaints under Regs 6(1) – (3)(a)(iv)-(vi) and 3(b) of the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 relying on the same allegations.

3. There was a Bundle of documents.

4. The Tribunal heard evidence from the Claimant. It heard evidence for the Respondent from: Victoria Newey, Clinical Lead Physiotherapist for Critical Care, Respiratory Medicine and Surgery, Band 8A. Ms Newey line managed Band 7 physiotherapists. Doug Still ("DS"), Team Lead Respiratory Physiotherapist (Band 7) and Aisling O'Donoghue ("AOD") (Highly Specialist Respiratory Physiotherapist) (Band 7). Mr Still and Ms O'Donoghue were the Claimant's line managers during his engagement with the Respondent.

5. The Respondent provided a skeleton argument

6. The Tribunal timetabled the hearing. Oral evidence was timetabled for the second day, followed by submissions. In the event, submissions were heard on the third day of the hearing, to accommodate all the evidence on the second day. The Claimant had made further applications at the start of the second day, which the Tribunal took time to determine.

7. Evidence and submissions were concluded during the listed hearing time.

Applications

8. The whole of the first morning of the hearing was taken up by parties' applications as follows.

Day 1

Strike out applications – No Reasonable Prospects of Success

9. The parties had made competing strike out applications on the grounds of, both unreasonable conduct of the proceedings and that each other's claim or response had no reasonable prospects of success.

10. The Respondent did not pursue strike out on the grounds of unreasonable conduct, but did pursue no reasonable prospects of success. The Respondent said that it would be proportionate to hear the application because the Claimant's claim could not succeed as a matter of law.

11. The Claimant pursued both his applications. He said that the Respondent had engaged in vexatious and unreasonable conduct, delivering documents late, so that the Claimant was unprepared at various times. He said there was a constellation of issues and it had not been fair for the Claimant to have been subjected to them.

12. The Tribunal said that it would not hear the parties' competing "no reasonable prospects of success" strike out applications. It was not in accordance with the overriding objective to do so. It would take time for the Tribunal to read into the papers in order to determine the applications and, if they were not successful, they would have added time to the proceedings The Tribunal would determine the case on the merits, having heard evidence and legal arguments. If there was indeed no reasonable prospect of success on either side, the hearing should be short, with little need for evidence,. A merits hearing would clearly be fair to both parties. It would therefore be proportionate and fair to proceed with the full merits hearing.

Claimant's Strike out application – Unreasonable Conduct

13. The Tribunal did hear the Claimant's unreasonable conduct application, as the Claimant said it affected the fairness of the merits hearing.

14. The Claimant said that the Respondent's Counsel had acted vexatiously and abusively towards the Claimant at the Preliminary Hearing before Judge Tinnion by describing the Claimant's correspondence as "Intemperate." The Claimant cited dictionary definitions of "intemperate" and said that it alluded to drunkenness. He said that it was deliberately used and referred to his Irish national origin; he said that his accent was Irish and he has obviously red hair. The Claimant contended that the description was unwarranted because the Claimant had explained politely that the Respondent had not paid his notice pay in time politely. The Claimant also contended that the Respondent had been unreasonable in sending a costs warning letter 3 days before Christmas, giving the Claimant 5 days to respond (which they later extended), when it had not even applied for a deposit order. He said that awards of costs are very rare but the level of costs sought by the Respondent would bankrupt the Claimant, so the Respondent was attempting to put pressure on the Claimant to drop his case.

15. The Claimant also said that the Respondent had been late in disclosing documents and had made lots of incorrect assertions in correspondence. There had been a litany of mischaracterisation. The Respondent had flip flopped in and out of without prejudice correspondence, which was confusing. He also said that the Respondent had deliberately used "without prejudice" correspondence to make misleading and prejudicial assertions and to hide concessions. He said that the Respondent's case was not clear – whether they said the Claimant was an agency or fixed term worker.

16. The Claimant said that he was happy to proceed with the trial but did not think it was necessary to do so.

17. Mr Edwards, Counsel acting for the Respondent, replied that he had used the term “intemperate” during a Preliminary Hearing to describe the Claimant’s correspondence. The manner of the Claimant’s communication with the Respondent’s solicitor had been unnecessarily hostile and aggressive and Mr Edwards had used “intemperate” as a polite way of describing that. Mr Edwards said that he had not understood that it was a term for drunkenness –he had only heard this from the Claimant. Mr Edwards said that he had not appreciated that the Claimant had an Irish accent and that the Claimant’s hair had, in fact, looked brown on screen. EJ Tinnion had not raised the matter at the time, and would have done so if Mr Edwards had behaved inappropriately.

18. Mr Edwards said that it was entirely reasonable for the Respondent to seek to protect itself with a costs warning letter. Regarding the late exchange of witness statements, the Respondent had sent its own witness statements “password protected” on the date for exchange, but the Claimant had not sent his statement until later. He said that it was common for there to be an issue about without prejudice correspondence. The Respondent was not hiding anything; the Respondent says that it does not matter what was the nature of the Claimant’s engagement- his claim must fail under either of the provisions. Mr Edwards said that the Respondent’s primary case is that the Claimant was a fixed term worker, but if it is wrong in that, then he was an agency.

19. The Tribunal did not strike out the Respondent’s response on the grounds of vexatious or unreasonable behaviour. It accepted Mr Edwards’ explanation of his use of the term, “intemperate.” That adjective was not, in the ET’s experience, used to mean drunkenness or aggressiveness – but simply as the opposite of “temperate” or “mild.” In the ET’s experience, indeed, “intemperate” was used as a polite term instead of “hostile.” The Tribunal noted that EJ Tinnion had not stated that the term had been inappropriately used.

20. None of the Claimant’s other complaints constituted unreasonable behaviour, but were typical incidences of adversarial litigation.

21. The Claimant might feel pressurised by a costs letter, but the Respondent was entitled to protect its position by warning that it would seek costs in certain circumstances. It was normal to send password protected documents until exchange of witness statements had been completed. The ET was not persuaded that the Respondent’s use of the without prejudice rule was to hide any concession. Delays in providing documents were not ideal, but not evidence in themselves of unreasonable conduct, rather than administrative pressures. Misstatements in correspondence were not necessarily evidence of unreasonable conduct rather than human error, particularly in the context of multiple, lengthy pieces of correspondence.

22. The Tribunal decided that there were no grounds for strike out. In any event, the Tribunal was satisfied that a fair hearing was still possible – witness evidence had been exchanged and a bundle prepared and the parties were ready for hearing.

<u>Respondent’s Application to Amend Grounds of Resistance</u>

23. The Respondent sought permission to file and serve amended grounds of resistance. Mr Edwards contended that t it was in the interests of justice to allow the amendment. The amendment changed the date on which a substantive employee, pending whose employment the Claimant was appointed as locum, had been recruited. It also pleaded to the case as clarified by the Claimant.

24. The Claimant objected to the amendment, saying that the Respondent had fundamentally changed its account.

25. Balancing the hardship and injustice caused by allowing or refusing the amendment, the Tribunal decided that it was in interests of justice to permit the Respondent to advance its case on the factual basis it wished to assert. The amendment to a date was minor; the Respondent's case had always been that a permanent employee was recruited and the Claimant's post was interim. All the points the Claimant sought to make about the Respondent's altered case could still be made by the Claimant in cross examination and submissions. He could still contrast the Respondent's previous pleaded case with the amended facts, to contend that the ET should not accept the Respondent's case. The Claimant would not be prejudiced by the amendment.

Production of Witnesses

26. The Claimant sought witness orders. He asked that the Tribunal order that Gita Marais, who the Respondent said witnessed a conversation about the Claimant's contract end date, and Genevieve Price, Rebecca Arkle, Sam Chivilo and Jessica Pierce, who might have witnessed conversations, all be called as witnesses.

27. He said that Gita Marais had declined to give evidence. The Claimant said that he believed that the Respondent was not calling these witnesses because there had, in fact, been no conversations about the end date of his contract.

28. Applying the overriding objective, and ensuring that hearing was conducted in a way which reduced expense and was proportionate to the issues in the case, the Tribunal did not make witness orders. The Claimant sought to prove an absence of evidence from the Respondent. However, the Claimant could still make the point that the Respondent had not called the witnesses itself. The ET could take the absence of evidence into account in doing justice between the parties. That was a fair way to proceed. It was not necessary and would waste time to call the witnesses to prove an absence of evidence or absence of corroboration.

Exclusion of witnesses

29. The Claimant sought an order that the Respondent's witnesses be excluded from the hearing room during each other's evidence. The Tribunal did not grant this on the first day, but the Claimant renewed the application the next day, following disclosure of WhatsApp messages. This is dealt with below.

Specific Disclosure

30. The Claimant asked the Tribunal to order the Respondent to disclose its witnesses' contracts of employment, as he challenged their authority to dismiss him.

31. He also sought disclosure of WhatsApp communications between the Respondent's witnesses on 28, 29, 30 April 2021, in relation to the Claimant's dismissal.

32. The Tribunal ordered disclosure of the witnesses' WhatsApp and any other electronic messages in relation to the Claimant's dismissal. They were clearly relevant and disclosable, if they existed. The Tribunal ordered that the messages be disclosed to the Claimant on the first day of the hearing, while the Tribunal read the witness statements and documents. The Claimant would have the messages before he gave evidence on the second day and before he cross examined the Respondent's witnesses.

33. The Respondent disclosed the messages, on the afternoon of the first day, as ordered. The Claimant did not seek any additional time to prepare, having received them.

34. The Tribunal did not order disclosure of the witnesses' contracts or job descriptions. The reason for the Claimant's dismissal was in issue, not the witnesses' ability to dismiss. The contracts and job descriptions were irrelevant and disclosure would be disproportionate, even if they were tangentially relevant.

The Claimant's Witness Statement

35. The Claimant said that, having exchanged his witness statement, he now wished to withhold it and not give evidence, but simply point to documents.

36. The Tribunal indicated that the Claimant would not, in those circumstances, be able to give his version of the facts surrounding the documents, so that the Tribunal would not be able to take his version of the surrounding facts into account.

37. The Claimant then agreed that he would give evidence. The Claimant had not included page references in his witness statement and was asked by the Tribunal to provide these, which he later did.

38. On the second morning of the hearing, the Clamant made 3 more applications.

Day 2

The Claimant's Amendment Applications

39. The Claimant told the Tribunal that, on the first day of the hearing, the Respondent had clarified that it considered that the Claimant had been its

employee. He said that, as a result of that clarification, he sought permission to amend his claim to add two new claims, arising out of the facts of the case. The two new claims were a claim for failing to allow the Claimant to be accompanied at a formal disciplinary meeting and a claim for unlawful deductions from wages in respect of a failure to pay the Claimant 2 days' sick pay. The Claimant made his application orally.

40. The Respondent resisted the applications, which it said were made far too late.

41. The Tribunal did not permit the Claimant to amend his claim to add these two new complaints, which were brought well out of time and very late. The Claimant had not put the applications in writing. The amendments were sought very late, on the second day of the hearing, when the Tribunal had already read all the witness statements. It was not in accordance with the overriding objective to allow the amendments, to do so would add time and expense. The Claimant had said that he was applying to amend because of clarification of the Respondent's case. However, in the Claimant's own claim form he had pleaded, "the Respondent avers the claimant was employed as a Direct-engagement temporary employee."

42. The Claimant therefore knew that the Respondent said he was an employee from the very outset of his claim. He also knew of facts of the new claims at the time when they occurred, during his employment. It had been reasonably practicable for the Claimant to have brought the claims in time and there was no good reason for the Claimant to have brought the claims so late.

<u>Exclusion of Witnesses from the Hearing Room</u>

43. The Claimant said that the newly disclosed WhatsApp messages, sent between the Respondent's witnesses around the time of his dismissal, showed that there was a risk of collusion between them and that they had engaged in a conspiracy to mislead the Tribunal. He pointed to messages which said, of the Claimant, " tell him where to stick it", " best not to tell anyone", "Can me and Gita both say we were there for the conversation". The Claimant said that Gita had refused to provide a statement. He said there had been a verbal dismissal and the reason for the dismissal would be explored in cross examination.

44. The Respondent resisted the application

45. The Tribunal did not make any finding that the WhatsApp messages, correctly understood, showed that the Respondent's witnesses conspired to mislead anyone. However, to save time and make progress with the hearing, the Tribunal ordered that the Respondent's witnesses not be present in the Tribunal room when each other were giving evidence. The Respondent had both Counsel and Solicitors present in the hearing room, who could seek instructions as necessary. There would therefore be no impact on the fairness of the hearing, from the Respondent's point of view, if the Respondent's witnesses not directly hear each other's evidence.

The Facts

46. The Claimant started work at the Respondent Trust on 17 March 2021 pursuant to a “Contract Of Temporary Employment For Allied Health Professional” between the Claimant and the Respondent.

47. The contract provided that the Claimant was employed as a Band 6 physiotherapist. The front sheet of the contract provided that the start date for his employment was 17 March 2021 (paragraph 4 of the front sheet) and the end date would be 5 June 2021 (paragraph 5, front sheet).

48. By clause 2.1 the contract provided, “Your temporary employment under this fixed term contract with the Trust will commence on the date specified at paragraph 4 of the Front Sheet and shall continue, subject to the remaining terms of this contract, until the date specified at paragraph 5 of the Front Sheet when it will terminate automatically without the need for notice, unless terminated earlier by either party giving the other party statutory minimum notice in accordance with clause 31.1 below.”

49. Clause 31 provided, “Termination of Temporary Employment 31.1. Subject to clause 31.2 below, your temporary employment under this contract with the Trust will automatically terminate on the date listed at paragraph 5 of the Front Sheet without the need for notice. Should you or the Trust wish to terminate this contract before that date, you will be required to give the Trust and the Trust will be required to give you statutory minimum notice. If statutory notice is required (i.e. if you have more than one month's continuous temporary employment with the Trust) then notice must be given in writing and may expire at any time. The Trust reserves the right to terminate your temporary employment by making a payment to you of salary in lieu of notice.”

50. Before the Claimant’s appointment, the Respondent had advertised in January 2021 for a Band 6 Senior Respiratory Physiotherapist role, p 389-90. That was a substantive full time role.

51. On 27 January 2021 an invitation was sent to members of an interview panel to interview Ms Libby Aitcheson for that substantive Band 6 Respiratory role, p 434. The Tribunal was told that the interview took place on 29 January 2021.

52. On 4 February 2021 the Respondent sent an offer letter to Ms Aitcheson, p 636-638. On 5 February 2021 Ms Aitcheson accepted the offer for the substantive Band 6 Senior Respiratory Rotational Physiotherapist post, p 435;

53. On 8 February 2021 Ms Aitcheson emailed Douglas Still, Team Lead Respiratory Physiotherapist Band 7, seeking clarification on various arrangements for the substantive role, including shift patterns and on-call arrangements, p 436.

54. Later, on 8 March 2021 Ms Aitcheson emailed Mr Still again, saying she would be giving notice to her current employer that week and that she would be available to start work for the Respondent on 3 May 2021, p 476. Ms Aitcheson

said that she would be able to work on 3 May, even though it was a Bank Holiday. She gave her annual leave dates for the coming year.

55. Ms Newey told the Tribunal that the Respondent's Bank Holiday rota is prepared 12 weeks in advance, so Ms Aitcheson had not been rostered to work the 3 May Bank Holiday. In the event, therefore, Ms Aitcheson started work on the 4 May 2021. It was not in dispute that Ms Aitcheson did start in that substantive band 6 physiotherapist role in early May 2021.

56. The Respondents' witnesses told the Tribunal that, in the meantime, while the substantive Band 6 Physiotherapist role was being recruited to, the Respondent needed locum cover for that position.

57. Ms Newey told the Tribunal that, during the second wave of the covid19 pandemic, it was important to have this respiratory physiotherapist's post filled. She said that she therefore applied for funding for a locum post, pending Ms Aitcheson taking up her substantive post.

58. On 9 February 2021 a request was made for approval for a number of "bank/locum" posts to the Respondent's bank and agency panel, p437.

59. On 11 February 2021 the Respondent's Bank and Agency panel approved the request for a bank/locum Band 6 Physiotherapist Role, post number 31682594, and the request was sent for processing, p437.

60. On the same day, 11 February 2021, Ms Newey emailed the Respondent's Staffbank, p439 , saying, "We've had approval for a band 6 physiotherapist from the 15th Feb to 31st March 2021 – please can you search for a candidate with the following: Band 6 Physiotherapist To work at Charing Cross Hospital on the Respiratory wards/ITU Experience with acute inpatients, experience in the NHS and respiratory physiotherapy".

61. The Respondent uses its Staffbank to recruit temporary and locum staff.

62. On 3 March 2021 Staffbank sent out an advertisement by email titled "Charing Cross Band 6 Physio" saying, "Charing Cross Hospital are still looking for a band 6 physiotherapist to start asap until March 31st to work at Charing Cross Hospital on the Respiratory wards/ITU Experience with acute inpatients, experience in the NHS and respiratory physiotherapy is essential Working hours are 8:30-4:30 We could try for someone who has acute rehab experience, respiratory is preferable but if not we could try for someone with acute rehab experience."

63. On 4 March 2021 at 11.10 Luke Corley, at Globe Locums, replied to the Staffbank advert email in the same email chain with the title "Charing Cross Bank 6 Physio", proposing the Claimant for the role, p461.

64. In the same email chain at 13.05, on 4 March 2021, Staffbank confirmed that the Respondent wished to book the Claimant for the role. Again, in that same

email chain, Luke Corley negotiated about the Claimant's rate of pay and grade in the role, pp 457 – 459.

65. Once more in that email chain, on 8 March 2021 at 08.05, Luke Corley asked Staffbank, "In the cascade it says the job finishes 31st March. Do you know if this will be extended and for how long?" p456. On 8 March at 11.04, Staffbank replied saying, "We currently have funding till the end of April that's as long as I can confirm for now." P454. The same day, at 13.11, still in that email chain, Mr Corley confirmed that the Claimant would start in the role on 17 March.

66. In the meantime, on 8 March 2021, following Mr Corley's 08.05 enquiry about an extension, Staffbank had asked Ms Newey, "The agency have asked whether there was any chance that the post could be extended and if so for how long?" And Ms Newey had replied at 11.03, saying, "We currently have funding till the end of April that's as long as I can confirm for now." P444. It appeared, therefore, that Ms Newey's exact wording was copied and pasted by Staffbank into its reply to Mr Corley one minute later at 11.04.

67. It was clear, therefore, on the facts, that Ms Newey had told Staffbank and Staffbank had told the Claimant's agency, that the Band 6 physiotherapist role at Charing Cross, which the Claimant would start on 17 March only had "funding till the end of April".

68. However, it appeared that Mr Corley was having a somewhat different conversation with the Claimant. On 5 March 2021 the Claimant said to Mr Corley, "am going on the assumption that this is an ongoing contract, or at least expected 2+ months in length?" p470. On 8 March at 08.49 Mr Corley replied saying "This is an ongoing contract, correct", p468. This was despite Mr Corley knowing "In the cascade it says the job finishes 31st March." P456. It appears that Mr Corley never corrected his representation to the Claimant, even though he had been told on 8 March at 11.04, that the post was only funded until the end of April, p454.

69. Ms Newey had submitted a detailed "bank & agency request" form, p 391, seeking approval for a Band 6 Physiotherapist role in the respiratory team. This funding approval request stated that the end date for the bank/agency post would be, 'End date…30/4/21 – would stop once staff member in post'. It was clear that this funding approval request was for cover for Ms Aitcheson's role because in the box on the form "Your Current Plan to Reduce Requirement for bank and agency", Ms Newey gave the dates of advertisement and interview for Ms Aitcheson's role. This demonstrated that funding was being sought for a post which would end when the substantive post was filled. The post number for this bank/agency request was stated, on the form, as 31682594, p391.

70. The Tribunal noted that this was the same number, 31682594, as the locum Band 6 Physiotherapist Role, post number 31682594, which was approved for funding in the email on 11 February 2022, p437.

71. The Claimant, however, gave evidence that this request for funding was in respect of a different locum post to the one to which he was appointed. He

pointed out that the bank/agency request was for a locum who "would be moved around the 3 sites to cover as the acute caseload", p391. He said, by contrast, that he was appointed only to work at the Respondent's Charing Cross site.

72. The Tribunal decided that this bank/agency funding request was indeed to cover Ms Aitcheson's role; bank/agency funding for a Band 6 Physiotherapist Post Number 31682594 was approved by email on 11 February and led to Ms Newey emailing Staffbank the same day, "We've had approval for a band 6 physiotherapist from the 15th Feb to 31st March 2021 – please can you search for a candidate with the following: Band 6 Physiotherapist To work at Charing Cross Hospital on the Respiratory wards/ITU Experience with acute inpatients, experience in the NHS and respiratory physiotherapy". Staffbank advertised this very position and this was the position for which Mr Corley presented the Claimant - and to which the Claimant was appointed. This was clear from the chronology of the documents.

73. Moreover, there was no evidence at all that there were two different locum Grade 6 respiratory physiotherapist posts sought by Ms Newey at that time. The evidence indicated that only 1 such locum post had been sought and was granted funding. The Claimant was appointed to that post.

74. As the Tribunal has found, the Claimant was given a contract starting on 17 March 2021 and ending on 5 June 21. It was never explained to the Tribunal by the Respondent how the contract came to be drafted with an end date of 5 June 2021.

75. The Claimant commenced in post on 17 March 2021. Mr Doug Still was his line manager and conducted his induction. There was a dispute of fact as to whether Mr Still and the Claimant discussed the duration of the Claimant's appointment during his induction on the first day.

76. The Claimant told the Tribunal that he did not recall a discussion, during his induction day, about when his contract was terminating. He said that, if there had been such a discussion, he would have said that he had a contract until 5 June 2021.

77. Mr Still told the Tribunal that, on the first day, the subject of the Claimant's employment duration with the Trust was brought up and Mr Still told him that the Claimant would be "with us" until the end of April 2021, as the Trust had already recruited Ms Aitcheson as a permanent Band 6 Physiotherapist and that she was due to start at the beginning of May 2021. Mr Still told the Tribunal that the Claimant had responded that his locum agency had confirmed shifts for 12 weeks running until 5 June 2021. Mr Still gave evidence that he informed the Claimant that any shifts after 30 April were not from his Respiratory physiotherapy team, but that Mr Still would check if any other team elsewhere in the department had booked the Claimant.

78. Mr Still told the Tribunal that he then checked with Ms Newey, who confirmed that the Claimant's post was until 30 April. Mr Still said that he went back to the Claimant and confirmed that the Claimant's end date would be 30 April.

79. Ms Newey gave evidence that Mr Still contacted her on 17 March 2021 and raised the Claimant's query about the end date of his contract. She told the Tribunal, "I confirmed to him that Mr Egan was only with us until 30 April 2021 as [Ms Aitcheson] was starting on 3 May 2021 and we only had funding for the locum post until [Ms Aitcheson] started with us. I said that if Mr Egan wanted to send me a copy of his contract to demonstrate a different end date, I would speak to Staffbank about it."

80. It was not in dispute that, at a team meeting in about April 2021, Mr Still had said that the Claimant would be with the team until the end of April 2021. The Claimant told the Tribunal that he had said to Mr Still, at the end of the meeting, that, "I had a contract until 5 June." In evidence, the Claimant continued, "He did not make any specific reply – I can't recall .. I am not sure I am conflating that date or a later conversation on 29 April and he said 'Oh well talk to Vicky or something about it'… he did not express any doubt about my contract until 5 June – it was ambivalent . His face looked puzzled and confused. I recollect that he said he would speak to Vicky about it at the end of the conversation. I thought they would tell me where I was moving elsewhere in the Trust. Nothing came back to me."

81. Mr Still told the Tribunal that he had told the Claimant, on a number of occasions during his work, that the Claimant's contract would end on 30 April. He said that one of these conversations was witnessed in the team office by an ICU Occupational Therapist, Ms Gita Marais.

82. The Claimant pointed out that Ms Marais had not been called by the Respondent to corroborate Mr Still's evidence on this point.

83. The Claimant was adamant that he was not told, at any time before 29 April, that his contract with the Trust was due to end on 30 April.

84. Ms O'Donohue confirmed in evidence that she had personally never had any conversation about the end of the Claimant's contract before 29 April 2021, nor had she witnessed any such conversations.

85. It is correct that the Respondent did not give the Claimant any written notice that his contract was due to end on 30 April.

86. Neither Mr Still nor Ms Newey asked to see the Claimant's contract. Likewise, the Claimant did not show his contract to either of them.

87. However, on all the evidence, the Tribunal accepted Mr Still's account that he told the Claimant, during the Claimant's induction, that the Claimant would be employed until 30 April. The Tribunal accepted Mr Still and Ms Newey's evidence that they believed that the Claimant had been engaged until 30 April, because that was the date until which funding had been granted for the locum

contract and Ms Newey had confirmed to Staffbank that the Claimant's locum contract was funded until 30 April. The Tribunal considered that it would have been natural for a manager conducting an induction with a person engaged on a fixed term to mention the length of the contract. Ms Newey corroborated Mr Still's evidence that Mr Still had raised the length of the Claimant's contract with her when the Claimant had queried it at his induction. The Tribunal found their evidence on this to be convincing and decided that the length of the contract was discussed with the Claimant on his induction and that Mr Still afterwards confirmed to the Claimant that his engagement was until 30 April.

88. Given that the Claimant had a contract which gave an end date of 5 June, it may be that the Claimant believed that he would be offered work elsewhere in the Trust after 30 April, whatever Mr Still and Ms Newey had told him.

89. As the Tribunal has noted, it was not in dispute that the length of the Claimant's contract was raised again in a team meeting in April 2021. The Claimant again asserted that he had a contract until 5 June. The Tribunal found, on the evidence, that Mr Still made clear to the Claimant that the Claimant's contract with his team was only until 30 April. The Claimant himself acknowledged that Mr Still had said that the Claimant would be with the team until 30 April.

90. The Claimant may have continued to believe, or hope, that he would be offered other shifts by other teams at the Respondent, but it appears that he did not contact his agency, or Staffbank, to clarify the matter.

91. The Claimant was off sick for 2 days on 31 March and 1 April. He told the Tribunal that he claimed sick pay for the days he was absent. On 6 April 2021, however, Ms Newey cancelled payment for the shifts because the Claimant had not worked them due to sickness, p505. The Claimant was told that his payment had been rejected by someone called Anushka Gondhalekar, p507. He told the Tribunal that Ms O'Donohue had informed him, at about the same time, that Ms Newey had said he would not be paid. There was no evidence that the Claimant had spoken to Ms Newey himself about his sick pay entitlement, or that he challenged her cancellation of his payments.

92. The Claimant did not put to Ms Newey in evidence that one of the reasons he was later dismissed was the fact that he had sought sick pay. Despite encouragement from the Tribunal, to put his case to Ms Newey, he did not put to her that she had terminated his employment on 30 April to prevent him from acquiring the right to sick pay as an agency worker.

93. On 19 April 2021 a Ward Matron gave some negative feedback to Mr Still regarding the Claimant, p509.

94. On 20 April 2021 Mr Still asked the Claimant by WhatsApp Claimant to "meet … for a catch up with Vicky", p502. It was not in dispute that, at that meeting on 20 April, Mr Still and Ms Newey discussed the negative feedback, or complaint, against the Claimant.

95. There was no formal invitation to this meeting and the Claimant was not told that he was being investigated under the Respondent's disciplinary procedure. There was no evidence that the Claimant had asked to be accompanied at this meeting by a Trade Union representative; or that the Respondent had refused to allow the Claimant his right to be accompanied. In any event, there was no evidence that this was a disciplinary hearing, rather than an informal discussion.

96. The Claimant told the Tribunal that he considered that the Matron's negative feedback was in retaliation for concerns the Claimant had himself raised about nursing on the ward. It appeared that Mr Still and Ms Newey accepted the Claimant's version of events at the meeting and the matter was not taken any further.

97. Mr Still told the Tribunal that, in April 2021, he became aware that the department was recruiting for an additional locum physiotherapist post which was likely to start around 10 May 2021, p513. This role was for a Band 6 Physiotherapist to offer assistance across the Trust's three main sites. Mr Still and Ms Newey both told the Tribunal that funding was agreed to provide cover for respiratory physiotherapy staff who would be working in a new outpatient long covid clinic.

98. Mr Still told the Tribunal that, a few weeks before 30 April 2021, he asked the Claimant about his availability for this new role. Mr Still said that he discussed this new role on a couple of occasions with the Claimant, in passing in the corridor, when Mr Still had new information or the details of the role became clearer.

99. On 28 April 2021 Ms Newey emailed Staffbank with the subject, "Locum 10.05.2021 till 25.06.2021", asking Staffbank to search for a locum for her team, " Band 6 Respiratory Physiotherapist at Charing Cross Hospital Working Hours M-F 8.30am-4.30pm Experience of working with respiratory patients, post op surgical patients and respiratory medicine Experience working in the NHS is desirable Rota: Respiratory Physio SMH/CXH/HH", p513

100. The Claimant told the Tribunal that he was not informed about this new role until Mr Still spoke to him on 29 April, and informed him that the Claimant's last day would be 30 April. The Claimant told the Tribunal that this new role was, in fact, the Claimant's existing role and that he believed that Ms Newey had introduced it to enforce a gap in the Claimant's employment.

101. On 29 April 2021 at 11.49 Staffbank advertised a "Band 6 respiratory PT role", p536. On 30 April 2021 Luke Corley at Globe Locums responded to that advertisement, asking if this was the Claimant's role and whether he could be transferred to it, so that the Claimant did not have to finish, p535.

102. Later on 30 April 2021, Staffbank responded, saying that the role was not the Claimant's role, but was "cross site". Staffbank said that the manager had asked that the Claimant be booked for the role and that the start date would be 10 May, p535.

103. On 29 April 2021 at Ms Newey had also emailed Staffbank at 15:06 saying, “Dilan Egan finishes in our team tomorrow as that is when our funding is up until but he has been told he is booked until the end of June – do you know if another team has booked him? We could potentially slot him into our locum post from the 10th May if he is still available, but we definitely do not have funds for next week and cannot confirm from the 10th just yet.” P519

104. The Tribunal accepted the Respondent’s evidence that the role from 10 May was to provide cover, across all 3 of the Respondent’s sites, for staff allocated to a new long covid outpatient clinic. The Claimant appeared to agree in evidence that the post from 10 May was required to be across all 3 sites.

105. The Claimant told the Tribunal that, on 28 April 2021 a colleague, Rebecca Arkle, asked him about a shared lunch planned for the Claimant’s last day, 30 April. The Claimant said that he expressed surprise at this, because he did not believe that his employment would be ending.

106. The Claimant told the Tribunal that, on the following day, 29 April, Mr Still approached him at the end of his lunchbreak and asked about his availability for the next few months. The Claimant asked why and Mr Still replied that Vicky Newey was exploring a new position for which she wanted the Claimant, to provide ‘backfill for the COVID follow-up clinics”. He said that later that day, at 16:45, he encountered Mr Still and Ms O’Donohue in the office and asked why a new post was being discussed now, to which Mr Still responded that they were ‘just trying to make sure you are booked for a new job in May’. The Claimant told the Tribunal that Mr Still then stated that the Claimant was being dismissed because they had just hired a permanent replacement who was due to start.

107. In the Claimant’s statement, at paragraphs 95 – 96, he said,” I raised to them that my contract of employment with the Trust stated I was employed until 5th June 2021, and informed them that if they wished to dismiss me they needed a minimum of at least a weeks’ notice which hasn’t been given. To this Aisling O’ Donoghue claimed they “only ever had you booked until May” and Doug Still chimed “and really that is a problem with your agency”.”

108. On 29 April 2021 at 17.03 the Claimant emailed Luke Corley at Globe Locums saying, “Informed today that my post at CXH is ending tomorrow, despite being booked on their staff flow system until June and not being issued any notice of termination. Comes as quite the shock. Doug Still (the B7 at CXH) has said the imperial is denying all responsibility for the now alleged "error" and have said it's a problem on Globe's side.” P524. In the email, the Claimant said he had been given no notice, and, if he had, he would have looked for another post.

109. On 29 April 2021 at 17.22 Luke Corley emailed the Respondent’s staff bank and asked if the Claimant was going to be given notice, p513.

110. The Claimant was not given written notice of his termination.

111. The Claimant pointed out that, in Mr Still and Ms Newey's ' personal WhatsApp messages on 27 April, Ms Newey asked, "Is it definitely a no to extending Dylan yeah?"

112. Mr Still replied that it was difficult because of complaints. Ms Newey replied further, agreeing that it was difficult and saying, "We should hear today about funding and we have approval for the locum just pending final sign off, Clinic might start next week."

113. The Claimant put it to Ms Newey that this indicated that his contract could have been extended. Ms Newey told the Tribunal that "extended" was the wrong word. She was considering whether to offer the Claimant the new locum role, but there was no funding for a role between the end of the Claimant's locum role on 30 April and the start of the new role on 10 May.

114. The Tribunal also noted that, in Mr Still and Ms Newey's personal WhatsApp messages at 17.34 on 29 April 2021, Ms Newey said that the Claimant's agency were saying that the Claimant had not been given notice. She said, ".. but he knew the whole time didn't he that tomorrow was his last day?" Mr Still replied, "Yeah told him that day one and about 3 weeks after. Gita was there for one conversation…. He said on the first morning to me that they had given him shifts til June but he knew it wasn't our team and that was from the agency not us" p4, WhatsApp bundle.

115. On the facts, the Tribunal accepted Ms Newey and Mr Still's evidence that claimant's locum role commencing on 17 March was always due to end on 30 April and that another locum role, starting on 10 May, was funded by different funding. It was clear that, from Ms Newey's contemporary emails and Ms Newey and Mr Still's WhatsApps, that they had always believed that the claimant's original locum role was due to end on 30 April and that the Claimant was aware of this. The contemporaneous WhatsApp messages corroborated their account that the locum role, starting on 10 May, was funded by different funding.

116. The Claimant did not wish to accept the new role. He considered that it was a different role, on worse terms. On 30 April 2021 he and Ms Newey had a discussion when they had a significant disagreement about the circumstances of his termination. The Claimant told the Tribunal that, "I recapped events of the previous three days to Vicky Newey and I explained I was not happy to have a period of unpaid leave enforced in the middle of my employment period. Vicky Newey immediately became argumentative and showed difficulty in holding a sensible, reasoned discussion about the events. She claimed on the call that I had in fact been dismissed weeks earlier and that it was Gita Marais, Occupational Therapist, dismissed myself. And she could not understand the present confusion. I refuted that assertion that I was dismissed and questioned how I could be dismissed by a member of staff who as neither in my line management structure nor even a member of my own profession. To this she stuttered repeatedly, and began to explain that I couldn't keep working because she had since my hiring found a permanent employee to fulfil my position and she had no other funding for a Locum."…. "I explained to her clearly that the

attempt to dismiss myself for a period of four days only to be re-hired was a clear violation of the Agency Workers Regulations; a deliberate attempt to extend my employment beyond 12 weeks while simultaneously denying accrual of employment rights such as sick pay."

117. The Claimant presented a grievance on 4 May 2021. Ms Newey told the Tribunal that, following her conversation with him on 30 April 2021, when she considered him to have been rude, she did not wish to offer a new role to the Claimant.

118. In personal WhatsApp messages between Ms Newey and Mr Still and Ms O' Donohue on 30 April Ms Newey said she did not wish the Claimant to work with the Trust anymore. The Claimant pointed out that these WhatsApp messages displayed a change in attitude by the Respondent.

119. The Claimant also had a contract with Globe Locums dated 17 March 2021, p393. It said, "YOUR ASSIGNMENT IS CONFIRMED. Locum Name: Dillan Egan. Name of Hirer: Charing Cross Hospital. Assignment: Band 6.

120. The contract said, "I confirm that I will undertake this assignment through Globe Locums for the duration of this contract until its conclusion. Should I wish to terminate the contract I will notify Globe with 2 weeks' written notice. Before I undertake my contract, I will ensure that my compliance documents are up to date."

Relevant Law

121. Cairns LJ said in *Abernethy v Mott Hay and Anderson* [1974] ICR 323, ''A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. 'These words were approved by the House of Lords in *W Devis & Sons Ltd v* Atkins [1977] AC 931, [1977] 3 All ER 40.

122. The *Agency Worker Regulations 2010* provide:

"3.— The meaning of agency worker
(1) In these Regulations "agency worker" means an individual who—
(a) is supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer; and
(b) has a contract with the temporary work agency which is—
(i) a contract of employment with the agency, or
(ii) any other contract with the agency to perform work or services personally.

(2) But an individual is not an agency worker if—
(a) the contract the individual has with the temporary work agency has the effect that the status of the agency is that of a client or customer of a profession or business undertaking carried on by the individual; or
(b) there is a contract, by virtue of which the individual is available to work for the hirer, having the effect that the status of the hirer is that of a client or customer of a profession or business undertaking carried on by the individual.

(3) For the purposes of paragraph (1)(a) an individual shall be treated as having been supplied by a temporary work agency to work temporarily for and under the supervision and direction of a hirer if—
(a) the temporary work agency initiates or is involved as an intermediary in the making of the arrangements that lead to the individual being supplied to work temporarily for and under the supervision and direction of the hirer, and
(b) the individual is supplied by an intermediary, or one of a number of intermediaries, to work temporarily for and under the supervision and direction of the hirer.
(4) An individual treated by virtue of paragraph (3) as having been supplied by a temporary work agency, shall be treated, for the purposes of paragraph (1)(b), as having a contract with the temporary work agency.

(5) An individual is not prevented from being an agency worker—
(a) because the temporary work agency supplies the individual through one or more intermediaries;
(b) because one or more intermediaries supply that individual;
(c) because the individual is supplied pursuant to any contract or other arrangement between the temporary work agency, one or more intermediaries and the hirer;
(d) because the temporary work agency pays for the services of the individual through one or more intermediaries; or
(e) because the individual is employed by or otherwise has a contract with one or more intermediaries.

(6) Paragraph (5) does not prejudice the generality of paragraphs (1) to (4).

123. By *17 Agency Worker Regulations 2010* — "Unfair dismissal and the right not to be subjected to detriment

(1) An agency worker who is an employee and is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(2) An agency worker has the right not to be subjected to any detriment by, or as a result of, any act, or any deliberate failure to act, of a temporary work agency or the hirer, done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are—
(a) that the agency worker—
(i) brought proceedings under these Regulations;
(ii) gave evidence or information in connection with such proceedings brought by any agency worker;
(iii) made a request under regulation 16 for a written statement;
(iv) otherwise did anything under these Regulations in relation to a temporary work agency, hirer, or any other person;
(v) alleged that a temporary work agency or hirer has breached these Regulations;

(vi) refused (or proposed to refuse) to forgo a right conferred by these Regulations; or
(b) that the hirer or a temporary work agency believes or suspects that the agency worker has done or intends to do any of the things mentioned in sub-paragraph (a).

(4) Where the reason or principal reason for subjection to any act or deliberate failure to act is that mentioned in paragraph (3)(a)(v), or paragraph 3(b) so far as it relates to paragraph (3)(a)(v), neither paragraph (1) nor paragraph (2) applies if the allegation made by the agency worker is false and not made in good faith.

(5) Paragraph (2) does not apply where the detriment in question amounts to a dismissal of an employee within the meaning of Part 10 of the 1996 Act.

124. The *Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002* provide at Regulation: 6. " Unfair dismissal and the right not to be subjected to detriment
(1) An employee who is dismissed shall be regarded as unfairly dismissed for the purposes of Part 10 of the 1996 Act if the reason (or, if more than one, the principal reason) for the dismissal is a reason specified in paragraph (3).

(2) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, of his employer done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are—
(a) that the employee—
(i) brought proceedings against the employer under these Regulations;
(ii) requested from his employer a written statement under regulation 5 or regulation 9;
(iii) gave evidence or information in connection with such proceedings brought by any employee;
(iv) otherwise did anything under these Regulations in relation to the employer or any other person;
(v) alleged that the employer had infringed these Regulations;
(vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations;
(vii) declined to sign a workforce agreement for the purposes of these Regulations, or
(viii) being—
(aa) a representative of members of the workforce for the purposes of Schedule 1, or
(bb) a candidate in an election in which any person elected will, on being elected, become such a representative, performed (or proposed to perform) any functions or activities as such a representative or candidate, or
(b) that the employer believes or suspects that the employee has done or intends to do any of the things mentioned in sub-paragraph (a). (4) Where the reason or principal reason for dismissal or, as the case may

be, ground for subjection to any act or deliberate failure to act, is that mentioned in paragraph (3)(a)(v), or

(b) so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the employee is false and not made in good faith.

(5) Paragraph (2) does not apply where the detriment in question amounts to dismissal within the meaning of Part 10 of the 1996 Act.

125. In *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, [1966] 3 All ER 683, CA it was held that the defendant must be assumed, following the breach to have acted as would that darling of nineteenth-century economists, the 'economic man', and chosen to adopt any option open to him to minimise his liability.

126. The employer will be assumed in an assessment of damages for wrongful dismissal to perform the contract in the way least burdensome to it. This was confirmed by Anthony Metzer QC (sitting as a Deputy High Court Judge) in *MacKenzie v AA Ltd* [2021] EWHC 1605 (QB), who held at [33] that,

"The employer, as here, would be contractually obliged to pay the loss of salary as damages for the wrongful dismissal simpliciter. I do not accept [the employee's] suggestions as to why the exercise of the PILON clause would not be the “least burdensome” option. They are a combination of speculative and vaguely-defined counter-factual scenarios which I do not consider the [employer] would or should be expected to embark upon. First, I do not consider the argument that the [employer] would have exercised its discretion to make a payment in respect of bonus in light of [employee's] long service has any foundation. This is the same argument as was expressly rejected in Lavarack. [The employee] does not show why any other means of termination would be “less burdensome” save the rather tenuous suggestion that a single lump sum payment would be more expensive than monthly payments which if operated would potentially open up the [employer] to further payments owed to [the employee]."

Decision

127. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision.

Wrongful Dismissal

128. The Respondent agreed that it had dismissed the Claimant in breach of contract, without giving written notice.

129. The Claimant claimed 5 weeks’ notice and challenged the concept of the 'economic man'.

130. While the Tribunal has some sympathy for the Claimant who had been given a fixed term contract terminating on 5 June 2021 and who was never given any written notice of early termination, the Tribunal is bound by the caselaw. In

particular, *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278, [1966] 3 All ER 683, CA and *MacKenzie v AA Ltd* [2021] EWHC 1605. The Respondent must be assumed, following its breach, to have chosen to adopt any option open to it to minimise its liability; in the employment sphere that means terminating the contract immediately, on the shortest notice legally possible.

131. The Claimant's contract cl 31 permitted the Respondent, during the fixed term, to terminate the contract on statutory notice, which under *s86 ERA 1996*, was 1 week's notice. That was the shortest notice possible.

132. The measure of damages for wrongful dismissal in this case was therefore 1 week's notice.

Unfair dismissal

133. The Tribunal decided that the Claimant was given verbal notice of termination of his contract, at the latest, by Mr Still at 16.45 on 29 April, when Mr Still told the Claimant that his employment was ending the next day, 30 April. The Claimant understood that he had been given notice of dismissal and emailed his agency, confirming his understanding. He said, ""Informed today that my post at CXH is ending tomorrow, despite being booked on their staff flow system until June and not being issued any notice of termination." P524.

134. On the facts, Mr Still had also told the Claimant at the start of his employment, that his contract would end on 30 April. On the first day of the Claimant's employment, therefore, Mr Still gave verbal notice of dismissal to take effect on 30 April 2021.

135. In his closing submissions the Claimant said that his primary argument was that Ms Newey had structured the contracts so as to deny the Claimant his agency worker rights. He contended that Ms Newey wanted to deprive the Claimant of his right to sick pay and to be accompanied at meetings. The Claimant contended that the Respondent was concerned that he would assert his rights as an agency worker in the future, if he was employed for 12 weeks.

136. The Tribunal found that there was no evidence that this was the case. There was no evidence that the Claimant ever raised his right to sick pay directly with Ms Newey before Mr Still gave him notice, or his right to be accompanied at meetings, with either Ms Newey or Mr Still. There was no evidence that these matters were in their minds when Mr Still gave the Claimant notice at the start of his contract, or on 29 April 2021.

137. The reason for dismissal is the reason in the mind of the Respondent when it dismisses the Claimant. The Tribunal found that the only reason the Claimant's contract was terminated was that Mr Still believed that the Claimant had been employed on a contact starting on 17 March and ending on 30 April 2021. Mr Still knew that the Claimant had been employed as locum to cover a gap until a substantive employee, Ms Aitcheson, took up the band 6 physiotherapy post in Mr Still's team at the start of May 2021. He knew that the Claimant's

employment was only funded until 30 April and he told the Claimant this on the first day of the Claimant's employment.

138. It was abundantly clear from the documents that the Claimant was appointed to a role which was funded only until 30 April 2021. There was never any funding for the role beyond 30 April.

139. On the facts, there was funding for a new role starting on 10 May 2021, but that was a different role with different funding.

140. All this was clear from the contemporaneous documents and the chronology of the facts which the Tribunal has set out. The application for funding for the Claimant's locum post made clear that the post would end when the substantive post was filled, p391. The Tribunal has found as a fact that the Claimant's post was locum cover for Ms Aitcheson's substantive post, p391. On 8 March Ms Aitcheson gave notice that she intended to start on 3 May, p476. Ms Newey's contemporaneous emails to Staffbank on 8 March 2021, p444, stated that the funding of the locum post would end on 30 April. Mr Still and Ms Newey's WhatsApp messages on 29 April showed that they believed that the Claimant had always been told that his contract with them would end on 30 April.

141. It was clear from the evidence that, whatever the Claimant's written contract said, Ms Newey and Mr Still only ever intended to employ the Claimant until 30 April and, indeed, could not have employed him beyond that date because of the funding restriction.

142. While the Claimant argued with Ms Newey about his dismissal on 30 April, the decision to dismiss him had already been made. Ms Newey and Mr Still had always intended to dismiss the Claimant, from the outset of his contract, for the only reason that they believed that he had been appointed until 30 April and because there was only funding until 30 April. Anything said by the Claimant on 30 April had no effect on the decision to dismiss, which had already been made and communicated to the Claimant.

143. The reason for the Claimant's was not any of the automatically unfair reasons for dismissal under Agency Worker regulations or the Fixed Terms Employee Regulations. The Claimant's claim must fail.

____

Employment Judge Brown

2 March 2022

Sent to the parties on:

03/03/2022.

For the Tribunal: